BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

ANSWERS OF HONG KONG, CHINA TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Confidential

28 February 2022

TABLE OF SHORT FORMS

SHORT FORM	OFFICIAL NAME
ARO	Agreement on Rules of Origin
CVA	Customs Valuation Agreement
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
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement / Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF REPORTS

SHORT TITLE	FULL REPORT TITLE AND CITATION
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Canada – Patent Term	Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, p. 5093
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
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Saudi Arabia – IPRs	Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1, circulated to WTO Members 16 June 2020 [appealed by Saudi Arabia 28 July 2020] [short title modified on 29 July 2020]
Thailand – Cigarettes (Philippines) (Article 21.5)	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]
Thailand – Cigarettes (Second Recourse to Article 21.5, Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 July 2019 [appealed by Thailand 9 September 2019 – the Division suspended its work on 10 December 2019]

SHORT TITLE	FULL REPORT TITLE AND CITATION
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
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 (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
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837

UNITED STATES – ORIGIN MARKING REQUIREMENT (DS597)

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

31 January 2022

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?

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.

1. In theory, an "origin-based distinction" might not necessarily be the same as "*de jure* discrimination", because an origin-based distinction might not necessarily have detrimental effects. In such a case, there would not be "less favourable treatment" within the meaning of Article 2.1 of the TBT Agreement.

2. This theoretical possibility is not relevant in this case, because the revised origin marking requirement is *de jure* discriminatory. The measures draw a *de jure* distinction between goods originating in Hong Kong, China and goods originating in other WTO Members, because goods originating in Hong Kong, China must be marked as goods from a *different* WTO Member – namely, the People's Republic of China. As pointed out by the European Union in its answer to Panel question No. 9 – "[c]oncretely, the obligation to mark as origin a different WTO Member is detrimental because the like products imported from another WTO Member do not face that requirement."[1]

3. Turning now to the question of whether the Appellate Body's "legitimate regulatory distinction" ("LRD") jurisprudence is relevant in the case of *de jure* discriminatory measures – the answer is that it is not. In order to understand the reasons for this answer, Hong Kong, China believes that it is useful to recall the origins of the Appellate Body's LRD jurisprudence.

[1] European Union's third-party response to Panel question No. 9, para. 25. 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"): 19 C.F.R. § 134.1(b) [redacted].

4. In the early disputes concerning claims under Article 2.1 of the TBT Agreement, the measures at issue were origin-neutral on their face. The question confronted by panels, and later the Appellate Body, was whether *any* detrimental effect on competitive opportunities for imported products – including a detrimental effect unrelated to the origin of the product – would be sufficient to establish less favourable treatment. In *US – Clove Cigarettes*, it was the United States that argued that in such cases, Article 2.1 requires further inquiry into whether the detrimental effect is explained by factors *unrelated* to origin.[2]

5. The Appellate Body ultimately agreed with the United States that where origin-based discrimination is not evident on the face of the challenged measure, further inquiry is required. The Appellate Body began its analysis by emphasizing that the "treatment no less favourable" requirement of Article 2.1 of the TBT Agreement applies "in respect of technical regulations".[3] The Appellate Body explained that "… technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods."[4] The Appellate Body said that this suggests that "Article 2.1 should not be read to mean that any distinction, *in particular those that are based exclusively on particular product characteristics or their related processes and production methods*, would *per se* accord less favourable treatment within the meaning of Article 2.1."[5]

6. The Appellate Body found that this understanding was supported by the context provided by Article 2.2 of the TBT Agreement, which provides that "obstacles to international trade" may be permitted insofar as they are not found to be "unnecessary", that is, "more trade-restrictive than necessary to fulfil a legitimate objective". The Appellate Body also considered that the sixth recital of the preamble of the TBT Agreement provides relevant context regarding the ambit of the "treatment no less favourable" requirement in Article 2.1, by "making clear that technical regulations may pursue the objectives listed therein, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination … ."[6] Finally, the Appellate Body found that the object and purpose of the TBT Agreement weighed in favour of the conclusion that Article 2.1 "should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions."[7]

[2] Appellate Body Report, *US – Clove Cigarettes*, para. 166.

[3] Appellate Body Report, *US – Clove Cigarettes*, para. 169. A "technical regulation" is defined in Annex 1.1 to the TBT Agreement as a "[d]ocument which lays down product characteristics or their related processes and production methods … with which compliance is mandatory". "It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

[4] Appellate Body Report, *US – Clove Cigarettes*, para. 169.

[5] Appellate Body Report, *US – Clove Cigarettes*, para. 169 (emphasis added).

[6] Appellate Body Report, *US – Clove Cigarettes*, para. 173.

[7] Appellate Body Report, *US – Clove Cigarettes*, para. 174.

7. Based on its analysis of the relevant context, and the object and purpose of the Agreement, the Appellate Body concluded:

> [W]here the technical regulation at issue *does not de jure discriminate against imports*, the existence of a detrimental impact on competitive opportunities … is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[8]

8. The Appellate Body's analysis makes clear that in cases where there is *de jure* discrimination, as in the present case, there is no need for the panel to engage in an LRD analysis to determine whether there is "discrimination against the group of imported products", because the origin-based discrimination *is evident on the face of the measures*.

9. Regarding how this relates to the allegedly "origin-neutral" factors identified by the United States in the current dispute, the United States maintains that even if the challenged measures distinguish based on origin *and* have a detrimental impact on competitive opportunities for Hong Kong, China goods, there is still not less favourable treatment within the meaning of Article 2.1 if that detrimental impact is "rationally related" to the alleged "U.S. concerns for human rights, fundamental freedoms, and democratic norms".[9] The United States maintains that its alleged concerns are "global concern[s]"[10] and are "origin-neutral", "i.e., concerns that are not exclusively or applicable to only Hong Kong, China."[11]

10. As Hong Kong, China has previously explained, however, the U.S. argument only serves to reinforce the fact that the measures reflect origin-based discrimination. Notwithstanding having these allegedly "origin-neutral" concerns, the United States adopted measures to address these concerns that are aimed *explicitly and exclusively* at goods originating in Hong Kong, China.[12]

11. In this respect, Hong Kong, China believes that it is useful to explore a hypothetical situation based on the facts from *US – Clove Cigarettes*. In that case, the challenged measure banned flavoured cigarettes, and the measure's stated purpose was to reduce youth smoking.[13] The measure was origin-neutral on its face, but Indonesia alleged that the measure was *de facto* discriminatory because of the detrimental impact on imports of clove cigarettes from Indonesia.[14] This is the fact pattern that gave rise to the LRD jurisprudence.

[8] Appellate Body Report, *US – Clove Cigarettes*, paras. 182 (emphasis added); *see also* para. 215.

[9] United States' response to Panel question No. 14, para. 60. *See also* United States' opening statement for the second meeting, para. 66.

[10] United States' opening statement for the second meeting, para. 66.

[11] United States' response to Panel question No. 14, para. 60.

[12] Hong Kong, China's second written submission, para. 103.

[13] *See* Panel Report, *US – Clove Cigarettes*, para. 7.116.

[14] *See* Panel Report, *US – Clove Cigarettes*, para. 7.257.

12. In order to explore the U.S. argument in the present case, assume that the "origin-neutral" concern that the United States was trying to address in *Clove Cigarettes* was as stated – the appeal of flavoured cigarettes to children. But then assume that the United States chose to address that concern by implementing a measure that *only* targeted flavoured cigarettes from Indonesia. It would have been obvious that the measure was *de jure* discriminatory, which is exactly what the present case is about. As the United States again emphasized in its opening statement at the second meeting, its concerns are ostensibly about freedom and democratic norms around the world,[15] but it has chosen to address those alleged concerns with measures that, on their face, target only products of Hong Kong, China – this is the very definition of *de jure* discrimination.

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?

13. As stated in response to the prior question, which was advance question No. 1 at the second meeting of the Panel, Hong Kong, China's view is that in theory an "origin-based distinction" might not necessarily be the same as "*de jure* discrimination", because an origin-based distinction might not necessarily have detrimental effects. In such a case, there would not be "less favourable treatment" within the meaning of Article 2.1 of the TBT Agreement.

14. However, as also stated in response to the prior question, this theoretical possibility is not relevant in this case. 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.

15. 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. The fact that Hong Kong, China has provided evidence throughout the proceedings in support of its argument that the measures detrimentally modify the conditions of competition in the U.S. market is not, contrary to the U.S. argument, inconsistent with Hong Kong, China's view that the measures are *de jure* discriminatory. [redacted] Hong Kong, China believes that the detrimental impact of the origin-based distinction in the revised origin marking requirement is evident on the face of the measures, but Hong Kong, China has also provided evidence of this detrimental impact to reinforce its claim.

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

[15] United States' opening statement at the second meeting, para. 66.

[redacted]

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."

16. The United States contends that "it is unclear" whether the Appellate Body in *US – Clove Cigarettes* interpreted Article 2.1 as not requiring an LRD analysis if there is *de jure* discrimination.

17. In fact, the Appellate Body's views on this question are quite clear, as evidenced in particular by its consistent statements in the subsequent jurisprudence. The Appellate Body stated in both *US – Tuna II* and in *US – COOL* that the LRD analysis applies to technical regulations that have a *de facto* detrimental impact on imports.[17] Furthermore, in the subsequent *US – COOL (Article 21.5)* decision, the Appellate Body made clear that it is *only* in cases of *de facto* discrimination that the LRD analysis is relevant.

18. In that case, the Appellate Body began by stating that "if a panel finds that a technical regulation has a *de facto* detrimental impact on competitive opportunities for like imported products, the focus of the inquiry shifts to whether such detrimental impact stems exclusively from legitimate regulatory distinctions."[18] After discussing the LRD analysis for several paragraphs, the Appellate Body then said:

> We emphasize that the analysis described above is meant to assess an allegation of *de facto* discrimination under Article 2.1 of the TBT Agreement. Such *de facto* discrimination against imported products will not be *immediately discernible from the text of a measure*, nor may it be discernible when its operation is assessed exclusively through the lens of one of its components.[19]

19. The Appellate Body's view was therefore unambiguous. In cases where discrimination against imported products is "immediately discernible from the text of a measure" – as is the case here – then the LRD analysis is unnecessary.

20. It is also notable that based on the U.S. submissions throughout this dispute, the United States *agrees* that where a measure is *de jure* discriminatory, no LRD analysis is required. In its answer to Panel question No. 14, the United States explained:

> A measure may, *on its face*, treat imported products less favorably than other like foreign products (or treat foreign products less favorably than domestic products). *Where the measure does not*, sufficient facts would be needed to demonstrate that the measure treats certain imports less favorably than other like foreign product (or domestic like products).[20]

[17] *See* Appellate Body Report, *US – Tuna II*, para. 225; Appellate Body Report, *US – COOL*, para. 271.

[18] Appellate Body Report, *US – COOL (Article 21.5)*, para. 5.92.

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

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

21. In other words, the U.S. view is that where a measure treats imported products less favourably than other foreign like products on its face, *that is the end of the analysis*. It is only "where the measure does not" that further analysis is required.

