United States – Origin Marking Requirement (WT/DS597)

Opening Statement of Hong Kong, China

at the First Substantive Meeting with the Parties

31 August 2021

Introduction

1. Madame Chair, distinguished members of the Panel, Hong Kong, China welcomes this opportunity to present its views at the outset of this first substantive meeting. Hong Kong, China thanks the Panel and the Secretariat staff for their efforts in preparing for this first substantive meeting with the parties. While it is always preferable to conduct substantive meetings in person, Hong Kong, China appreciates the Panel's decision to conduct this first substantive meeting on a virtual basis due to the ongoing situation with the Covid-19 pandemic.

2. While Hong Kong, China is an inalienable part of the People's Republic of China, it is a separate customs territory Member of the WTO pursuant to Article XI of the WTO Agreement. Indeed, Hong Kong became a Contracting Party to the GATT 1947, the predecessor of the

WTO, in its own right in 1986 and thereby participated in the Uruguay Round of multilateral trade negotiations launched in the same year. Since the successful conclusion of the Marrakesh Agreement Establishing the World Trade Organization in 1994, Hong Kong has been a founding Member and a staunch supporter of the rules-based multilateral trading system established by the WTO.

3. The measures at issue in this dispute involve a determination by the United States that goods manufactured or processed within the customs territory of Hong Kong, China originate within the customs territory of the People's Republic of China, a different WTO Member. The measures at issue further require that goods of Hong Kong, China origin be marked to indicate this incorrect country of origin determination. Hong Kong, China has referred to this determination and requirement as the "revised origin marking requirement".[1]

4. The revised origin marking requirement is imposed based on political accusations unrelated to a proper determination of the country of origin of goods under the relevant WTO covered agreements. Hong Kong, China strongly opposes those accusations but considers that it

[1] Hong Kong, China's first written submission, paras. 15-22.

is not necessary for the Panel to go into them in the disposal of the present dispute.

5. In the present dispute, the United States has not put up any arguments to dispute that the revised origin marking requirement is inconsistent with the relevant WTO covered agreements (including the GATT 1994, the Agreement on Rules of Origin (the "ARO") and the Agreement on Technical Barriers to Trade (the "TBT Agreement")).

6. The only defence that the United States has put up is what we would call a "double maximalist" position, that is – Article XXI of the GATT 1994 is applicable to all of the multilateral agreements on trade in goods under the WTO Agreement (including the ARO and the TBT Agreement) ("Annex 1A agreements") and is self-judging in its entirety. As Hong Kong, China will further explain in this opening statement, this "double maximalist" defence is erroneous from a treaty interpretation perspective and is one that is doomed to fail.

7. In respect of the first "maximalist" position, an examination of the provisions of the covered agreements concerned, their textual linkages as well as prior panel and Appellate Body reports[2] would reveal that the

[2] See Appellate Body Report, *China – Rare Earths*, para. 5.58 (citing Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226); Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.748; Panel Report, *Russia – Traffic in Transit*, para. 7.235.

United States' contention that Article XXI of the GATT 1994 is applicable to all of the Annex 1A agreements including the ARO and the TBT Agreement is clearly untenable as a matter of treaty interpretation.

8. The second "maximalist" position put up by the United States, that Article XXI of the GATT 1994 is self-judging in its entirety, is one that has already been considered and rejected by the panels in *Russia – Traffic in Transit*[3] and *Saudi Arabia – IPRs*.[4] That said, given that the United States has not contested the inconsistencies of its measures with, in particular, the ARO and the TBT Agreement, and has failed to establish that Article XXI of the GATT 1994 is applicable to the two said agreements, Hong Kong, China submits that the Panel should exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994 and need not go into the interpretation of Article XXI.

Uncontested Violations of the WTO Covered Agreements

9. I will now first address the United States' uncontested violations of the WTO covered agreements concerned. In its first written submission, Hong Kong, China demonstrated that the revised origin marking requirement is inconsistent with the provisions of the covered agreements

[3] See Panel Report, *Russia – Traffic in Transit*, para. 7.101.

[4] See Panel Report, *Saudi Arabia – IPRs*, paras. 7.230 and 7.231.

identified by Hong Kong, China in its Panel Request. The United States has not contested these violations in its own first written submission. Hong Kong, China therefore considers that it has established a *prima facie* case of inconsistency. The Panel, of course, must satisfy itself that the measures at issue are inconsistent with the identified provisions of the covered agreements, and Hong Kong, China looks forward to answering any questions that the Panel may have in this regard. For the purposes of this opening statement, however, Hong Kong, China shall proceed on the basis that the uncontested violations of the covered agreements are established.

