BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

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

Confidential

14 October 2021

TABLE OF SHORT FORMS

SHORT FORM	OFFICIAL NAME
ARO	Agreement on Rules of Origin
August 11 Federal Register notice	85 Fed. Reg. 48551 (11 August 2020)
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
Executive Order 13936	The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020)
GATT 1994	General Agreement on Tariffs and Trade 1994
HKTDC	Hong Kong Trade Development Council
ILC	International Law Commission
MFN	Most-Favoured-Nation
NVNI	Non-Violation Nullification or Impairment
TBT Agreement	Agreement on Technical Barriers to Trade
TFA	Agreement on Trade Facilitation
TRIMs Agreement	Agreement on Trade-Related Investment Measures
USITC	U.S. International Trade Commission
USCBP	U.S. Customs and Border Protection
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
1949 Decision	1949 GATT Council Decision in *United States – Export Measures*
1982 Decision	1982 Decision adopted by the GATT CONTRACTING PARTIES

TABLE OF REPORTS

SHORT TITLE	FULL REPORT TITLE AND CITATION
Australia – Tobacco Plain Packaging (Dominican Republic)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS441/R, Add.1 and Suppl.1, adopted 29 June 2020, as upheld by Appellate Body Report WT/DS441/AB/R, DSR 2018:VIII, p. 3925
Brazil – Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Publications and Audiovisuals	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Publications and Audiovisuals	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
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
Colombia – Textiles	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add.1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R, DSR 2016:III, p. 1227
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591

SHORT TITLE	FULL REPORT TITLE AND CITATION
EC – Bananas III (Article 21.5 – Ecuador II / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU*, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
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
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
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
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203

SHORT TITLE	FULL REPORT TITLE AND CITATION
Thailand – Cigarettes (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019 – the Division suspended its work on 10 December 2019]
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]
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
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 (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 – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
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 – Norwegian Salmon AD	GATT Panel Report, *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, BISD 41S/229
US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755

SHORT TITLE	FULL REPORT TITLE AND CITATION
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Tuna II (Mexico)	Appellate Body Report, U*nited 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 FIRST SUBSTANTIVE MEETING

21 September 2021

1 ORDER OF ANALYSIS

1. To both parties: Please comment on/discuss what legal error, if any, you consider would occur, if the Panel were to decide:

i. (i) on Hong Kong, China's claims first before addressing the invocation of Article XXI(b), including its applicability to non-GATT agreements; or

ii. (ii) on the invocation of Article XXI(b), including its applicability to non-GATT agreements, first before deciding on Hong Kong, China's claims.

1. Hong Kong, China agrees with Brazil, Canada, the European Union, Norway, and Switzerland[1] that the order of analysis mandated by the provisions at issue in this dispute is for the Panel to address Hong Kong, China's claims of violation before turning to the United States' invocation of Article XXI(b) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), including its applicability to non-GATT agreements.

2. While panels are generally free to determine their order of analysis in each case,[2] there are circumstances in which the relationship between the different provisions at issue compels a particular order. As the Appellate Body observed in *Canada – Wheat Exports and Grain Imports*,

> in each case it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law. In some cases, this relationship is such that a failure to structure the analysis in the proper logical sequence will have repercussions for the substance of the analysis itself. As the Appellate Body explained in *Canada – Autos*, "a panel may not ignore the 'fundamental structure and logic' of a provision in deciding the proper sequence of steps in its analysis, *save at the peril of reaching flawed results*".[3]

3. In the present dispute, Hong Kong, China has advanced claims of violation under the Agreement on Rules of Origin ("ARO"), the Agreement on Technical Barriers to Trade ("TBT Agreement"), and the GATT 1994. The only response that the United States has

[1] See Brazil's third-party statement, para. 7; Canada's third-party submission, paras. 15-19; European Union's third-party statement, paras. 4-12; Switzerland's third-party submission, paras. 49-51; Norway's third-party statement, paras. 21 and 22.

[2] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126. See also Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.229.

[3] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109 (emphasis original).

offered to these claims of violation is to invoke Article XXI(b) of the GATT 1994. Like Article XX of the GATT 1994, Article XXI(b) is an affirmative defence that a Member may invoke to seek to justify measures that are otherwise inconsistent with the GATT 1994. This is evidenced, *inter alia*, by the fact that both provisions share the same "nothing in this Agreement shall be construed to prevent" structure.