22. The second part of the Panel's question concerns Canada's argument that "it is conceivable that an origin-based distinction could in itself be an LRD".[21] Canada notes at the same time that "it may be more difficult, as a matter of practice, for a respondent to establish that an origin-based distinction is an 'LRD'".[22]

23. As Hong Kong, China explained at the second meeting of the Panel, Hong Kong, China has difficulty envisioning how an origin-based distinction could itself be an LRD, and Canada did not provide an example for the parties or the Panel to consider. More importantly, however, this is clearly not the U.S. argument in this case. The U.S. argument is that the origin-based distinction on the face of the challenged measures is not discriminatory because it allegedly stems from origin-neutral concerns about freedom and democratic norms, despite the fact that the measures specifically and exclusively target goods originating in Hong Kong, China. The U.S. argument is *not* that the specific targeting of goods originating in Hong Kong, China is pursuant to a legitimate regulatory distinction. Accordingly, Canada's claim that such an argument might be theoretically possible is not implicated in this dispute.

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?

24. No, for the reasons described in its response to Panel question No. 71, Hong Kong, China's view is that a panel would not undertake an LRD analysis under Article 2.1 of the TBT Agreement if the challenged measure makes an origin-based distinction that results in a detrimental impact on the products of a Member (i.e. if the challenged measure is *de jure* discriminatory). Hong Kong, China agrees with the Appellate Body that an LRD analysis only makes sense in cases of alleged *de facto* discrimination, where the discrimination against imported products "will not be *immediately discernible from the text of a measure*".[23] Furthermore, as Hong Kong, China explained in its response to the prior question, the United States appears to agree that where a measure "*on its face*, treat[s] imported products less favorably than other like foreign products", no further analysis is required.[24]

25. The reason that the parties and the Appellate Body are all in agreement on this point is that Article 2.1 of the TBT Agreement states quite clearly that "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to … like products originating in any other country." If the origin-based less favourable

[21] Canada's third-party response to Panel question No. 11, para. 39.

[22] Canada's third-party response to Panel question No. 11, para. 39.

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

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

treatment is evident on the face of the measure, the violation of Article 2.1 is incontrovertible.

26. Hong Kong, China also believes that it is essential to bear in mind, as the Appellate Body emphasized when it first articulated the LRD framework, that the TBT Agreement is concerned only with "technical regulations", which are measures that "establish distinctions between products according to their characteristics or their related processes and production methods."[25] It is difficult to hypothesize many circumstances in which a technical regulation would need to draw origin-based distinctions to achieve a legitimate regulatory objective that could not otherwise be achieved on an origin-neutral basis – i.e. by focusing on product characteristics or their related processes and production methods, rather than the origin of the products.

27. Finally, Hong Kong, China would once again emphasize that the United States has *never* suggested that the detrimental impact on Hong Kong, China products "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[26] If the United States had ever suggested that the detrimental impact here was based exclusively on a legitimate regulatory distinction (and if the Panel disagreed with both parties and the Appellate Body and found an LRD analysis appropriate in a case of *de jure* discrimination), then Hong Kong, China would agree with the Appellate Body that the Panel would need to "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."[27]

28. Hong Kong, China does not know how a measure could be "even-handed" when it applies only to like products from one single Member, and when the United States has repeatedly emphasized that the "origin-neutral" concerns that allegedly underlie the measure are "concerns that are not exclusively or applicable to only Hong Kong, China."[28]

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

[25] Appellate Body Report, *US – Clove Cigarettes*, para. 169. The Appellate Body's concern in the early Article 2.1 cases with allegations of *de facto* discrimination was about preventing a circumstance in which "any distinction, *in particular those that are based exclusively on particular product characteristics or their related processes and production methods*, would *per se* accord less favourable treatment within the meaning of Article 2.1." *Ibid* (emphasis added).

[26] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[27] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[28] United States' response to Panel question No. 14, para. 60.

your response, please also comment on the statement by the Appellate Body in paragraphs 96 and 101 in Appellate Body Report, *US – Clove Cigarettes*.

29. In *US – Clove Cigarettes*, the Appellate Body observed that "[t]he balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994".[29] The Appellate Body recalled this "balance" in the preamble of the TBT Agreement when it concluded that "where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1."[30]

30. However, the Appellate Body also emphasized in *US – Clove Cigarettes* that unlike the GATT 1994, the TBT Agreement does not contain among its provisions a general exceptions clause.[31] In response to the Panel's question, *this* is the textual basis for Hong Kong, China's view that "a level of justification" would be available under the GATT exceptions for *de jure* discrimination claims under Articles I and IX of the GATT 1994, but not for *de jure* discrimination claims under Article 2.1 of the TBT Agreement – namely, that the general exceptions clause *exists* in the GATT 1994, and not in the TBT Agreement. As Hong Kong, China noted at the second meeting of the Panel, the significant differences in scope between the GATT 1994 and the TBT Agreement could certainly explain the drafters' decision to include a general exceptions clause in the former agreement and not the latter. In all events, however, the inclusion of a general exceptions clause in the GATT 1994 and not the TBT Agreement must be given effect.

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".

[29] Appellate Body Report, *US – Clove Cigarettes*, para. 96.

[30] Appellate Body Report, *US – Clove Cigarettes*, paras. 174, 182.

[31] Appellate Body Report, *US – Clove Cigarettes*, para. 101.

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.

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?

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"?

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?

31. In its analysis under Article 2.1 of the TBT Agreement in *US – Clove Cigarettes*, the Appellate Body began by observing that the TBT Agreement does not contain among its provisions a general exceptions clause like Article XX of the GATT 1994.[32] However, the Appellate Body considered that the sixth recital of the preamble of the TBT Agreement provides relevant context regarding the ambit of the "treatment no less favourable" requirement in Article 2.1 by making clear that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[33]

32. As to whether prior panels and the Appellate Body have incorporated concepts "mostly associated with the text under Article XX" into the analysis under Article 2.1, the Appellate Body explained in *EC – Seal Products*:

[32] Appellate Body Report, *US – Clove Cigarettes*, para. 101.

[33] Appellate Body Report, *US – Tuna II*, para. 213.

> [T]here are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX. In particular, we note that the concepts of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and of a 'disguised restriction on trade' are found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement, which the Appellate Body has recognized as providing relevant context for Article 2.1 of the TBT Agreement. … [A]s interpreted by the Appellate Body, Article 2.1 'permit[s] detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions', while under the chapeau of Article XX, discrimination is permitted if it is not arbitrary or unjustifiable.[34]

33. However, the Appellate Body also recognized that "there are significant differences between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX". The Appellate Body ultimately concluded in *EC – Seal Products* that the panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement.[35] Thus, it seems clear that the Appellate Body's view was that there are similar concepts in an analysis under Article 2.1 of the TBT Agreement and under the chapeau of Article XX of the GATT 1994, but also significant differences that must be taken into account.

34. Ultimately, however, Hong Kong, China's view is that the concepts that the Appellate Body has or has not incorporated into its LRD analysis under Article 2.1 of the TBT Agreement are only relevant in cases of alleged *de facto* discrimination. Where the measures are *de jure* discriminatory, as is the case here, no LRD analysis is required.

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)?

35. It is undisputed that the preamble of the TBT Agreement is not part of the rights and obligations stipulated therein. However, it is also undisputed that the preamble is part of the context for all of the operative provisions, and also sheds light on the object and purpose of the Agreement. Hong Kong, China has never stated, as the United States has suggested, that the seventh recital "is only relevant for certain provisions" of the TBT Agreement. All of the recital provisions provide context for all of the operative provisions in the Agreement.

36. Hong Kong, China has noted that the reference in the preamble to measures that a Member may take "for the protection of its essential security interest" foreshadows the specific provisions in the TBT Agreement, including Articles 2.2 and 10.8.3, that give effect to this recital language.[36] Article 2.1 of the TBT Agreement is not one of the provisions that

[34] Appellate Body Report, *EC – Seal Products*, para. 5.310.

[35] Appellate Body Report, *EC – Seal Products*, paras. 5.311-5.313.

[36] Hong Kong, China's response to Panel question No. 14, para. 50.

expressly incorporates national or essential security considerations, and so Hong Kong, China sees no basis for the Panel to read such considerations into Article 2.1 in relation to measures that are *de jure* discriminatory.

37. In relation to measures that are alleged to be *de facto* discriminatory under Article 2.1, the Appellate Body has previously concluded that a panel would need to examine whether the detrimental impact from a measure that is origin-neutral on its face is exclusively based on a legitimate regulatory distinction. It is uncontroversial, and Article 2.2 also makes clear, that national security requirements are legitimate objectives. In the context of an LRD analysis in relation to a measure that is origin-neutral on its face, a Member could certainly seek to demonstrate that the detrimental impact from the measure stems exclusively from a regulatory distinction based on national security requirements.

38. In the context of *de jure* discriminatory measures, however, nothing in the seventh recital or any of the other provisions that provide context for Article 2.1 suggests that the purpose of a *de jure* origin-based discrimination is relevant to the analysis.

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.

39. Hong Kong, China continues to believe that any difference that may exist between a Member's "essential security interest(s)" and its "national security requirements" is not relevant for the assessment of the applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement. The drafters elected to address both concepts in numerous provisions throughout the Agreement, but did not elect to incorporate Article XXI(b) of the GATT 1994 into the TBT Agreement.

40. It is notable, however, that the panel in *Russia – Traffic in Transit* explained that "essential security interests" is "evidently a narrower concept than 'security interests'" and "may generally be understood to refer to 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."[37]

41. In its second written submission, the United States explains that "[w]hile the term 'national security requirement' reflects a security interest, this term does not contain the word 'essential'. Based on the ordinary meaning, an 'essential' security interest is, according to the United States, one '[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important.'"[38] Hong Kong, China does not disagree with these observations.

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

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

[38] United States' second written submission, para. 135.

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?

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?

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.

42. Hong Kong, China will answer subparts (a) and (b) of this question together.

43. The panel in *Russia – Traffic in Transit* explained that it is "incumbent on the invoking Member to articulate … [its] essential security interests … sufficiently enough to demonstrate their veracity."[39]

44. In the context of Russia's invocation of Article XXI(b)(iii) of the GATT 1994, the panel further explained:

> What qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue. In particular, the Panel considers that the less characteristic is the 'emergency in international relations' invoked by the Member, i.e. the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings), the less obvious are the defence or military interests, or maintenance of law and public order interests, that can be generally expected to arise. In such cases, a Member would need to articulate its essential security interests with greater specificity than would be required when the emergency in international relations involved, for example, armed conflict.[40]

45. Article XXI(b) of the GATT 1994 does not apply to the TBT Agreement for the reasons that Hong Kong, China and the third parties have previously described at length in their prior submissions. However, if the Panel were to somehow take into account the United States' essential security interests in the context of its analysis under Article 2.1 of the TBT Agreement, Hong Kong, China agrees, with reference to the panel in *Russia – Traffic in Transit*, that the United States would need to articulate its essential security interests "sufficiently enough to demonstrate their veracity", and that what qualifies as a "sufficient level of articulation" is circumstance dependent.

46. In this case, the United States made clear at the outset of the dispute that it was not required to provide information regarding the nature of its essential security concerns.[41] Later, as noted in subpart (b) of the Panel's question, the United States explained:

> [T]he United States has long valued the fundamental freedoms and human rights of the people of Hong Kong, China, and considered the continued existence of those freedoms and human rights after the resumption of sovereignty by the People's Republic of China to be relevant to U.S. interests . . . [and the] United States has determined the situation with respect to Hong Kong, China, to be a threat to its essential security.[42]

47. The United States reiterated this same point in paragraph 5 of its second written submission, and emphasized its particular alleged concern about the enactment of the National Security Law. In paragraph 2 of the United States' second written submission, the United States claimed that "the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an

[39] Panel Report, *Russia – Traffic in Transit*, para. 7.134.

[40] Panel Report, *Russia – Traffic in Transit*, para. 7.135.

[41] United States' first written submission, paras. 226 and 238.