Unjustified ''Double Maximalist'' Defence / Judicial Economy

10. As mentioned earlier, the "double maximalist" defence of the United States is doomed to fail. The United States' defence of the challenged measures rests upon its assertion that the inconsistencies of the measures with the covered agreements can be justified under Article XXI of the GATT 1994. It claims that this exception is "self-judging" in its entirety, such that the United States needs only invoke Article XXI to bring this dispute to an end.[5] Hong Kong, China rejects this interpretation of

[5] United States' first written submission, paras. 26; 321-327.

Article XXI, together with every third party[6] that has commented upon the issue. Indeed, this interpretation of Article XXI has been rejected by two prior panels.[7]

11. In Hong Kong, China's view, however, the Panel can exercise judicial economy and need not interpret and apply Article XXI in the context of this dispute, as the United States' reliance upon Article XXI is based on an equally unfounded and erroneous position: that Article XXI of the GATT 1994 applies to *all* of the Annex 1A agreements.[8] Once the contention of the United States that Article XXI applies to the ARO and the TBT Agreement is rejected, the Panel could achieve a satisfactory resolution of this matter by finding that the United States has presented no valid defence to the uncontested violations of these two agreements. Such a finding would obviate the need for the Panel to interpret and apply Article XXI of the GATT 1994.

[6] See Brazil's third party submission, paras. 4; 11-20; Canada's third party submission, paras. 24-28; China's third party submission, paras. 14-16; European Union's third party submission, paras. 23-29; Switzerland's third party submission, paras. 6-48; Ukraine's third party submission, paras. 6-12.

[7] See Panel Report, *Russia – Traffic in Transit*, para. 7.101; Panel Report, *Saudi Arabia – IPRs*, paras. 7.230 and 7.231.

[8] See United States' first written submission, paras. 268-279; 297.

A. GATT Article XXI does not apply to the ARO and the TBT Agreement

12. For this reason, we now turn to the key question of whether Article XXI of the GATT 1994 applies to the ARO and the TBT Agreement. In Hong Kong, China's view, the answer to this question is obvious: it does not. The United States' position that Article XXI applies to all of the Annex 1A agreements flies in the face of the texts of the agreements themselves, as well as established interpretive principles for evaluating how the provisions of one covered agreement relate to the provisions of a different covered agreement. The United States' position, if accepted, would dramatically disrupt the balance of rights and obligations that the Members have negotiated within each of the Annex 1A agreements. It is not surprising that the United States' position on the applicability of Article XXI to other Annex 1A agreements found no support from any of the third parties which have commented on the issue.[9] The United States' position, and hence its defence, is completely untenable.

13. The United States suggests two arguments to support its contention that Article XXI of the GATT 1994 applies to the ARO and the TBT Agreement. First, the United States contends that Article XXI applies to

[9] See Brazil's third party submission, paras. 21-26; European Union's third party submission, paras. 24 and 47; Switzerland's third party submission, paras. 56-66.

all of the Annex 1A agreements merely by virtue of the fact that all of the Annex 1A agreements relate in some way to trade in goods.[10] This is a "maximalist" position. Perhaps knowing that such a maximalist position has no interpretive basis, the United States purports to rely upon the interpretive principles adopted by prior panel and Appellate Body reports in determining whether a GATT exception applies to a different covered agreement to support its erroneous position.[11] In this regard, Hong Kong, China submits that this attempt of the United States would fail. This is because the types of general textual linkages that the United States identifies as the basis for its maximalist position are no different than the types of textual linkages that prior panel and Appellate Body reports have found insufficient to establish the applicability of a GATT exception to a different covered agreement.

Examination of the text of the covered agreements

14. Our analysis of these issues begins, as it must, with the text of the agreement itself. Article XXI of the GATT 1994 states that "Nothing in this Agreement shall be construed" and then proceeds to enumerate three exceptions, including the exception set forth in Article XXI(b). As other

[10] See United States' first written submission, paras. 268-279; 297.