4. It is well established that where the responding Member has invoked an exception provision like Article XX or Article XXI(b) of the GATT 1994, the legally mandated order of analysis is to evaluate first whether the complaining Member has established a *prima facie* case of inconsistency and only then turn to an assessment of whether any inconsistency so established is justified under the invoked exception.[4] As the Appellate Body in *Thailand – Cigarettes (Philippines)* has stated, "an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the 'further and separate' assessment of whether such measure is otherwise justified".[5] This is because, among other reasons, what a panel must evaluate for conformity with the exception is the GATT-inconsistent aspect or aspects of the measure, not the measure as a whole.[6] A panel must therefore first identify the GATT-inconsistent aspect or aspects of the challenged measure before proceeding to evaluate whether any inconsistencies are justified under the invoked exception.

5. In the present case, the United States has invoked Article XXI(b) of the GATT 1994 in respect of the violations of two non-GATT agreements to which Article XXI(b) does not, on its face, apply, namely the ARO and the TBT Agreement. Should the Panel find that Hong Kong, China has established a *prima facie* case of inconsistency with one or both of these two agreements, the Panel should proceed to evaluate the United States' argument that Article XXI(b) of the GATT 1994 is available as a defence to violations of one or both of these two agreements. Should the Panel conclude that Article XXI(b) is *not* available as a defence to violations of these two agreements, the Panel should limit its findings and recommendations to the violations of the ARO and/or the TBT Agreement and exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994. This approach would obviate the need for the Panel to interpret or apply Article XXI(b) of the GATT 1994, other than as necessary to conclude that it does not apply to either the ARO or the TBT Agreement.

2. To Hong Kong, China: With reference to paragraphs 69 and 86 of its first written submission, could Hong Kong, China please clarify whether you consider the Panel is required to start its assessment with the claims under the ARO?

6. It is well established that a panel should begin its analysis with the agreement or agreements that deal specifically, and in detail, with the subject matter of the dispute, as compared to the agreement or agreements that deal more generally with the subject matter of

[4] See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 173 (citing Appellate Body Report, *US – Gasoline*, p. 23; GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.9); Panel Report, *Colombia – Textiles*, para. 7.16.

[5] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 173.

[6] See e.g. Appellate Body Report, *US – Gasoline*, pp. 13-14. See also Panel Report, *Brazil – Retreaded Tyres*, para. 7.106.

the dispute.[7] In the present case, Hong Kong, China believes that the ARO is the agreement that deals most specifically, and in detail, with the subject matter of this dispute, namely the rules for determining the country of origin[8] as they apply to origin marking requirements. As discussed in response to Panel question No. 8 below, the United States has clearly made a country of origin determination in connection with the revised origin marking requirement, and it is the lawfulness of that determination under the ARO that is principally at issue in the present dispute. The Panel should therefore begin its analysis with Hong Kong, China's claims under the ARO.

7. The TBT Agreement also deals specifically, and in detail, with the measures at issue as "marking … requirement[s]" that "apply to a product". Both the ARO and the TBT Agreement are the more detailed and specialized agreements pertaining to the subject matter of this dispute relative to the GATT 1994. While Hong Kong, China considers that the Panel should begin its analysis with Hong Kong, China's claims under the ARO for the reasons stated above, in all events the Panel should begin its analysis with Hong Kong, China's claims under either the ARO or the TBT Agreement before proceeding, if necessary, to Hong Kong, China's claims under the GATT 1994.

2 CLAIMS UNDER ANNEX 1A AGREEMENTS

2.1 Factual background

3. [To the United States]

4. [To the United States]

2.2 Agreement on Rules of Origin (ARO)

5. To both parties: Does the requirement to indicate a particular country as a country of origin for the purpose of an origin mark necessarily involve a prior determination that that country is the country of origin as stated by Hong Kong, China in paragraphs 24 and 30 of its first written submission, or can that indication be made independently of such a determination? If so, on what basis?

8. As discussed in further detail in response to Panel question No. 6 below, the fact that the ARO applies to "all rules of origin used … in the application of … origin marking requirements under Article IX of GATT 1994" means that an origin mark necessarily involves a prior determination concerning the country of origin of the marked goods. It is the prior country of origin determination that establishes the name of the country with which a good must be marked. Were that not the case, the ARO would not in any meaningful sense apply to rules of origin used in the application of origin marking requirements, contrary to the express text of Article 1.2.