[42] *See* United States' response to Panel question No. 16(a), para. 71, quoting United States' opening statement at the first meeting of the Panel, para. 5.

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."

48. The reason that Hong Kong, China continues to emphasize that the United States only "claims" to have articulated its essential security interests, as referenced in subpart (b) of the Panel's question, is that *none* of the U.S. statements above give any indication of *what* U.S. essential security interests, as properly interpreted within the meaning of Article XXI(b), are actually implicated by the "situation with respect to Hong Kong, China".

49. Essential security interests, as defined by the panel in *Russia – Traffic in Transit*, are "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".[43] The United States has not disagreed with this understanding of what constitutes "essential security interests." To the contrary, the United States has in fact emphasized that an "essential security interest" must be one "'[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important.'"[44]

50. In its opening statement at the second meeting of the Panel, the United States argued that on their face, the measures at issue "make clear the essential security interests at stake"[45] – namely, the alleged global concerns of "the values of fundamental freedoms and human rights".[46] The United States repeatedly asserts that the problem in this dispute is not the United States' failure to articulate its essential security interests, but rather Hong Kong, China's failure to engage with the U.S. arguments.[47]

51. The problem, to be clear, is that while the United States has suggested that the alleged global concerns of "the values of fundamental freedoms and human rights" *are* its essential security interests under Article XXI(b), the United States has made *no* attempt to explain how protecting "the values of fundamental freedoms and human rights" *in Hong Kong, China* as alleged has anything to do with the protection of the United States from external threats or the maintenance of law and public order *internally*.

52. This is why Hong Kong, China maintains that the United States has not sufficiently articulated its essential security interests – because what the United States has in fact articulated cannot conceivably fall within the undisputed understanding of what constitutes an "essential security interest" under Article XXI(b).

GATT 1994

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)

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

[44] United States' second written submission, para. 135.

[45] United States' opening statement at the second meeting, para. 3.

[46] United States' opening statement at the second meeting, para. 6.

[47] *See, e.g.*, United States' opening statement at the second meeting, paras. 4 and 24.

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".

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?

53. It is undisputed that the reference to "this Agreement" in Article XXI(b) of the GATT 1994 is a reference to the GATT 1994 itself and not to any other agreement.[48] Thus, on its face, Article XXI(b) is available as a potential justification only in respect of claims advanced under the GATT 1994. As the United States itself has explained in reference to Article XX of the GATT 1994, the reference to "this Agreement" means that "if Article XX is to apply to an obligation in a WTO agreement other than the GATT 1994, the language and context of that obligation must provide a basis for the applicability of Article XX."[49] The same is true in respect of the identical language ("Nothing in this Agreement") that introduces Article XXI of the GATT 1994.[50]

[48] *See, e.g.*, Panel Report, *China – Raw Materials*, para. 7.153 ("*A priori*, the reference to 'this Agreement' [in Article XX of the GATT 1994] suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements."). The United States endorsed this finding on appeal. *See China – Measures Related to the Exportation of Various Raw Materials*, Joint U.S. and Mexican Appellee Submission (22 September 2011), paras. 12-20 (available at https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/US%20Mex%20Jt%20Appellee%20Sub.ExecSumm.pdf). The United States has not suggested that the reference to "this Agreement" in Article XXI of the GATT 1994 has a different meaning that the identical reference to "this Agreement" in Article XX of the GATT 1994, and there is no basis for such a conclusion.

[49] *China – Measures Related to the Exportation of Various Raw Materials*, United States' Second Written Submission (8 October 2010), para. 14 (available at https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/DS394.US_.Sub2_.fin_.pdf). *See also id.*, para. 21 ("the text of the commitment at issue in a WTO agreement other than the GATT 1994 must provide a basis for finding that the exceptions in Article XX of the GATT 1994 are applicable.").

[50] In response to Panel question No. 91, Hong Kong, China addresses the United States' contention that there is a meaningful difference in this regard between Article XX of the GATT 1994 and Article XXI of the GATT 1994. As explained in response to that question, the U.S. position is unfounded and based on nothing more than assertion.

54. Hong Kong, China's argument in paragraph 133 of its second written submission was that if the drafters of the GATT 1994 had meant for Article XXI(b) to apply to all of the Annex 1A Agreements, as the United States contends, the drafters would and could have provided for this result expressly. While it is commonplace to refer to the text of the GATT 1947 as the "GATT 1994", the GATT 1994 is, of course, a distinct legal document that incorporates the GATT 1947 and other legal instruments into a new multilateral treaty, the General Agreement on Tariffs and Trade 1994. The GATT 1994 modified the GATT 1947 in numerous respects. Some of those modifications were essentially stylistic (e.g. changing the references to the "contracting parties" in the GATT 1947 to refer instead to "Members") while others were substantive (such as the express incorporation of the six adopted understandings concerning the interpretation of specific provisions of the GATT 1994, as well as the exemption of the U.S. "Jones Act" from the scope of Part II of the GATT 1947). If the drafters had intended Article XXI(b) of the former GATT 1947 to apply to all of the Annex 1A Agreements, it would have been a simple matter to provide for this result in the incorporation text. The fact that the drafters did *not* provide for this result means that Article XXI(b) must be interpreted as originally drafted: by its terms, this exception applies only in respect of claims arising under "this Agreement", i.e. the GATT 1994.

55. Hong Kong, China is not aware of any factual basis for an "alternative view" that the drafters of the GATT 1994 "shared the common understanding that the security exception was assumed to apply to the Annex 1A Agreements, unless expressly provided otherwise". This unfounded "alternative view" is directly refuted by the fact that the drafters of the Annex 1A Agreements incorporated certain of the GATT 1994 exceptions into some of those agreements, but not others. This fact confirms what is already apparent from the text of Article XXI itself: that this exception is not available under other agreements, including other Annex 1A Agreements, unless expressly incorporated into that other agreement or made available through the necessary implication of the terms used in that agreement. In that event, and as the panel in *China – Raw Materials* found, it is the text of the relevant agreement, not the text of the GATT 1994, that provides the legal basis for applying the incorporated exception to that agreement.[51]

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?

56. As the Appellate Body pithily observed in *Canada – Patent Term*, "[s]ometimes the absence of something means simply that it is not there."[52] As the Appellate Body has also observed, an "omission must have some meaning".[53] Where, as in this case, certain of the

[51] Panel Report, *China – Raw Materials*, para. 7.153 ("the legal basis for applying Article XX exceptions to TRIMs obligations is the text of the incorporation of the TRIMs Agreement, not the text of Article XX of the GATT 1994"). As Hong Kong, China has explained previously, there is no difference in this respect between Article XX of the GATT 1994 and Article XXI of the GATT 1994. *See, e.g.*, Hong Kong, China's answer to Panel question No. 21, para. 80.

[52] Appellate Body Report, *Canada – Patent Term*, para. 78.

[53] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18.

Annex 1A Agreements incorporate one or both of the GATT 1994 exceptions, while others do not, the omission in the latter group of agreements must be given effect as a matter of treaty interpretation. The only possible interpretative conclusion arising from these facts is that the relevant GATT 1994 exception "is not there", i.e. it does not form a part of any agreement in which the exception is not incorporated expressly or made available by the necessary implication of the terms used in that agreement. Were that not the case, the presence of an express incorporation of a GATT 1994 exception in certain agreements and the omission of any such incorporation in other agreements would have no meaning.

57. Under Article 31 of the Vienna Convention, treaty interpretation proceeds on the basis of the words actually used in the treaty, interpreted in their context and in light of the object and purpose of the agreement. Under Article 32 of the Vienna Convention, the treaty interpreter may have recourse to supplementary means of interpretation, including an examination of the preparatory work of the treaty and the circumstances surrounding its conclusion, in order to confirm the meaning resulting from the general rule of interpretation or to determine the meaning of the treaty when the general rule of interpretation leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Within this interpretative framework, the silence of a treaty on a particular issue means only that the treaty does not address that issue. In all events, the identification of a specific right or obligation within a treaty (including the availability of an exception to violations of that treaty) must derive from the general rule of interpretation under Article 31 or, if applicable, supplementary means of interpretation under Article 32.

58. When faced with the silence of a treaty on a particular issue, panels and the Appellate Body have proceeded to apply the general rule of interpretation set forth in Article 31 or, if applicable, supplementary means of interpretation under Article 32 to discern the meaning of the treaty. For example, in *US – Carbon Steel*, the panel had found that the *de minimis* standard of less than one percent subsidization applicable at the investigation stage of a countervailing duty proceeding, as set forth in Article 11.9 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), must also apply to sunset reviews of countervailing duty orders under Article 21.3 of the SCM Agreement. The United States challenged this finding on appeal, arguing that the panel had "read into" Article 21.3 of the SCM Agreement "words and obligations that simply do not exist under that provision".[54]

59. The Appellate Body began its analysis of the U.S. claim of error by observing that "the lack of any indication, in the text of Article 21.3, that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, as an indication that no such requirement exists."[55] The Appellate Body recalled in this connection its prior observation that "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning'."[56] The Appellate Body then proceeded to interpret the relevant provisions of the SCM Agreement in accordance with their ordinary meaning, interpreted in their context and in the light of the object and purpose of the SCM Agreement, and ultimately agreed with the United States that the absence of a *de minimis* provision applicable to sunset reviews under

[54] Appellate Body Report, *US – Carbon Steel*, para. 59.

[55] Appellate Body Report, *US – Carbon Steel*, para. 65.

[56] Appellate Body Report, *US – Carbon Steel*, para. 65 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, at 111).

Article 21.3 of the SCM Agreement means that Members are under no obligation to apply a *de minimis* standard in that context. Of particular relevance to the present dispute, the Appellate Body placed considerable weight on the fact that "the technique of cross-referencing is frequently used in the SCM Agreement", indicating that "when the negotiators of the SCM Agreement intended that the disciplines set forth in one provision be applied in another context, they did so expressly."[57] The Appellate Body observed that the sunset review provision in Article 21.3 of the SCM Agreement does not cross-reference the *de minimis* standard applicable to investigations under Article 11.9, indicating that the drafters of the SCM Agreement did not intend the *de minimis* standard that applies to the investigation stage of a countervailing duty proceeding to apply to sunset reviews of countervailing duty orders.

60. In the present dispute, the United States argues that an exception provision available under one agreement (the GATT 1994) is available under two other agreements (the ARO and TBT Agreement) despite the absence of any textual indication in those two agreements that the exception applies, and in a context in which the drafters of the Annex 1A Agreements clearly demonstrated their ability to incorporate GATT exceptions by reference when that was their intention. It is the United States that is now seeking to "read into" the ARO and TBT Agreement words that "simply do not exist" in those two agreements. While the silence of the ARO and TBT Agreement on this issue is not dispositive, that omission "must have some meaning" as a matter of treaty interpretation and, most importantly, it is the United States that must demonstrate *on the basis of accepted principles of treaty interpretation* that Article XXI(b) applies to those two agreements *notwithstanding* the absence of express incorporation or any other textual linkage to Article XXI(b). Merely positing the existence of a "common agreement that Article XXI applies to Annex 1A Agreements" is not a sufficient basis to overcome the evident silence of the ARO and TBT Agreement on this issue.

61. Moreover, as Hong Kong, China explained in response to Panel question No. 84, there is *no* basis for the identification of any "common agreement that Article XXI applies to Annex 1A Agreements". Such an "agreement" might have been discerned, for example, from the existence of an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", as contemplated by Article 31(2)(a) of the Vienna Convention, or by a "subsequent agreement between the parties" as contemplated by Article 31(3)(a) of the Vienna Convention. The United States has identified no such "agreement" because no such "agreement" exists. In the context of treaty interpretation, at least, "agreements" cannot be inferred from silence. They must have some basis in accepted principles of treaty interpretation.