[11] See United States' first written submission, fns 301 and 317, citing Appellate Body Report, *China – Rare Earths*, para. 5.74.

panels have found in respect of the identical language in Article XX of the GATT 1994, the reference to "this Agreement" in Article XXI is a reference to the GATT 1994, not to any other agreement.[12] This conclusion is reinforced by the fact that Annex 1A to the WTO Agreement refers to the Multilateral *Agreements* on Trade in Goods. The GATT 1994 is one such "agreement" and does not encompass, as a class, the *other* Multilateral Agreements on Trade in Goods. Thus, *a priori*, Article XXI is available as an exception only in respect of claims arising under the GATT 1994.

15. Under its maximalist position, the United States contends that Article XXI applies to *all* of the Annex 1A agreements merely by virtue of the fact that Annex 1A agreements "are the product of negotiations in the Uruguay Round, undertaken with the purpose of elaborating upon the disciplines in the GATT 1994 and related matters involving trade in goods."[13] This contention is belied by the fact that some of the Annex 1A agreements expressly incorporate one or both of the GATT 1994 exceptions, while others do not. In particular:

[12] See e.g. Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.743; Panel Report, *China – Raw Materials*, para. 7.153; Panel Report, *China – Publications and Audiovisuals*, para. 7.743.

[13] United States' first written submission, para. 272.

- Article 3 of the *Agreement on Trade-Related Investment Measures* provides that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement";

- Article 1.10 of the *Agreement on Import Licensing Procedures* provides that "[w]ith regard to security exceptions, the provisions of Article XXI of GATT 1994 apply"; and

- Article 24.7 of the *Agreement on Trade Facilitation* provides that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement".

16. In contradistinction, the other Annex 1A agreements, including the ARO and the TBT Agreement, do not incorporate or refer to either or both of the GATT 1994 exception provisions.

17. This distinction among the Annex 1A agreements is fatal to the United States' contention that Article XXI applies to all of the Annex 1A agreements merely by virtue of the fact that these agreements all relate in some way to trade in goods. The drafters of the Annex 1A agreements made clear choices about when the GATT 1994 exceptions would apply to a particular agreement and when they would not. As a matter of treaty interpretation, those choices must be given effect. It cannot be the case, as the United States' argument necessarily implies, that the incorporation of

one or both exceptions into certain of the Annex 1A agreements was superfluous, a mere restatement of exceptions that would have applied in any event.[14] Rather, a proper application of the treaty interpretation principles should lead to the conclusion that an exception available under the GATT 1994 applies to another Annex 1A agreement when that exception is expressly incorporated into that other agreement, and does not apply when it is not so incorporated.

18. Article 24.7 of the Agreement on Trade Facilitation ("TFA") is particularly instructive. The TFA is the most recently concluded Annex 1A agreement. The text of the TFA was concluded at the 2013 Bali Ministerial Conference and the agreement entered into force in February 2017. If Article XXI of the GATT 1994 would have applied to the TFA merely by virtue of the fact that the TFA relates to trade in goods and is incorporated into Annex 1A to the WTO Agreement, one would ask rhetorically why did the drafters bother to include a provision that expressly incorporates the GATT exceptions? By the United States' logic, those exceptions would have applied anyway. The drafters of the TFA made an intentional choice that the GATT exceptions would apply, a

[14] See United States' first written submission, para. 272.

choice that the drafters of the ARO and the TBT Agreement did *not* make in their respective cases.

19. The United States' maximalist position also cannot be reconciled with numerous panel and Appellate Body reports,[15] all adopted by the DSB, concerning the applicability of Article XX of the GATT 1994 to other covered agreements. It is important to emphasize in this regard that nothing in the United States' maximalist position concerning the applicability of *Article XXI* to the other Annex 1A agreements would not also apply with equal force to the applicability of *Article XX* to the other Annex 1A agreements. The necessary implication of the United States' position is that Article XX would also apply to all of the Annex 1A agreements. Yet to the best of Hong Kong, China's knowledge, no Member has ever even *argued* that Article XX of the GATT 1994 applies to all of the Annex 1A agreements merely by virtue of the fact that those agreements all relate to trade in goods. More importantly, no panel or Appellate Body report has ever accepted that proposition. On the contrary,

[15] See Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.744 and fn 1598 (citing Panel Report, *China – Publications and Audiovisual Products*, paras. 7.742-7.745; Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 205-233; Panel Reports, *China – Raw Materials*, paras. 7.116-7.159; Appellate Body Reports, *China – Raw Materials*, paras. 270-307; Panel Reports, *China – Rare Earths*, paras. 7.53-7.115 and 7.1016-7.1033; Appellate Body Reports, *China – Rare Earths*, paras. 5.1-5.74; *US – Clove Cigarettes*, paras. 96 and 101; Panel Report, *US – Poultry (China)*, paras. 7.465-7.482).

as will be pointed out in a moment, panels and the Appellate Body[16] have recognized only a few exceptional circumstances in which a GATT exception applies to another WTO legal instrument, and have *never* found that a GATT exception applies to another Annex 1A agreement in the absence of express incorporation.