[7] See e.g. Appellate Body Report, *Chile – Price Band*, para. 184; Appellate Body Report, *EC – Bananas III*, para. 204.

[8] With respect to the terms "country" and "country of origin", Hong Kong, China would like to reiterate that by virtue of the first explanatory note to the WTO Agreement, the term "country" as used in the WTO covered agreements, including for the purpose of determining the country of origin of a good, is understood to include Hong Kong, China, as a separate customs territory Member of the WTO.

9. The proposition that an origin marking requirement involves a prior country of origin determination should not be a controversial one. In 1988, in connection with the Uruguay Round, the Negotiating Group on Non-Tariff Measures requested the Secretariat to prepare a background note on the various uses of rules of origin and their means of administration. The Secretariat observed that the General Agreement on Tariffs and Trade "contains various provisions which foresee the necessity of rules of origin".[9] The Secretariat identified Article IX, concerning marks of origin, as one such provision. The Secretariat noted in relation to Article IX that "[i]f marks of origin are to be used, *some rule for identifying origin will be required.*"[10] The fact that marks of origin require a prior determination of the country of origin of the good, as the Secretariat correctly noted, is undoubtedly one of the reasons why the ARO, which was a product of the Uruguay Round, applies to rules of origin used in the application of origin marking requirements.

10. The United States has recognized that marks of origin necessarily involve a prior determination of the country of origin of a good. The U.S. International Trade Commission ("USITC") has explained in the context of origin marking requirements that "the origin determination is used *to establish the name of the country that must be marked on an imported article*".[11] As this explanation makes clear, the country applying the origin marking requirement must *first* determine the country of origin of the good, and that determination in turn "establish[es] the name of the country that must be marked" on the imported article. In other words, the requirement to mark an imported article with the name of a particular country is the *result* of a prior country of origin determination.

11. Consistent with this fact, the United States has previously notified its origin marking measures to the Committee on Rules of Origin, as required by Article 5.1 of the ARO. Article 5.1 provides that "[e]ach Member shall provide to the Secretariat, within 90 days after the date of entry into force of the WTO Agreement for it, its rules of origin, judicial decisions, and administrative rulings of general application relating to rules of origin in effect on that date". In its Article 5.1 notification[12], the United States notified its "[m]arking rules of origin" as those set forth in 19 U.S.C. 1304[13] and 19 C.F.R Part 134.[14] As Hong Kong, China explained in its first written submission, these measures are, respectively, the U.S. statutory requirement to mark imported articles with their country of origin and the U.S. Customs and Border Protection (USCBP)'s regulations implementing that requirement.[15] The United States' notification of these measures under Article 5.1 properly recognizes that the U.S. origin marking requirement involves a prior determination of the country of origin of an

[9] Rules of Origin: Background Note by the Secretariat, MTN.GNG/NG2/W/12 (21 June 1988) (US-101), para. 13.

[10] Rules of Origin: Background Note by the Secretariat, MTN.GNG/NG2/W/12 (21 June 1988) (US-101), para. 14 (emphasis added).

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

[12] See Committee on Rules of Origin, Notifications Under Paragraph 5.1 and Paragraph 4 of Annex II of the Agreement on Rules of Origin (G/RO/N/1/Add.1) (22 June 1995), p. 15.

[13] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304 [redacted].

[14] 19 C.F.R. Part 134 [redacted].

[15] Hong Kong, China's first written submission, paras. 9-14.

imported good, and that this determination is based on rules of origin that are governed by the ARO.

12. For these reasons, and as explained further below, a requirement to mark an imported good with the name of a particular country necessarily involves a prior determination that that country is the country of origin as determined in accordance with the rules of the ARO. The identification of the name of the country with which the good must be marked cannot be made independently of the country of origin determination. To conclude otherwise would amount to a conclusion that the ARO does not apply to rules of origin used in the application of origin marking requirements, contrary to the plain terms of that agreement.

6. To both parties: Article 1.2 of the ARO indicates that rules of origin are "used … in the application of … origin marking requirements under Article IX of [the] GATT 1994"? Please explain how rules of origin are used in such application of origin marking requirements.