62. It is particularly ironic that *the United States* is asking the Panel to "read into" the ARO and TBT Agreement an exception that is not present in those agreements, given the United States' extensive criticism of the Appellate Body for allegedly engaging in "impermissible gap-filling" and "read[ing] into the text of the covered agreements obligations or rights that are not present in the text."[58] In the present dispute, the United States is going well beyond asking the Panel to fill a "gap". It is asking the Panel to interpret Article XXI of

[57] Appellate Body Report, *US – Carbon Steel*, para. 69.

[58] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), p. 81 (available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf).

the GATT 1994 *contrary to its ordinary meaning* ("this Agreement") and asking the Panel to disregard the fact that certain of the Annex 1A Agreements expressly incorporate Article XXI of the GATT 1994 while others do not – an element of context that entirely refutes the U.S. assertion that Article XXI applies to *all* of the Annex 1A Agreements.

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"?

63. It is well established that "[u]nder Article II:2 of the Marrakesh Agreement, the Multilateral Trade Agreements contained in the annexes are all necessary components of the 'same treaty', and they, together, form a single package of WTO rights and obligations."[59] For this reason, "[t]he Marrakesh Agreement and the Multilateral Trade Agreements together form a single package of rights and obligations that must be read in conjunction."[60]

64. However, "the mere fact that each of the Multilateral Trade Agreements is an integral part of the Marrakesh Agreement by virtue of Article II:2 of the Marrakesh Agreement does not, in and of itself, answer the question as to how specific rights and obligations contained in those Multilateral Trade Agreements relate to each other".[61] This is because each of the Multilateral Trade Agreements, while forming an integral part of the Marrakesh Agreement, is nevertheless a distinct agreement. This is evident, *inter alia*, from Article XVI:3 of the Marrakesh Agreement, which provides that "[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict," and also from the General Interpretative Note to Annex 1A, which provides that "[i]n the event of a conflict between 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." Far from forming an undifferentiated mass of rights and obligations, the WTO system consists of a series of distinct agreements falling under a single umbrella agreement, the Marrakesh Agreement.

65. For this reason, "the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the

[59] Appellate Body Report, *China – Rare Earths*, para. 5.47 (quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

[60] Appellate Body Report, *China – Rare Earths*, para. 5.52.

[61] Appellate Body Report, *China – Rare Earths*, para. 5.53.

relevant provisions of these agreements."[62] The specific relationships among the Multilateral Trade Agreements, and between those agreements and the Marrakesh Agreement, "must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A)."[63]

66. Within this framework (i.e. the overarching Marrakesh Agreement and a series of distinct Multilateral Trade Agreements), it cannot be assumed that the exceptions available under one agreement are available to justify violations of a different agreement. As the United States has aptly explained, "[v]arious provisions of the multilateral agreements might overlap in subject matter (for example, by imposing disciplines with respect to trade in goods), but that does not mean that those different agreements all have an 'intrinsic relationship' to one another such that the exceptions of one agreement should be assumed to apply to another."[64] Instead, panels and the Appellate Body have undertaken "a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute" to determine whether an exception set forth in one of the multilateral agreements applies to another.[65] As the Appellate Body has explained:

> In some instances, such examination will lead to the conclusion that exceptions in one covered agreement, such as Article XX of the GATT 1994, may be invoked to justify a breach of an obligation set forth elsewhere than in the GATT 1994. In principle, different types of provisions and circumstances may lead to such a conclusion. One clear example is found in Article 3 of the Agreement on Trade Trade-Related Investment Measures (TRIMs Agreement), the express terms of which provide that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." <u>In other instances, such examination may lead to the opposite conclusion</u>. For example, Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement). In many instances, no express language identifying the relationship between specific terms and provisions of a Multilateral Trade Agreement with those of another Multilateral Trade Agreement or the Marrakesh Agreement is found in the agreements at issue. Where this is so, recourse to other interpretative elements will be necessary to determine the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement.[66]

67. As the underscored language makes clear, and as the Appellate Body's finding in respect of the TBT Agreement confirms, the fact that the Annex 1A Agreements form an

[62] Appellate Body Report, *China – Rare Earths*, para. 5.55.

[63] Appellate Body Report, *China – Rare Earths*, para. 5.55.

[64] *China – Rare Earths*, United States' Second Written Submission (25 April 2013), para. 24, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes-1).

[65] Appellate Body Report, *China – Rare Earths*, para. 5.62.

[66] Appellate Body Report, *China – Rare Earths*, para. 5.56 (emphasis added).

integral part of the Marrakesh Agreement is not a sufficient basis to conclude that the exceptions available under the GATT 1994 are available under the other Multilateral Agreements on Trade in Goods. The same conclusion is evident from the panel's finding in *Thailand – Cigarettes (Philippines) (Article 21.5)*, in which the panel held that Article XX of the GATT 1994 is not available as a potential defence to violations of the Customs Valuation Agreement ("CVA"). In that dispute, the United States agreed with Japan, both as third parties, that the mere fact that the CVA elaborates upon the obligations found in Article VII of the GATT 1994 is not a sufficient basis to conclude that Article XX applies to the CVA. As the United States explained, "the exceptions that apply to general rules do not necessarily apply to special rules vis-à-vis those general rules."[67] This is true even though the CVA and the GATT 1994 are integral parts of the same treaty.

68. Panels and the Appellate Body have frequently recognized that each of the Multilateral Agreements on Trade, including each of the Multilateral Agreements on Trade in Goods, contains *its own* balance of rights and obligations as embodied in the terms of each agreement, notwithstanding the fact that each of these agreements forms an integral part of the Marrakesh Agreement. For example, the balance of rights and obligations embodied in the terms of the TBT Agreement was an important basis for the Appellate Body's conclusion in *US – Clove Cigarettes* that Article XX of the GATT 1994 is inapplicable to that agreement.[68] The same was true of the panel's finding in *Thailand – Cigarettes (Philippines) (Article 21.5)*, discussed above, that Article XX of the GATT 1994 does not apply to the CVA.[69] Similar observations about the balance of rights and obligations intrinsic to each agreement have been made in respect of the SCM Agreement,[70] the GATS,[71] and protocols of accession.[72] To interpret the exception provisions of one agreement as applicable to another agreement merely because they form an integral part of the same overarching agreement, the Marrakesh Agreement, would upset the balance of rights and obligations that Members have negotiated in the context of each agreement.

69. In essence, and as detailed further in response to Panel question No. 91, the United States is arguing in the present dispute that the Marrakesh Agreement should be interpreted *as if* it contained a "security exception" applicable to *all* of the Multilateral Agreements on Trade. However, as the panel in *China – Raw Materials* correctly found, "there are no general umbrella exception[s] in the Marrakesh Agreement."[73] The panel observed that "the Marrakesh Agreement contains voting rules that are applicable to all WTO agreements" but does not contain general exceptions applicable to all WTO agreements.[74] The same is true of

[67] *Thailand – Cigarettes (Philippines) (Article 21.5)*, Responses of the United States of America to the Panel's Questions to Third Parties (15 September 2017), para. 37 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.Thai.Qs.fin.pdf).

[68] *See, e.g.*, Appellate Body Report, *US – Clove Cigarettes*, paras. 96, 101.

[69] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5)*, para. 7.756.

[70] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

[71] Appellate Body Report, *Argentina – Financial Services*, para. 6.114.

[72] Panel Report, *China – Raw Materials*, para. 7.112.

[73] Panel Report, *China – Raw Materials*, para. 7.150.

[74] Panel Report, *China – Raw Materials*, n. 188.

security exceptions – there are no security exceptions applicable to all WTO agreements found in the Marrakesh Agreement. Instead, "[e]ach WTO agreement provides its own set of exceptions or flexibilities applicable to the specific obligations found in each covered agreement."[75] Sometimes these exceptions and flexibilities, if present, are embodied in formal exception provisions (like Articles XIV and XIV *bis* of the GATS), sometimes an agreement incorporates by reference exceptions found in other agreements (like Article 3 of the TRIMs Agreement), and sometimes the flexibilities available to Members are found within the substantive provisions of the agreement itself (like Articles 13, 17, and 30 of the TRIPS Agreement, authorizing Members to create exceptions to certain intellectual property rights that they are otherwise obligated to recognize). However formulated, these exceptions and flexibilities form an important part of the balance of rights and obligations that Members have agreed upon in the context of each agreement. As a matter of treaty interpretation, each such balance of rights and obligations must be recognized and enforced.

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.

70. The modalities of the negotiating process in the Uruguay Round do not detract from Hong Kong, China's observations in respect of subpart (a) of this question. The concept of the "single undertaking" and the principle that "nothing would be agreed until everything is agreed" does not change the fact that the results of the Uruguay Round were embodied in an umbrella agreement (the Marrakesh Agreement) and a series of distinct agreements relating to particular subject matters. As discussed in response to subpart (a), each one of those agreement represents its own balance of rights and obligations in respect of its subject matter. As Hong Kong, China also noted in response to subpart (a), if it had been the negotiators' intention to create a security exception applicable to all of the WTO agreements, as the United States now implies, they would have placed that exception in the Marrakesh Agreement. They did not.

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.

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

[75] Panel Report, *China – Raw Materials*, para. 7.150.

even noted that the 'systemic structure of a treaty is … of *equal importance* to the ordinary linguistic meaning of the words used …".

71. The United States' statement in paragraph 116 of its second written submission relates to its contention that the "structure" and "logic" of the WTO Agreement, including the fact that the GATT 1994 was included in the same annex as the other Multilateral Agreements on Trade in Goods, support the conclusion that Article XXI of the GATT 1994 applies to all of the Annex 1A Agreements. Hong Kong, China has addressed this contention in response to the previous questions, particularly Panel question No. 86. As Hong Kong, China has explained, the fact that the WTO system is comprised of an overarching agreement (the Marrakesh Agreement) plus a series of distinct agreements relating to particular subjects does not, by itself, support the conclusion that the exceptions found in one of those agreements apply to all other agreements. Nor does the fact that the GATT 1994 appears in the same annex as the other Multilateral Agreements on Trade in Goods support such a conclusion. Each agreement represents its own balance of rights and obligations in respect of its subject matter, and any finding that the exceptions available under one agreement apply to another agreement must follow from accepted principles of treaty interpretation, not abstract assertions about "structure" and "logic".

72. It is, however, interesting to examine more closely the source upon which the United States relies for its assertions about the interpretative significance of the "systematic structure" of a treaty. As that source explains, the "systematic structure of a treaty" forms part of the <u>context</u> for the interpretation of the provision in question.[76] This is not a controversial observation – the structure of a treaty is clearly an element of context in which the terms of a treaty must be interpreted. As this observation pertains to the interpretative question at hand, the "systematic structure" of the WTO Agreement is that it consists of an umbrella agreement with *no* security or other exceptions applicable to all agreements, an annex (Annex 1A) that contains all of the Multilateral Agreements on Trade in Goods, a single agreement *within* that annex (the GATT 1994) that contains the exception at issue (Article XXI), three other agreements in that annex that *expressly incorporate* that exception by reference (the TRIMs Agreement, the Agreement on Import Licensing Procedures, and the Trade Facilitation Agreement), and ten other agreements in that annex that do *not* incorporate the exception in question, either expressly or by the necessary implication of the terms used in the agreement.