20. In sum, the United States' maximalist position on the applicability of Article XXI to the other Annex 1A agreements has no interpretive basis and is contrary to the texts of the agreements themselves. In fact, the United States makes no real effort to demonstrate that its position finds support in accepted principles of treaty interpretation. Instead, the essence of the United States' argument is that Article XXI of the GATT 1994 *must* apply to the other Annex 1A agreements because, in the United States' view, it would not make any sense for the security exception to apply to the "general agreement" on trade in goods but not to the more specific agreements on trade in goods.[17] What the United States' submission overlooks is the fact that each of the more specific agreements on trade in goods reflects a carefully negotiated balance of rights and obligations pertaining to the subject matter of each agreement. In some cases the

[16] See Appellate Body Report, *China – Rare Earths*, para. 5.58 (citing Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226); Panel Report, *Russia – Traffic in Transit*, para. 7.235.

[17] United States' first written submission, paras. 273-279.

Members chose to incorporate some or all of the GATT exceptions into that balance, and in other cases they did not. To conclude that the GATT exceptions apply to all of the Annex 1A agreements whether or not they incorporate those exceptions would upend the balance that the Members struck in the context of each agreement. The Panel must reject this proposition.

Prior panel and Appellate Body reports

21. Evidently aware that its maximalist position has no interpretive support, the United States tries its hand at applying the interpretive principles that prior panel and Appellate Body reports[18] have used to determine whether a GATT exception applies to a different covered agreement, and argues on this basis that Article XXI of the GATT 1994 applies to the ARO and the TBT Agreement. Once again, this argument is unsustainable.

22. The Appellate Body has stated that the relationship between provisions contained in two different agreements, including the applicability of a GATT exception to another 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

[18] See Appellate Body Report, *China – Rare Earths*, para. 5.74.

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".[19] Within this framework, the fact that a covered agreement refers to certain provisions of the GATT 1994, or otherwise elaborates upon certain provisions of the GATT 1994, is not a sufficient basis to conclude that the GATT exception provisions apply. As the panel in *Thailand – Cigarettes (Article 21.5 – Philippines)* observed, "each of the covered agreements in Annex 1A … to the WTO Agreement is in some way an elaboration [upon], or otherwise linked to, one or more specific provisions in the GATT 1994", and yet these sort of general linkages between the GATT 1994 and other Annex 1A agreements have never been considered sufficient to find that the GATT exceptions apply to those other agreements.[20]

23. The only circumstance in which a GATT exception has been found applicable to another WTO legal instrument in the absence of an explicit textual cross-reference is where the provision at issue in the other WTO legal instrument necessarily encompasses the availability of the GATT exception. There are only two such cases, both involving Protocols of Accession and not other Annex 1A agreements.

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

[20] Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.748.

24. In *China – Publications and Audiovisuals*, the Appellate Body concluded that the phrase "[w]ithout prejudice to China's right to regulate trade *in a manner consistent with the WTO Agreement*" appearing in Article 5.1 of China's Protocol of Accession encompasses not only China's affirmative rights under the covered agreements pertaining to the regulation of trade, but also its right to regulate trade pursuant to relevant exceptions, including Article XX of the GATT 1994.[21] In *Russia – Traffic in Transit*, the panel found that various provisions in Russia's Protocol of Accession that refer to Russia's right to act "*in conformity with*" relevant provisions of the WTO Agreement, or language to similar effect, encompassed Russia's right to act in conformity with the exceptions to the GATT 1994, including, in that case, Article XXI.[22] In both cases, the relevant language in the Protocol of Accession necessarily encompassed the GATT exception in question, thus establishing a specific textual linkage to the *exception* and not merely a general textual linkage between the two *agreements*.

25. In its first written submission, the United States goes on at length identifying various ways in which the ARO and the TBT Agreement refer

[21] Appellate Body Report, *China – Rare Earths*, para. 5.58 (citing Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226).