73. As context, this "systematic structure" supports only one conclusion: that Article XXI of the GATT 1994 applies to the GATT 1994 ("this Agreement") and to the three other Annex 1A Agreements that incorporate that exception by reference, and does *not* apply to the ten other Annex 1A Agreements that do not incorporate that exception. The United States' attempt to interpret Article XXI of the GATT 1994 as an exception applicable to all of the Annex 1A Agreements is refuted, not supported, by a consideration of the "systematic structure" of the treaty as an element of context.

[76] United States' opening statement at the first meeting, para. 38, citing Oliver Dörr, General Rules of Interpretation, in Vienna Convention on the Law of Treaties: A Commentary, O. Dörr and K. Schmalenbach (ed.), Springer, 2d edn. (2012), at 582 (**US-138**) ("The systematic structure of a treaty is thus of equal importance to the ordinary linguistic meaning of the words used, in order to determine its true meaning, since, as the PCIJ had already pointed out, words obtain their meaning <u>from the context in which they are used</u>.") (emphasis added).

74. Hong Kong, China also finds it interesting that the United States' argument based on the "structure" and "logic" of Annex 1A and the WTO Agreement as a whole is quite evidently one that it has invented for the purposes of this dispute. One of the central issues in the ongoing disputes concerning the "Section 232" tariffs that the United States has imposed on imports of steel and aluminium products is whether Article XXI(b) of the GATT 1994 applies to the Agreement on Safeguards. Based on publicly available documents, it is apparent that the United States has not argued in those disputes that Article XXI(b) of the GATT 1994 applies to the Agreement on Safeguards by reason of the "structure" and "logic" of the Annex 1A Agreements and the WTO Agreement as a whole. Rather, the United States has attempted, albeit unpersuasively, to demonstrate that there is an "express, textual link between the GATT 1994 and obligations under the Agreement on Safeguards" such that Article XXI(b) should be interpreted to apply to the Agreement on Safeguards.[77] This is a failed attempt to apply the analytical framework that adopted panel and Appellate Body reports have previously applied to determine whether an exception available under the GATT 1994 applies to another Annex 1A agreement, *not* an argument that Article XXI applies to *all* of the Annex 1A Agreement by reason of the "structure" and "logic" of Annex 1A and the WTO Agreement as a whole.

75. In sum, a consideration of the "systematic structure of the treaty" as an element of context supports the conclusion that Article XXI of the GATT 1994 does *not* apply to either the ARO or TBT Agreement. The United States' argument to the contrary is baseless and one that it has contrived for the purpose of this dispute, there being no credible argument based on accepted principles of treaty interpretation that Article XXI of the GATT 1994 applies to these two other agreements.

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?

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?

[77] *See, e.g., United States – Steel and Aluminium Products* (European Union) (DS548), United States' First Written Submission, para. 183 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS548%29.fin.%28public%29.pdf); *United States – Steel and Aluminium Products* (China) (DS544), United States' First Written Submission, para. 180 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS544%29.fin.%28public%29.pdf). *See also id.*, Responses of the United States of America to the Panel's First Set of Questions to the Parties (14 February 2020), paras. 354-355 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.As.Pnl.Qs1.(DS544).fin.(public).pdf).

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".

76. As Hong Kong, China has explained, the U.S. position concerning the applicability of Article XXI(b) of the GATT 1994 to all of the Annex 1A Agreements would mean, necessarily, that Article XX of the GATT 1994 *also* applies to all of the Annex 1A Agreements. The United States' arguments to the contrary are merely words on paper, "sound and fury, signifying nothing".

77. As best as Hong Kong, China can follow a rather convoluted line of argument, the U.S. position that Article XXI(b) applies to all of the Annex 1A Agreements is based on three considerations: (i) the "legal structure" of the Marrakesh Agreement, whereby the GATT 1994 and all other multilateral agreements on trade in goods were included in a single annex;[78] (ii) "logic" and "common sense", by which the United States evidently means that it would not be "logical" or in accordance with "common sense" if an exception applicable to trade in goods under the GATT 1994 did not also apply to the other multilateral agreements on trade in goods, which in many cases elaborate upon disciplines contained in the GATT 1994;[79] and (iii) closely related to the second consideration, the proposition that because the Annex 1A Agreements contain what the United States characterizes as "overlapping" disciplines (e.g. obligations of most-favoured nation or national treatment), it must be the case that the same exceptions apply to all of these "overlapping" disciplines wherever they arise (i.e. that it would not be "logical" or "rational" if this were not the case).[80]

78. All of these considerations, whatever their merit, would apply with equal force to Article XX of the GATT 1994. The United States is evidently aware that it is a non-starter to suggest that Article XX of the GATT 1994 applies to all of the Annex 1A Agreements, among other reasons because adopted panel and Appellate Body reports have rejected the proposition that Article XX applies to other Annex 1A Agreements.[81] The United States therefore asserts that "textual differences between Articles XX and XXI themselves, as well as differences in the structure of the WTO Agreement with respect to those exceptions", lead to the conclusion that Article XXI of the GATT 1994 applies to all of the Annex 1A Agreements while Article XX does not.[82]

79. The United States elaborated upon these alleged "differences" in its response to Panel question No. 21. The first "difference" that the United States identifies has something to do with its assertion that, in the case of Article XXI(b), "the operative language regarding the

[78] *See, e.g.*, United States' first written submission, para. 268; United States' second written submission, para. 115.

[79] *See, e.g.*, United States' first written submission, para. 273.

[80] *See, e.g.*, United States' first written submission, para. 277; United States' second written submission, para. 129.

[81] *See, e.g.*, Panel Report, *Thailand – Cigarettes (Second Recourse to Article 21.5, Philippines)*, paras. 7.441-7.449; Panel Report, *US – Poultry (China)*, para. 7.481.

[82] United States' second written submission, para. 120.

relationship between the measure and its objective is in the chapeau", whereas, it contends in the case of Article XX, "the operative language regarding the relationship between the measure taken and the Member's objective" appears in the subparagraphs.[83] As a factual matter, this assertion is false – the subparagraphs of Article XXI(b), just like the subparagraphs of Article XX, contain language specifying the required relationship between the circumstance described in each subparagraph and the action for which justification is sought (i.e. "relating to", "relating to", and "taken in time of"). For the purpose of the present question, however, what matters is that the United States fails to explain how this alleged "difference", even if it existed, would have any bearing upon its contention that Article XXI(b) applies to all of the Annex 1A Agreements while Article XX does not. In the end, this alleged "difference" seems to amount to nothing more than a reassertion of the United States' claim that Article XXI(b) is "self-judging", an assertion that, while untrue, has no relevance to the question at hand.[84]

80. The second "difference" that the United States identifies concerns the fact that each of the Annex 1A, 1B, and 1C agreements contains a "security" exception, while only the GATT 1994 and the General Agreement on Trade in Services ("GATS") contain "general" exceptions. Hong Kong, China does not see how this "difference", even if accurately described, has any bearing upon the question of whether either or both of the GATT 1994 exceptions applies *to the other Annex 1A Agreements*, i.e. whether these exceptions apply *as among the Multilateral Agreements on Trade in Goods*.

81. The United States' second argument, as best as Hong Kong, China can discern, is that the security exceptions are ubiquitous, whereas the general exceptions are not. Based on this characterization, the United States appears to suggest that Article XXI(b) should be interpreted to apply to all of the Annex 1A Agreements, whereas the exceptions contained in Article XX should not. In essence, and as Hong Kong, China has already discussed in response to Panel question No. 86, the United States is suggesting that the security exceptions should be interpreted as if they appeared *in the WTO Agreement*, not in specific Multilateral Trade Agreements listed in Annex 1 to that agreement.

82. This characterization overlooks the fact that this is not how the drafters of the Uruguay Round agreements decided to situate these exceptions. It also overlooks the fact that there are differences in the wording of the security exception in each of the three agreements in which they appear, especially between the GATS, on the one hand, and the GATT 1994 and the TRIPS Agreement, on the other. There is not a single "security exception" applicable to all of the Multilateral Trade Agreements, as the United States seems to suggest. The United States' characterization also overlooks the fact that the GATT 1994, the GATS, and the TRIPS Agreement each contain overlapping general exceptions, albeit tailored in each case to the particular subject matter of each agreement. Each agreement, for example, has an exception from the national treatment obligation for measures necessary to

[83] United States' answer to Panel question No. 21, paras. 112-113.

[84] *See* United States' answer to Panel question No. 21, para. 113 ("By its terms, Article XXI(b) does not permit a panel to substitute its judgment for that of a WTO Member as to whether an action is necessary for that Member to protect its essential security interests"). This is a good example of the United States' tendency throughout these proceedings to fall back on its "self-judging" interpretation of Article XXI(b) even when that interpretation is not pertinent to the issue under examination.

secure compliance with laws and regulations which are not inconsistent with the agreement, provided that such measures are not applied in a manner which would constitute a disguised restriction on trade.[85] Can one infer from this commonality that this exception should be read into each of the Annex 1A Agreements, even though only certain of the Annex 1A Agreements incorporate Article XX(d) of the GATT 1994? Of course not. The fact that the same or similar exceptions appear frequently in the Multilateral Agreements on Trade, or even in each of the GATT 1994, the GATS, and the TRIPS Agreement, does not mean that those exceptions can be interpreted to apply *universally* to *all* of the Multilateral Agreements on Trade.

83. In sum, the second "difference" identified by the United States is based on a mischaracterization of how certain exceptions, both "security" and "general", appear in and are used in different Annex 1 agreements. Exceptions apply to the agreements in which they are expressly incorporated or made available by the necessary implication of the terms used in the relevant agreement, and do not apply to agreements in which they are not so incorporated or implied. In any event, as Hong Kong, China has already noted, the United States' observations concerning the presence of a security exception in each of the GATT 1994, GATS, and TRIPS Agreement, whatever their accuracy, have no bearing upon the question at hand, namely the applicability of Article XXI(b) of the GATT 1994 *to other Annex 1A Agreements*.

84. The alleged "textual" and "structural" differences between Article XX and Article XXI of the GATT 1994 are, in short, both inaccurate and irrelevant to the question of whether Article XXI(b) of the GATT 1994 applies to the other Annex 1A Agreements. The three considerations identified by the United States in support of its contention that Article XXI(b) applies to the other Annex 1A Agreements would apply with equal force to Article XX of the GATT 1994. As the United States appears to recognize through its unsuccessful attempt to distinguish the two situations, it is completely untenable to suggest that Article XX of the GATT 1994 applies to all of the Annex 1A Agreements. The same is true of Article XXI of the GATT 1994.

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".

85. The statement by the United States quoted by this question appears to relate to the United States' contention that the same exceptions should apply to "overlapping" claims, i.e. claims arising under different Annex 1A Agreements that are similar in some respect, for example claims arising under provisions that require national or most-favoured-nation treatment in respect of the subject matter of each provision. The United States contends that it would be "absurd" or "untenable" for these "overlapping" claims to be subject to different potential justifications.[86]

86. Hong Kong, China has already addressed this contention in detail in response to Panel question No. 27. As Hong Kong, China explained there, the United States' "overlapping

[85] *See* GATT 1994, Article XX(d); GATS, Article XIV(c); TRIPS Agreement, Article 3.2.

[86] United States' second written submission, para. 143.

claims" theory suffers from two basic problems. The first is that the United States has offered no interpretative basis for the conclusion that "overlapping claims", even if they could be identified, should be subject to the same exceptions. The second is that the United States has not established that there are any "overlapping" claims at issue in this dispute under any plausible understanding of what that concept might entail.

87. Beginning with the first problem, the United States' assertion that "overlapping" claims should be subject to the same exceptions overlooks what the United States itself would call the "structure" and "logic" of the WTO Agreement, its relationship to the Multilateral Agreements on Trade in Goods, and the relationships among the Multilateral Agreements on Trade in Goods. As Hong Kong, China has explained in detail, including in response to Panel question No. 86 above, the drafters of the WTO agreements made clear choices about where to situate exception provisions and when to make those exception provisions applicable, or not applicable, to other agreements. Most pertinently to the present dispute, all of the Annex 1A Agreements relate to trade in goods, and many of those agreements contain provisions that elaborate upon or might be said to "overlap" with provisions of the GATT 1994 in some sense, and yet the drafters of those agreements did not decide to extend the exception provisions of the GATT 1994 to *all* of those agreements – only certain of those agreements. As context for interpreting what "this Agreement" means in Articles XX and XXI of the GATT 1994, this "structure" and "logic" of the Annex 1A Agreements confirms that those two exception provisions apply only to claims arising under the GATT 1994 except in cases where the relevant exception is incorporated expressly or by necessary implication into another Annex 1A Agreement.

88. The CVA is an instructive example. There is no question that the CVA elaborates upon and implements Article VII of the GATT 1994. Like the United States in the present dispute, Thailand argued in the first compliance proceeding in *Thailand – Cigarettes (Philippines)* that it would be "absurd" to "allow a violation of Article VII of the GATT 1994 to be justified … under the general exceptions in Article XX of the GATT 1994" but "not allow for the justification of a violation of the CVA, notwithstanding that the CVA is an agreement that expressly implements Article VII of the GATT 1994."[87] The panel rejected this argument, finding that "it does not follow that the applicability of Article XX [to Article VII of the GATT 1994] mandates that those same exceptions must also be applicable to the system of customs valuation comprising detailed methodologies found in the CVA."[88]

89. As that panel noted, all but one of the third parties in that dispute – including Canada, the European Union, Japan, and the United States – agreed with the panel and the Philippines "that the applicability of Article XX to violations of Article VII, but not to violations of the CVA, would not lead to an absurdity."[89] Japan expressed its view that "the CVA is a special agreement on the implementation of a specific article, namely, Article VII of the GATT 1994. Therefore, by its nature, the CVA constitutes special law vis-à-vis the GATT 1994, and provides special rules focusing on how Member states should determine the customs

[87] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5)*, para. 7.751.

[88] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5)*, para. 7.752.

[89] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5)*, para. 7.753.

value."[90] The United States agreed with Japan's position, explaining that "as a general matter, the exceptions that apply to general rules *do not necessarily apply to special rules vis-à-vis those general rules*."[91] Yet under the "overlapping claims" theory advanced by the United States in the present dispute, the United States should have *endorsed* Thailand's position in that dispute.

90. The United States was right then, and it is wrong now. The mere fact that a provision of an Annex 1A Agreement other than the GATT 1994 "overlaps" with a provision of the GATT 1994 in some sense, whether by virtue of its subject matter or the nature of the discipline imposed, is not a sufficient basis to conclude that the exceptions available under the GATT 1994 apply to that provision. As the compliance panel in *Thailand – Cigarettes (Philippines)* emphasized when it rejected Thailand's argument a *second* time, the CVA contains its own balance of rights and obligations, including its own internal flexibilities, and that balance would be disrupted by finding that the exceptions available under the GATT 1994 apply to that agreement when there is no indication that this was the drafters' intent.[92] There is nothing "absurd" or "untenable" about this result, as the United States now claims. On the contrary, it is a result that properly gives effect to the terms of each agreement.

91. This first problem with the United States' "overlapping claims" theory should provide a sufficient basis for the Panel to reject this theory. Hong Kong, China nevertheless proceeds to the second problem with the United States' theory, namely that it is factually unsound. There are no "overlapping" claims at issue in the present dispute under any plausible understanding of what this concept might entail.

92. Beginning with the ARO, there can be no "overlap" between the ARO and the GATT 1994 because the ARO addresses a subject that the GATT 1994 does not address at all – rules of origin. The ARO is atypical among the Annex 1A Agreements in that it does not elaborate upon a provision of the GATT 1994 (unlike, for example, the CVA, which elaborates upon Article VII of the GATT 1994). If the exception provisions of the GATT 1994 do not apply to the CVA – as the compliance panel in *Thailand – Cigarettes (Philippines)* correctly found – they certainly do not apply to the ARO.

93. The TBT Agreement likewise does not elaborate upon a specific provision of the GATT 1994, although some of its provisions (such as Article 2.2) may be understood to relate generally to the subject matter of Article XX of the GATT 1994. The TBT Agreement addresses a class of measures – technical regulations – that the GATT 1994 does not specifically address and establishes its own balance of rights and obligations in respect of that class of measures. The Appellate Body took this balance into account in finding that Article XX of the GATT 1994 is not available as a potential justification for violations of the

[90] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5)*, para. 7.753 (quoting Japan's third-party statement, para. 19).

[91] *Thailand – Cigarettes (Philippines) (Article 21.5)*, Responses of the United States of America to the Panel's Questions to Third Parties (15 September 2017), para. 37 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.Thai.Qs.fin.pdf) (emphasis added).

[92] Panel Report, *Thailand – Cigarettes (Philippines) (Second Recourse to Article 21.5, Philippines)*, paras. 7.446-7.449.

TBT Agreement.[93] This is true even though the same measure may, for example, violate the non-discrimination obligation in Article 2.1 of the TBT Agreement (as a technical regulation) while simultaneously violating the non-discrimination obligation contained in Article I:1 and/or Article III:4 of the GATT 1994 (as a measure falling within the scope of those provisions). While the nature of the obligation is similar (broadly, an obligation of non-discrimination), the subject matter of each provision is different. Claims under these provisions are not and cannot be "the same", such that, under the United States' theory, the exceptions applicable to claims under these provisions should also be the same.

94. In sum, the United States' assertion 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" is simply another formulation of its position that "overlapping" claims should be subject to the same exceptions even when those "overlapping" claims arise under different agreements, each with its own balance of rights, obligations, exceptions, and flexibilities. This position ignores the structure of the WTO agreements as a series of distinct agreements falling under an umbrella agreement, ignores the clear choices that the drafters of the Multilateral Agreements on Trade in Goods made in respect of the availability or non-availability of certain exceptions, and is based on a factually inaccurate assertion that the claims at issue in this dispute are "the same" or "overlapping" in any relevant sense.

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?

95. Hong Kong, China believes that its answers to the previous questions, including Panel question No. 92, have set forth Hong Kong, China's position on this issue. In brief, and with respect, the "assumption" posited by this question has it backwards. The context provided by the Annex 1A Agreements, including the reference to "this Agreement" in Articles XX and XXI of the GATT 1994, as well as the fact that certain of the Annex 1A Agreements incorporate these exceptions by reference while others do not, establishes that the justifications available under the GATT 1994 are *not* available under the other Annex 1A Agreements unless otherwise provided in the specific Annex 1A Agreement at issue. In addition, the concept of "sameness" inherent in this question is based on a misunderstanding of the different subject matters of the various Annex 1A Agreements and the different balances of rights, obligations, exceptions, and flexibilities that each such agreement establishes in respect of its subject matter.

[93] *See* Appellate Body Report, *US – Clove Cigarettes*, paras. 96, 101. *See also* Appellate Body Report, *China – Rare Earths*, para. 5.56. To the same effect, the panel in *US – Poultry (China)* found that because the SPS Agreement specifically elaborates upon Article XX(b) of the GATT 1994, a measure that is inconsistent with the SPS Agreement cannot be justified under Article XX(b). Panel Report, *US – Poultry (China)*, para. 7.481.

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?

96. Hong Kong, China agrees that the phrase "which it considers" leaves the determination of the *necessity* of a particular action for the protection of a Member's essential security interests to the judgment of the invoking Member. That determination must still be made in good faith.[94]

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?

97. It is undisputed that, as a matter of English usage, subparagraph (iii) of Article XXI(b) can only be understood to modify the term "action". This is because, in English, "interests" are not "taken". As Hong Kong, China has previously explained, while it is grammatically possible in at least the French and English texts to interpret the first two subparagraphs as modifying the term "interests", the only *consistent* understanding of all three subparagraphs in the French and English texts is that they modify the term "action". This understanding is confirmed by the equally authentic Spanish text, which, because of the feminine gender agreement between "relativas" and "medidas", leaves no doubt that all three subparagraphs modify the term "action" ("mesures", "medidas").[95] This is the only possible understanding of the Spanish text, and it is fully consistent with an understanding of the French and English texts that interprets all three subparagraphs as modifying the term "action" ("mesures").

98. Even under the United States' "single relative clause" theory, subparagraph (iii) of Article XXI(b) does not fall within the clause that the United States considers to be "self-judging" by virtue of the phrase "which it considers".[96] The United States' efforts to resolve this fundamental problem with its theory are incoherent and internally inconsistent.[97] Thus, even if one were to accept the United States' theory that subparagraph (iii) modifies the term "action" while subparagraphs (i) and (ii) modify the term "interests", subparagraph (iii) would not fall within the portion of Article XXI(b) that the United States considers to be "self-judging" even under its own theory.

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

[94] *See* Hong Kong, China's second written submission, para. 154; Hong Kong, China's answer to Panel question No. 44(b), para. 152.

[95] *See* Hong Kong, China's answer to Panel question No. 62.

[96] *See* Hong Kong, China's answer to Panel question No. 44(a), para. 145.

[97] *See, e.g.*, Hong Kong, China's answer to Panel question No. 62, para. 248.

response, please cover all three of the authentic WTO languages, namely English, French and Spanish.

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"?

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"?

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."

99. The statement to which this question refers reflects the United States' position that Article XXI(b) contains a "single relative clause" beginning with "which it considers" and ending with each of the three subparagraphs. Hong Kong, China has explained at length why this position is incorrect as a matter of treaty interpretation, including in its response to Panel question No. 95. Among other problems with this interpretation, it fails to make sense of subparagraph (iii) – which, by its ordinary meaning, can only be understood to modify the term "action". Subparagraph (iii) forms a noun phrase with the term "action" ("action … taken in time of war or other emergency …") and this noun phrase *precedes* the language ("which it considers") that introduces the clause that the United States considers to be "self-judging". Subparagraph (iii) therefore does not form a part of the portion of Article XXI(b) that is committed to a Member's judgment. Contrary to what the United States asserts, this conclusion follows from the words used in Article XXI(b) and does not require "reading into the provision words that are not there."[98]

100. The United States' statement also disregards the equally authentic Spanish text, which does, in fact, interject a term ("relativas") which clearly relates each of the subparagraphs back to the term "action" ("medidas"), thereby refuting the United States' theory that Article XXI(b) contains a "single relative clause" beginning with "which it considers" and ending in each of the subparagraphs. The United States' statement to which this question refers simply pretends that the Spanish text does not exist or that it can be disregarded as erroneous, when in fact it stands on equal footing in relation to the English and French texts.

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

[98] United States' opening statement at the second meeting, para. 14.

comment on the relevance, if any, of this further modification, to the interpretation of Article XXI(b).