[22] Panel Report, *Russia – Traffic in Transit*, para. 7.235.

to the GATT 1994 or otherwise build upon or relate to rights and obligations contained in the GATT 1994.[23] In respect of these contentions, it would suffice for the purposes of this statement to observe that all of the linkages identified by the United States do nothing more than establish a general relationship between the GATT 1994, on the one hand, and the ARO and the TBT Agreement, on the other. None of these linkages as identified by the United States would be sufficient to encompass the availability of Article XXI of the GATT 1994, or the GATT exceptions more generally under the two said agreements.

26. As mentioned, the only two cases in which a GATT exception has been found to apply to other WTO legal instruments were cases involving Protocols of Accession, not another Annex 1A agreement. No similar textual linkages as found in the two cases involving the Protocols of Accession are present in this case. Given that the drafters of the Uruguay Round agreements *knew* how to, and indeed did incorporate one or both of the GATT exceptions when they considered it appropriate, as I have already discussed above, it is difficult to envision the circumstance in which it would be appropriate to conclude as an interpretive matter that the drafters of an Annex 1A agreement incorporated one or both of the GATT exceptions merely by *implication*. As the maxim goes, the drafters of the

[23] See United States' first written submission, Parts III.C and III.D.

Uruguay Round agreements did not hide elephants in mouseholes. If they meant for a GATT exception to apply, they said so expressly. For this reason, Hong Kong, China submits that the United States' claim that a GATT exception applies to another Annex 1A agreement in the absence of an explicit incorporation of that exception should be approached with extreme caution, especially when the United States is only able to identify merely general linkages among the covered agreements concerned in its first written submission.

The discretion claimed by the United States does not exist

27. At this stage, Hong Kong, China will make two further observations about the arguments presented by the United States concerning the applicability of Article XXI of the GATT 1994 to the ARO and the TBT Agreement.

28. First, with regard to the ARO, the United States claims that the discretion accorded to a Member prior to the completion of the Harmonized Work Programme includes the discretion "to take action which it considers necessary to protect its essential security interests".[24] But as the United States' own quotation of the panel report in *United States – Textiles Rules of Origin* makes clear, the transitional rules contained in

[24] United States' first written submission, para. 291.

Article 2 of the ARO set out "what Members cannot do" during the transition period, and leave discretion to Members to "decide what, *within those bounds*, they can do".[25] One of the things that Members *cannot* do during the transition period is condition the conferral of a particular country of origin upon "the fulfilment of a certain condition not related to manufacturing or processing".[26] As Hong Kong, China explained in its first written submission, and as the United States does not contend otherwise, conditioning the conferral of origin of goods from Hong Kong, China upon conditions unrelated to the manufacturing or processing of such goods is *exactly* what the United States has done with the measures at issue in this dispute.[27] The United States does not have "discretion" to act inconsistently with this prohibition, either during the transition period or after.

29. It stands to reason that the prohibition on basing a country of origin determination on considerations unrelated to manufacturing or processing is a rule that applies during the transition period, as set forth in Article 2(c) of the ARO, and is also a requisite element of the Harmonized Work Programme, as set forth in Article 3(b) (as read together with Articles

[25] United States' first written submission, para. 290 (quoting Panel Report, *US – Textiles Rules of Origin*, para. 6.24 (emphasis added)).

[26] ARO, Article 2(c).

[27] See Hong Kong, China's first written submission, para. 40.

9(1)(b) and 9(1)(d)) of the same. One can say that the entire point of the ARO is to ensure that country of origin determinations are based on neutral, factual considerations that relate exclusively to where a good was made. As the preamble to the ARO states, the purpose of the agreement is to establish "clear and predictable rules of origin" that are "prepared and applied in an impartial, transparent, predictable, consistent and neutral manner".[28] If the drafters of the ARO had considered that policy considerations of the types enumerated in Articles XX and XXI of the GATT 1994 may permissibly enter into a country of origin determination, they would have provided for this expressly. The fact that such policy considerations have not been expressly provided for in the ARO shows that, contrary to what the United States claims in the present dispute, Members do not have "discretion" to base country of origin determinations on considerations other than those related to manufacturing or processing.

30. Hong Kong, China's second observation concerns the TBT Agreement. In its first written submission, the United States refers to the fact that the preamble to the TBT Agreement recognizes "that no country should be prevented from taking measures necessary for the protection of its essential security interest", and claims on this basis that "measures taken

[28] ARO, Preamble, Third and Seventh Recitals.

to protect a Member's essential security interests are not subject to additional requirements or scrutiny".[29] But in point of fact, the multiple references to national or essential security considerations contained within the TBT Agreement prove just the opposite.