101. The final text of Article 99 of the Havana Charter is fully consistent with, and helps to confirm, the interpretation of Article XXI(b) of the GATT 1994 that results from the proper application of accepted principles of treaty interpretation. Under Article 99 of the Havana Charter, as with Article XXI(b) of the GATT 1994, each of the subparagraphs relates to the term "action" ("mesures", "medidas") and does not form part of the clause that is committed to the invoking Member's judgment (namely, the necessity of that action for the protection of its essential security interests). As Hong Kong, China detailed in Part VI of its second written submission and in response to the Panel's questions following the first substantive meeting, this conclusion follows from the application of Article 31 of the Vienna Convention and is confirmed by supplementary means of interpretation under Article 32 of the Vienna Convention. While Hong Kong, China considers that it would be appropriate for the Panel to note that this conclusion is *also* supported by what subsequently became Article 99 of the Havana Charter (in essence, a circumstance surrounding the conclusion of the GATT 1947 given the parallel manner in which the two documents were negotiated and drafted), Hong Kong, China does not consider that reference to Article 99 of the Havana Charter is necessary to reach this interpretative conclusion.

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)?

102. As Hong Kong, China has previously explained, the "views" expressed by certain GATT Contracting Parties prior to the entry into force of the WTO Agreement do not provide evidence of a "subsequent agreement" or "subsequent practice" within the meaning of Articles 31(3)(a) and (b) of the Vienna Convention.[99] The United States does not contend otherwise. These statements are therefore irrelevant to the interpretation of Article XXI(b) of the GATT 1994.

103. As for the internal documents of the U.S. delegation during the negotiation of the GATT 1947 and the Havana Charter, Hong Kong, China addressed this subject at length in response to Panel question No. 59. As Hong Kong, China explained there, these documents form part of the "historical background against which the treaty was negotiated" and, as such, may be taken into account as supplementary means of interpretation under Article 32 of the Vienna Convention. While Hong Kong, China does not consider that it is necessary for the Panel to have recourse to supplementary means of interpretation to determine or confirm the proper interpretation of Article XXI(b), the internal documents of the U.S. delegation nevertheless serve to confirm that the subparagraphs of what became Article XXI(b) of the GATT 1994 do not fall within the portion of Article XXI(b) that is committed to the invoking Member's own judgment.

[99] *See* Hong Kong, China's second written submission, para. 175; Hong Kong, China's answer to Panel question No. 60.

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)").

104. In respect of the definition of "war" identified by the panel in *Russia – Traffic in Transit*, as there is no suggestion that the measures at issue in this dispute relate to any sort of "war" or indeed any armed conflict, Hong Kong, China does not believe that the Panel needs to address this interpretative issue in detail to resolve the present dispute.

105. As a general statement bearing upon this question and all other questions below relating to the interpretation of Article XXI(b)(iii) of the GATT 1994, Hong Kong, China recalls that the United States bears the burden of demonstrating the objective applicability of one or more of the subparagraphs of Article XXI(b) as the Member purporting to invoke this exception. The United States has made no effort to discharge that burden of proof. It is well established that, under Article 11 of the DSU, a panel "may not use its interrogative powers" to make the case for a party, including "to make good the absence of argumentation on a party's behalf."[100] Because the United States has presented *no* evidence or legal argument in support of the purported applicability of Article XXI(b)(iii) to the GATT-inconsistent actions for which it seeks justification, Hong Kong, China does not consider that it would be consistent with Article 11 of the DSU for the Panel to explore arguments that the United States *might* have chosen to present had it sought to discharge its burden of proof. Hong Kong, China answers this and the following questions concerning the interpretation of Article XXI(b)(iii) subject to that caveat.

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").

106. Hong Kong, China agrees with the definition of "emergency in international relations" identified by the panel in *Russia – Traffic in Transit.* As that panel correctly found, an "emergency in international relations" must be interpreted "as eliciting the same types of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b)," each of which concerns "defence and military interests, or maintenance of law and public order interests."[101]

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

[100] Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.176.

[101] Panel Report, *Russia – Traffic in Transit*, paras. 7.74-7.75.

107. Hong Kong, China considers that whether a situation could constitute an "emergency in international relations" under Article XXI(b) inevitably depends on the facts and circumstances of individual cases. Commenting on the hypothetical situations described by the European Union and Canada in a vacuum may not be particularly helpful in resolving the present dispute in which the United States has not even itself argued the objective applicability of any of the subparagraphs of Article XXI(b).

108. In all events, however, the situation alleged to constitute an "emergency in international relations" must implicate defence or military interests, or maintenance of law and public order interests, *within* the territory of the invoking Member. As the panel in *Russia – Traffic in Transit* correctly found, an "emergency in international relations" refers "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*."[102] Events occurring in other countries that do not directly implicate defence or military interests, or maintenance of law and public order interests, within the territory of the invoking Member do not constitute an "emergency in international relations".

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)?

109. The panel in *Russia – Traffic in Transit* found that the term "international relations" refers generally to "world politics" or "global political interaction, primarily among sovereign states."[103] As that panel found, and as discussed further in response to the following questions, the phrase "or other emergency in international relations", when properly interpreted in its context, refers to a situation in international relations that implicates defence or military interests, or maintenance of law and public order interests.[104]

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).

110. The French and Spanish texts of Article XXI(b) of the GATT 1994 confirm that the phrase "or other emergency in international relations" refers not merely to any situation in international affairs, but 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."[105] To take the French as an example, the word "tension" refers to une "situation tendue entre deux groupes, deux personnes, *deux États*", as in "tension diplomatique".[106] The word "grave"

[102] Panel Report, *Russia – Traffic in Transit*, para. 7.76 (emphasis added).

[103] Panel Report, *Russia – Traffic in Transit*, para. 7.73.

[104] Panel Report, *Russia – Traffic in Transit*, paras. 7.74-7.75.

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

[106] Larousse Dictionary, "Tension" [redacted] (emphasis added).

means "qui est d'une grande importance en soi; sérieux"; "qui peut avoir des consequences fâcheuses, qui peut entraîner des suites dangereuses"; "qui est critique, dramatique".[107] Taken together, une "grave tension internationale" encompasses situations short of armed conflict only insofar as those situations are situations of "heightened tension or crisis" or situations "of general instability engulfing or surrounding a state", i.e. situations of the utmost gravity and seriousness that have the potential to lead to international conflict ("qui peut entraîner des suites dangereuses"), and not merely any state of political or economic disagreement between Members or states.

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".

111. Hong Kong, China agrees with this statement by the European Union. As the European Union notes, and as discussed in response to the preceding question, the need to assess the gravity of the situation in international relations alleged to constitute an "*emergency* in international relations" is supported, *inter alia*, by the French and Spanish texts of Article XXI(b) of the GATT 1994 ("grave tension internationale"; "grave tensión internacional").

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"?

112. As a preliminary matter, Hong Kong, China believes for the reasons that it has previously explained that the existence of an "other emergency in international relations" is an objective matter for a panel to determine.[108] A Member invoking Article XXI(b)(iii) should certainly make its own assessment of whether the gravity of a situation is such that it would constitute an "other emergency in international relations", but ultimately the existence or non-existence of such a situation is for a panel to determine.

113. With that said, a Member considering whether to invoke Article XXI(b)(iii) should take into account whether a situation in international relations is one that implicates defence or military interests, or maintenance of law and public order interests, of that Member.[109]

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.

114. Yes. As the panel in *Russia – Traffic in Transit* correctly found, purely political or economic conflicts between Members or states may be considered urgent or serious in a

[107] Larousse Dictionary, "Grave" [redacted].

[108] *See* Panel Report, *Russia – Traffic in Transit*, para. 7.77.

[109] *See* Hong Kong, China's response to Panel question No. 104 above.

political or diplomatic sense, but they do not constitute an "emergency in international relations" within the meaning of Article XXI(b)(iii) unless they give rise to defence or military interests, or maintenance of law and public order interests.[110]

115. Hong Kong, China does not consider it useful to evaluate whether certain hypothetical situations may or may not constitute an "emergency in international relations" within the meaning of Article XXI(b)(iii). It suffices for the Panel to resolve the present dispute to note that the United States has failed to demonstrate that its alleged concerns about freedom and democracy in Hong Kong, China constitute such a situation. That is, the United States has failed to demonstrate that these alleged concerns implicate any defence or military interests, or maintenance of law and public order interests, of the United States.

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?

116. This document has no relevance to the Panel's assessment of the existence of an emergency in international relations, as nothing in this document provides evidence that the situation in Hong Kong, China implicates any defence or military interests, or maintenance of law and public order interests, of the United States.

117. As Hong Kong, China noted in its response to this question during the second substantive meeting, 13 of the 21 signatories to the statement contained in Exhibit US-210 are Member States of the European Union. The European Union has taken the position as a third party in this dispute that political conflicts or disagreements between Members or states do not constitute an "emergency in international relations" unless those situations "give rise to defence and military interests, or maintenance of law and public order interests" and "reach a sufficiently high threshold of a tension or crisis" to qualify as an "emergency in international relations".[111] The statement contained in Exhibit US-210 does not support the existence of such a situation.

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"?

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"

[110] Panel Report, *Russia – Traffic in Transit*, para. 7.75.

[111] European Union's answer to Panel question No. 53, para. 166.

may inform an interpretation of the concept of "emergency in international relations" in Article XXI(b)(iii).

118. Hong Kong, China understands the quoted finding by the panel in *Russia – Traffic in Transit* to relate generally to the fact that each of the subparagraphs of Article XXI(b) implicates defence or military interests, or maintenance of law and public order interests. The panel properly interpreted the phrase "other emergency in international relations" in this context to conclude that this phrase "must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b)".[112] Hong Kong, China agrees with this interpretative finding by the panel in that dispute.

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."

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

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)".

120. Hong Kong, China agrees with the European Union and Canada that Article XXI(b)(iii) requires a sufficient nexus between the GATT-inconsistent action for which justification is sought and the circumstances shown to constitute an "emergency in international relations". The said nexus requirement extends both to the *temporal* connection, as highlighted by the European Union, and to the *subject matter* connection between the

[112] Panel Report, *Russia – Traffic in Transit*, para. 7.74.

GATT-inconsistent action and the demonstrated "emergency in international relations", to which Canada refers. In respect of the latter requirement, it would not make sense if, for example, a Member could invoke Article XXI(b)(iii) to justify a GATT-inconsistent action that does nothing to protect the invoking Member from the defence and military concerns, or maintenance of law and public order concerns, implicated by the "emergency in international relations" shown to exist.

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.

121. While not necessary for this purpose, Hong Kong, China considers that the referenced statement by the U.S. delegate serves to confirm the interpretation of the phrase "other emergency in international relations" that follows from the application of Article 31 of the Vienna Convention. As the explanation provided by the U.S. delegate makes clear, an "emergency in international relations" is one that implicates the defence or military interests (as in that case), or maintenance of law and public order interests, *of the invoking Member*. Moreover, as discussed in response to Panel question No. 114 above, that situation, whatever it might be, must have both a temporal and subject matter connection to the GATT-inconsistent action for which justification is sought. Those conditions would have been satisfied, in the case of the United States, in the years immediately preceding its involvement in World War II. The United States has failed to demonstrate that those conditions are satisfied under the circumstances of the present case.

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?

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?

122. In *Russia – Traffic in Transit,* the panel's interpretation of the phrase "other emergency in international relations" was based on a straightforward consideration of the context in which this phrase appears.

123. Working from the outside in, Article XXI of the GATT 1994 is entitled "*Security* Exceptions". The treaty interpreter is therefore on notice that the subject matter of Article XXI as a whole relates to *security* matters, not just any sort of political or economic matters. Article XXI(b) concerns enumerated types of "actions" that a Member may consider "necessary for the protection of its *essential* security interests", underscoring the gravity of the "security" interests that Article XXI(b) concerns.[113] The first two subparagraphs of Article XXI(b) (the first two types of "actions") both concern defence or military interests. The third and final subparagraph refers to actions "taken in time of war *or other emergency in international relations*". The conjoining of "war" and "other emergency in international relations", together with the context provided by the other two subparagraphs, support the conclusion that the phrase "other emergency in international relations" refers to the same types of defence or military interests, or maintenance of law and public order interests, implicated by the subject matter of Article XXI(b) as a whole.

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).

124. As the panel in *Russia – Traffic in Transit* correctly ruled, the obligation to interpret and perform a treaty in good faith is a general principle of international law, codified in Articles 26 and 31 of the Vienna Convention.[114] Article 26 provides, in particular, that "[e]very treaty in force is binding upon the parties to it and must be performed by them *in good faith*" (emphasis added). Thus, even in respect of the portion of Article XXI(b) that is committed to the invoking Member's judgment, namely the *necessity* of the action for the protection of the Member's essential security interests, that determination by the invoking Member must still be made in good faith.

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

[113] *See, e.g.*, Panel Report, *Russia – Traffic in Transit*, para. 7.130 ("'Essential security interests', which is evidently a narrower concept than 'security interests', may generally be understood to refer to 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.").

[114] Panel Report, *Russia – Traffic in Transit*, para. 7.132.

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

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).

125. Hong Kong, China agrees with these interpretive findings by the panel in *Russia – Traffic in Transit.* The obligation upon the responding Member to articulate its essential security interests "sufficiently enough to demonstrate their veracity", and then to demonstrate that the action for which justification is sought meets a "minimum requirement of plausibility" in relation to those proffered essential security interests, is necessary for the reviewing panel to determine whether the responding Member has invoked Article XXI(b) in good faith, as required by Article 26 of the Vienna Convention. In the absence of these showings by the responding Member, a panel would have no basis to determine whether the exception has been invoked in good faith.

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.

126. Hong Kong, China agrees with this interpretative finding by the panel in *Russia – Traffic in Transit.* It is evident that the further removed a particular situation is from one of armed conflict, or a breakdown of law and public order, the less likely it is that such a situation will implicate the essential security interests of the invoking Member, i.e. "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."[115] A Member invoking Article XXI(b)(iii) in such a situation must therefore articulate its "essential security interests" with greater specificity so that a panel may properly evaluate whether the invoking Member has invoked Article XXI(b)(iii) in good faith.

127. As this statement pertains to the present dispute, Hong Kong, China recalls its prior observation that the United States has presented *no* evidence and legal argument in support of the objective applicability of Article XXI(b)(iii) to the GATT-inconsistent actions for which it seeks justification. Nor, for that matter, has the United States articulated any "essential security interests" as this term is properly understood. As Hong Kong, China observed in its

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

closing statement at the second substantive meeting, not every foreign policy or political concern, no matter how sincerely held, necessarily implicates a Member's "essential security interests". Even if one were to take at face value the United States' asserted interest in promoting "fundamental freedoms, human rights, and democratic norms" around the world, the United States has failed to demonstrate how the alleged situation with regard to "fundamental freedoms, human rights, and democratic norms" in other parts of the world relates to the protection of the United States' territory and its population from external threats, or the maintenance of law and public order internally.[116]

128. The United States has, in short, failed to articulate its alleged "essential security interests" in this matter with *any* specificity, let alone the degree of specificity required in the circumstance in which the situation alleged to constitute an "emergency in international relations" has no demonstrated or even plausible connection to armed conflict or a breakdown of law and public order. While Hong Kong, China considers that the Panel could end its analysis under Article XXI(b) by finding that the United States has failed to demonstrate the objective applicability of any of its subparagraphs, the Panel would need to find that the United States has failed to demonstrate that it has invoked Article XXI(b) in good faith if the Panel were to proceed to a consideration of the chapeau.

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).

129. Hong Kong, China agrees with this statement by the European Union. The requirement that the GATT-inconsistent action for which the responding Member seeks justification implicate that Member's "*essential security* interests" follows from the ordinary meaning of Article XXI(b).

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?

130. No. As the panel in *Russia – Traffic in Transit* correctly held, the fact that a Member has some element of discretion to determine the *necessity* of a GATT-inconsistent action for the protection of its essential security interests "does not mean that a Member is free to elevate any concern to that of an 'essential security interest'".[117]

131. Part III of the Vienna Convention is entitled "Observance, Application and Interpretation of Treaties". Within that Part, Article 26 provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them *in good faith*", while Article 31 provides that "[a] treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". These requirements mean that a party to a treaty must *itself* interpret and apply the treaty in good faith, as required in its observance and application of that treaty,

[116] Hong Kong, China's closing statement at the second meeting, para. 15.

[117] Panel Report, *Russia – Traffic in Transit*, para. 7.132.

and also that a reviewing panel may assess whether a party to a treaty has performed its obligations in good faith. In the particular context of the covered agreements, the latter conclusion is confirmed by Article 3.2 of the DSU, which provides that the function of dispute settlement panels is to "clarify the existing provisions of those agreements *in accordance with customary rules of interpretation of public international law*", which such customary rules include the obligation to interpret and apply a treaty in good faith.

132. For these reasons, a panel may clarify the meaning of the term "essential security interests" in accordance with Article 3.2 of the DSU as part of its assessment of whether the Member invoking Article XXI(b) of the GATT 1994 has invoked that provision in good faith. As the panel in *Russia – Traffic in Transit* found, the obligation of good faith encompasses the invoking Member's articulation of its "essential security interests" sufficiently enough to demonstrate their veracity, as well as its demonstration that the action for which justification is sought meets "a minimum requirement of plausibility in relation to the proffered essential security interests".[118] A reviewing panel must determine the meaning of the term "essential security interests" to ensure that these requirements are satisfied.

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.

133. Hong Kong, China considers that the phrase "which it considers" qualifies the entirety of the phrase "necessary for the protection of its essential security interests". A Member's assessment of the "necessity" of an action is not made in the abstract, but rather relates to the "necessity" of an action *for the protection of its essential security interests.* This does not mean, however, that the phrase "essential security interests" is devoid of meaning or that it rests entirely within the judgment of the invoking Member. As discussed in response to the preceding question, a Member must articulate its "essential security interests" with sufficient particularity to allow a reviewing panel to evaluate whether the Member has invoked Article XXI(b) in good faith. For this purpose, a reviewing panel must (i) interpret the meaning of the phrase "essential security interests" (as discussed in response to the preceding question); and (ii) evaluate whether the invoking Member has sufficiently articulated its "essential security interests", properly interpreted, to permit the panel to conclude that the invoking Member has acted in good faith in reaching the conclusion that the GATT-inconsistent action for which justification is sought is one that is "necessary for the protection 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

[118] Panel Report, *Russia – Traffic in Transit*, paras. 7.134-7.138.

United States' invocation of Article XXI(b)(iii) with respect to the revised origin marking requirement?

134. It is well established that the aspect or aspects of a measure to be justified under an exception are those that give rise to the finding of inconsistency under the GATT 1994, even if they form part of a broader measure.[119]

135. In this case, the measures at issue, and the measures that Hong Kong, China has shown to be inconsistent with Articles I and IX of the GATT 1994, are the determination by the United States that goods indisputably manufactured or processed within the customs territory of Hong Kong, China originate within the People's Republic of China, a different WTO Member, and the requirement by the United States that these goods be marked to indicate this origin (which we have referred to collectively as the "revised origin marking requirement"). It is immaterial that these measures were adopted in conjunction with other measures mandated by Executive Order 13936. As the United States itself has noted, other changes to the treatment of Hong Kong, China goods resulting from the Executive Order "are not at issue in this dispute".[120] Therefore, no question of justification arises in respect of these other measures.

136. The approach of the panel in *Saudi Arabia – IPRs* is instructive. In that dispute, the panel found that there existed an emergency in international relations between Qatar, the complaining Member, and Saudi Arabia, the responding Member. Before the panel, Saudi Arabia articulated its essential security interests as seeking to protect itself "from the dangers of terrorism and extremism", and that "[o]ne of the means through which Saudi Arabia seeks to protect these essential security interests is by ending any direct or indirect interaction between Saudi Arabia and Qatar, extending to their respective populations and institutions".[121]

137. The panel proceeded to examine under Article 73 of the TRIPS Agreement (the counterpart to Article XXI(b) of the GATT 1994) the two aspects of Saudi Arabia's measures that the panel had previously found to violate the TRIPS Agreement: the measures that had the result of preventing beIN, a Qatari broadcaster, from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement proceedings (the so-called "anti-sympathy measures"), and the measures that resulted in the non-application of criminal procedures and penalties to beoutQ, an entity engaged in the pirating of beIN's broadcasts. Even though both sets of measures had been adopted as part of what Saudi Arabia characterized as a "comprehensive" set of measures to sever all relations with Qatar, the panel correctly focused its assessment under Article 73 on the specific aspects of those measures that Qatar had challenged and that the panel had found to be inconsistent with the TRIPS Agreement.[122]

[119] *See, e.g.*, Appellate Body Report, *EC – Seal Products*, para. 5.185; Appellate Body Report, *US – Gasoline*, pp. 13-14. The European Union has agreed with these findings in the context of this dispute. *See* European Union's answer to Panel question No. 59, para. 175.

[120] United States' answer to Panel question No. 3, para. 13.

[121] Panel Report, *Saudi Arabia – IPRs*, paras. 7.280, 7.284.

[122] This approach was supported by, *inter alia*, Canada, the European Union, and Japan. *See* Panel Report, *Saudi Arabia – IPRs*, para. 7.240.

138. The panel found that the anti-sympathy measures had the required nexus to Saudi Arabia's articulated essential security interests, but found that the non-application of criminal procedures and penalties to beoutQ did not have the required nexus to those articulated essential security interests. The panel found, in particular, that the non-application of criminal procedures and penalties to beoutQ "does not have any relationship to Saudi Arabia's policy of ending or preventing any form of interaction with Qatari nationals" and therefore that this TRIPS-inconsistent action was not justifiable under Article 73.[123]

139. Note how the analysis under Article 73 proceeded in *Saudi Arabia – IPRs:* Saudi Arabia *articulated its essential security interests* (protecting its population from the dangers of terrorism and extremism), described a *means* of protecting those essential security interests (ending all interaction between Saudi and Qatari nationals), and the panel then proceeded to examine *each* of the TRIPS-inconsistent measures *individually* to determine whether it had a plausible nexus to the articulated essential security interests. That was the correct analytical approach to the application of an exception provision.

140. In the present dispute, only one set of measures adopted pursuant to the Executive Order is at issue: the set of measures that give rise to the revised origin marking requirement. It is the revised origin marking requirement that is inconsistent with, among others, Articles I and IX of the GATT 1994, and that the United States seeks to justify under Article XXI(b). The United States must therefore articulate its essential security interests in sufficient detail for the Panel to assess their veracity, and the United States must then demonstrate *how and why* the discriminatory application of the United States' country of origin marking requirement to goods of Hong Kong, China origin furthers those essential security interests. It is irrelevant in this context that the revised origin marking requirement was adopted in conjunction with other actions taken pursuant to the Executive Order.[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?

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.

[123] Panel Report, *Saudi Arabia – IPRs*, para. 7.293.

[124] In paragraph 42 of its opening statement at the second meeting, the United States acknowledged that the "action" for which it seeks justification under Article XXI(b) is the revised origin marking requirement, not some broader set of measures. Thus, the United States itself recognizes that it is the revised origin marking requirement alone that is the subject of the analysis under Article XXI(b).