31. Consider, for example, Article 2.2 of the TBT Agreement. Article 2.2 identifies "national security requirements" as among the "legitimate objectives" that a technical regulation may pursue, provided that the technical regulation is not "more trade-restrictive than necessary … taking account of the risks non-fulfilment would create". This is a clear example of a provision in the TBT Agreement that imposes "additional requirements or scrutiny" on measures that a Member takes on national security grounds. In another example, Article 10.8.3 of the TBT Agreement provides that "[n]othing in this Agreement shall be construed as requiring … Members to furnish any information, the disclosure of which they consider contrary to their essential security interests." This language is taken *directly* from Article XXI(a) of the GATT 1994, yet the TBT Agreement does *not* incorporate or repeat the general exception for essential security measures contained in Article XXI(b) of the GATT 1994. The drafters of the TBT Agreement, in other words, made a clear choice

[29] United States' first written submission, para. 300.

about which elements of Article XXI of the GATT 1994 to incorporate into the TBT Agreement, and this did not include Article XXI(b).

32. What these examples demonstrate is that the reference in the preamble to measures that a Member may take "for the protection of its essential security interest" foreshadows the provisions *in the TBT Agreement* that give effect to this concern, like the fact that Article 2.2 of the TBT Agreement recognizes national security requirements as among the legitimate objectives that a technical regulation may pursue. Contrary to what the United States alleges[30], the reference to essential security interests in the preamble is not meant to exempt such measures from "additional requirements or scrutiny". Rather, the preambular language reflects the fact that the TBT Agreement *itself* embodies the balance that the Members struck in regard to the interplay between technical regulations and national security considerations. This balance does not include a general exception along the lines of Article XXI(b) of the GATT 1994, and it would disrupt the balance that the Members struck to interpret the TBT Agreement otherwise.

33. In sum, there is no credible argument that Article XXI of the GATT 1994 applies to the ARO or the TBT Agreement. Neither the United States'

[30] United States' first written submission, paras. 299-302.

maximalist position nor its attempt to apply the interpretive framework developed in prior panel and Appellate Body reports suffices to demonstrate that an exception contained in one agreement is available in two other agreements, neither one of which incorporates that exception.

34. As Hong Kong, China explained at the beginning of this statement, the conclusion that Article XXI of the GATT 1994 does not apply to either the ARO or the TBT Agreement should bring this matter to a close. Hong Kong, China has demonstrated, and the United States has not disputed, that the measures at issue in this dispute are inconsistent with the ARO and the TBT Agreement. The only defence that the United States has presented in response to these claims is one that has no basis in customary principles of treaty interpretation.[31] The Panel should therefore find that the challenged measures are inconsistent with the ARO and the TBT Agreement and exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994. This resolution of the matter would achieve a satisfactory resolution to the dispute and obviate the need for the Panel to interpret and apply Article XXI of the GATT 1994, other than as necessary to conclude that it does not apply to the ARO or the TBT Agreement.

[31] See United States' first written submission, para. 11.

B. GATT Article XXI(b) is not ''self-judging'' in its entirety

35. If I may now turn briefly to Article XXI(b) and the argument that it is self-judging. If Hong Kong, China's submission on the issue of the applicability of Article XXI of the GATT 1994 to the ARO and the TBT Agreement is correct, there should not be a need for the Panel to interpret and apply Article XXI in the context of this dispute. Hong Kong, China will therefore not devote a significant amount of time in this statement to rebutting the United States' erroneous contention that Article XXI(b) of the GATT 1994 is "self-judging" in its entirety. As the Panel is aware, the United States' interpretation of Article XXI(b) is one that two prior panels have considered and rejected. In *Russia – Traffic in Transit*, the panel concluded that the subparagraphs of Article XXI(b), which define the subject matter applicability of the exception, are objectively reviewable by a panel in dispute settlement.[32] That panel further concluded that the obligation of good faith requires a Member invoking Article XXI(b) to demonstrate that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests.[33] In *Saudi Arabia – IPRs*, the parties to the dispute accepted this interpretation

[32] See Panel Report, *Russia – Traffic in Transit*, paras. 7.101-7.103.

[33] See Panel Report, *Russia – Traffic in Transit*, paras. 7.138 and 7.139.

of Article XXI(b) as correct and differed only as to its application to the facts of that dispute.[34]

36. As the Panel may also be aware, the arguments that the United States has set forth in its first written submission in support of its interpretation of Article XXI(b) are essentially identical to the arguments that the United States has already advanced in connection with the ongoing disputes concerning the United States' unlawful imposition of tariffs on imports of steel and aluminium. The United States' arguments concerning the interpretation of Article XXI(b) have been examined extensively in connection with those disputes. Given that there would not be a need for the Panel to interpret and apply Article XXI(b) in connection with the present dispute on the basis of judicial economy, Hong Kong, China does not believe that it should be necessary for the Panel and the parties to examine the United States' arguments at the same level of detail here.

37. At this stage, it would appear sufficient for the Panel to note that the fundamental problem with the United States' interpretation of Article XXI(b) remains what it has always been – the United States' failure to give meaning and effect to the subparagraphs of that provision. Like their counterparts in Article XX of the GATT 1994, the subparagraphs of

[34] See Panel Report, *Saudi Arabia – IPRs*, paras. 7.230 and 7.231.

Article XXI(b) define the specific circumstances in which the exception can be invoked. In other words, they serve to limit the subject matter applicability of Article XXI(b) to the three circumstances therein enumerated. The United States engages in syntactic contortions to try to place the subparagraphs within the portion of Article XXI(b) which is committed to the invoking Member's discretion, subject to the obligation of good faith. But if the applicability of the subparagraphs to a particular action for which justification is sought were committed to the invoking Member's discretion, then one may justifiably ask what purpose would those subparagraphs serve? If the United States could unilaterally declare that *anything* can be a "fissionable material" under Article XXI(b)(i), for example, then why does Article XXI(b) have the subparagraphs in the first place? The meaning and effect of Article XXI(b) would be exactly the same as if the subparagraphs did not exist, in contravention of the principle of effective treaty interpretation.

38. Properly interpreted, each of the subparagraphs of Article XXI(b) modifies the term "action" in the chapeau to this provision. The United States is forced to concede this point in the case of the third subparagraph, which, as a matter of English grammar, can *only* modify the term "action". The fact that each of the subparagraphs of Article XXI(b) modifies the term "action" is confirmed by the equally authentic Spanish text, which, due to

the gender agreement of the word "relativas" with the word "medidas", leaves no possible doubt that each of the subparagraphs of Article XXI(b) modifies the term "action" in the English text. It is therefore apparent that each of the subparagraphs of Article XXI(b) forms a noun phrase with the term "action" in the chapeau, serving to define the three exclusive types of "actions" for which justification may be sought under this exception. Whether or not an "action" for which justification is sought is one of these three types is a question that is objectively reviewable by a panel in dispute settlement.

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

40. In its first written submission, the United States has not identified which of the three subparagraphs of Article XXI(b) it considers applicable

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

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

Conclusion

42. Distinguished members of the Panel, to conclude, Hong Kong, China reiterates that the present dispute is one in which the measures of the United States are in clear violation of the relevant WTO covered agreements, in particular the ARO and the TBT Agreement, and such violations as detailed in Hong Kong, China's first written submission remain uncontested. For the reasons summarised in this opening statement, the United States has not, as it cannot, put forward any credible justifications for its measures. Perhaps out of desperation, the United States comes up with the untenable "double maximalist" position in arguing that Article XXI of the GATT 1994 applies to either the ARO or the TBT Agreement. Hong Kong, China believes that such frivolous contention should be firmly rejected by the Panel.

43. Hong Kong, China respectfully asks the Panel to resolve this dispute by finding that the challenged measures of the United States are inconsistent with the ARO and the TBT Agreement and have not been otherwise justified by the United States. Once the Panel finds that the United States' contention of the applicability of Article XXI of the GATT 1994 to the ARO and the TBT Agreement fails, the Panel does not need to go into the interpretation and application of Article XXI(b) of the GATT 1994 in the present dispute.

44. This resolution of the dispute would be in accordance with the objectives of the DSU, that is to, among others, provide security and predictability to the multilateral trading system. This is also a resolution that, in Hong Kong, China's view, the Panel could reach expeditiously within the timeframes contemplated by the DSU for the resolution of disputes between Members.

45. Hong Kong, China thanks the Panel for its attention to this opening statement and looks forward to answering any question that the Panel may have during the course of the first substantive meeting.