13. Article 1.1 of the ARO defines the term "rules of origin" as "those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods". Article 1.2 of the ARO further establishes that the term "rules of origin" includes "all rules of origin used … in the application of … origin marking requirements under Article IX of GATT 1994". It is clear from these definitional provisions that an origin marking requirement requires a determination of the country of origin of the goods so marked, and that this determination is governed by the rules of the ARO.

14. It is self-evident that for the ARO to apply to origin marking requirements, as provided for in Article 1.2, there must be a *correspondence* between the country of origin of a good, properly determined in accordance with the rules of the ARO, and the specific country of origin mark that an importing Member requires that good to bear. As the USITC has correctly and succinctly explained, rules of origin are used in the application of origin marking requirements "to establish the name of the country that must be marked on an imported article".[16] It would not be meaningful to say that the ARO applies to origin marking requirements if, for example, the rules of the ARO require the conclusion that a good is of Canadian origin and yet it were nevertheless permissible for an importing Member to require that good to be marked as a product of the United Kingdom, a different Member. The ARO applies to marks of origin precisely so that a required mark of origin *correctly* indicates the customs territory of a Member from which a good originates. There is no other respect in which the ARO could meaningfully apply to marks of origin.

15. For this reason, Canada is mistaken when it asserts that "the provisions of the ARO … do not discipline a Member's determination of the particular country that must be marked as the country of origin".[17] That is exactly what these provisions do. If the rules prescribed by the ARO require the conclusion that a good has the origin of a particular Member, an importing Member must accord that origin to the imported product, including for the purpose of establishing the name of the country with which the good must be marked pursuant to any

[16] U.S. International Trade Commission, "Country-of-Origin Marking: Review of Laws, Regulations, and Practices" (USITC Pub. No. 2975) (July 1996), p. 2-1 [redacted].

[17] Canada's third-party submission, para. 6.

origin marking requirement. To conclude otherwise would mean, in effect, that the ARO does not apply to origin marking requirements, contrary to the text of the agreement itself.

7. To both parties: What constitutes a "determination" of origin within the meaning of Article 1.1 of the ARO ("applied … to determine the country of origin of goods …")?

16. A determination of the country of origin of goods in the sense of Article 1.1 of the ARO ("applied … to determine the country of origin of goods") is any determination by which a Member decides to confer or not confer a particular origin status to a good or group of goods.

8. To Hong Kong, China: With reference to paragraph 47 of its first written submission, does the Panel understand Hong Kong, China correctly to be arguing that the determination of origin, i.e. the determination that the goods originate in the People's Republic of China, is made in the August 11 Federal Register notice ([redacted]/Exhibit USA-7)?

17. Yes. The August 11 Federal Register notice clearly entails a country of origin determination by the United States. The title of the notice is "Country of Origin Marking of Products of Hong Kong". The notice states that the purpose of the document is to "notif[y] the public that … goods produced in Hong Kong … must be marked to indicate that their origin is 'China' for purposes of 19 U.S.C. 1304." As discussed in response to Panel questions Nos. 5 and 6 above, and as the United States itself has acknowledged, an origin marking requirement necessarily involves a prior determination of the country of origin. The United States has determined through the August 11 Federal Register notice that goods manufactured or processed within the separate customs territory of Hong Kong, China have an origin of the People's Republic of China, a different Member.

18. The fact that the August 11 Federal Register notice involves a country of origin determination is confirmed by the subsequent actions of USCBP. In August 2020, subsequent to the August 11 Federal Register notice but prior to the revised origin marking requirement taking effect, the Hong Kong Trade Development Council ("HKTDC") submitted a request to USCBP to permit the use of "Hong Kong, China" as a mark of origin under 19 U.S.C. 1304 for goods manufactured or processed within the separate customs territory of Hong Kong, China.[18] USCBP rejected this request, as well as any other mark of origin involving the words "Hong Kong". USCBP explained that:

[18] As discussed in Hong Kong, China's first written submission, USCBP and its predecessors had previously rejected any use of the word "China" in goods of Hong Kong, China origin on the grounds that Hong Kong, China and the People's Republic of China are two separate customs territories and thus two distinct countries of origin for origin marking purposes. See Hong Kong, China's first written submission, para. 15 and notes thereto. Thus, USCBP had previously required the use of the term "Hong Kong" (without "China") as the exclusive mark of origin for goods of Hong Kong, China origin. HKTDC's submission to USCBP effectively requested USCBP to reconsider its prior rejection of "Hong Kong, China" in view of the August 11 Federal Register notice, by allowing "Hong Kong, China" for goods of Hong Kong, China origin and "China" for goods having an origin of the People's Republic of China. This request, had USCBP accepted it, would have been consistent with the ARO and would have permitted Hong Kong, China exporters to mark their goods with the

> CBP's position under the [August 11] Federal Register Notice is that goods produced in Hong Kong must be marked to indicate that their origin is "China" and it is not acceptable to include "Hong Kong" in the country of origin marking to indicate the origin of the product. The reference to Hong Kong under the current policy may mislead or deceive the ultimate purchaser as to the actual country of origin of the article and, therefore, is not acceptable for purposes of 19 U.S.C. § 1304.[redacted]

19. USCBP's explanation for its rejection of "Hong Kong, China" as a permissible mark of origin under the August 11 Federal Register notice confirms that, in its view, "the actual country of origin" of goods manufactured or processed within the separate customs territory of Hong Kong, China is the People's Republic of China. This confirms that USCBP has made a country of origin determination under the August 11 Federal Register notice, and its determination is that goods manufactured or processed within the customs territory of Hong Kong, China are goods having an origin of the People's Republic of China.

9. To both parties: In paragraph 296 of its first written submission, the United States argues that "Hong Kong, China, appears to seek a finding that the Agreement on Rules of Origin not only disciplines how Members determine the country of origin, but also obligates Members to recognize particular claims of sovereignty or territory. Hong Kong, China, would require an importing Member agree with an exporting Member's claims as to territorial boundaries, for purposes of its origin marking requirements. Put simply, this is not a determination that WTO Members agreed to assign to dispute settlement panels." Similarly, in paragraph 6 of its third-party statement Canada states that the determination of what constitutes a country "is not a 'rule of origin' per se, and therefore not governed by the ARO. The ARO governs rules that determine whether a product originates in a particular country, not the identification of that particular country."[20]

20. Before addressing the subparts of this question, Hong Kong, China wishes to emphasize that the United States does not dispute that Hong Kong, China is a "country" in the only sense that is pertinent to the ARO, i.e. that it is a distinct customs territory from which goods may originate for all purposes for which a determination of origin is required. There is no dispute between the parties that Hong Kong, China is a "country"（i.e. a separate customs territory from which goods may originate） in the sense of the WTO Agreement and the covered agreements. Canada's conjecture as a third party – that the United States has determined that Hong Kong, China is not a "country" – bears no relationship to any rationale that can be found within the measures at issue. For this reason, Hong Kong, China does not believe that the Panel needs to address the meaning of the term "country" in order to resolve the matter before it.

full English name of the country of origin, as the United States permits in respect of goods manufactured or processed in the customs territory of other Members.

[redacted]

[20] See also Canada's third-party submission, para. 6 and third-party statement, paras. 4 to 7.

21. The United States has consistently recognized that, for the purpose of its origin marking requirement, "Hong Kong is a separate country from China."[21] [redacted] Nothing in the August 11 Federal Register notice purports to determine that Hong Kong, China is not a "country" for this purpose. On the contrary, the United States *continues* to recognize that Hong Kong, China is a distinct "country" for all country of origin purposes other than for the purpose of origin marking. In the guidance that accompanied the August 11 Federal Register notice, USCBP explained that "[t]he change in marking requirements does not affect *country of origin determinations* for purposes of assessing ordinary duties … or temporary or additional duties".[22] Consistent with this fact, the United States continues to assess duties on goods of Hong Kong, China origin on the basis that Hong Kong, China is a distinct country of origin.

22. Contrary to Canada's conjecture, the United States has determined that, for origin marking purposes, goods manufactured within the separate customs territory of Hong Kong, China have an origin of the People's Republic of China. This is not a determination that Hong Kong, China is not a "country" in the sense of the ARO or the WTO Agreement (a determination that, in any event, the United States has no authority to make for the reasons discussed below). Rather, it is an erroneous and unlawful country of origin determination that the United States has made contrary to the rules of the ARO.

a. Is the determination of "what constitutes a 'country' for country of origin marking purposes" a question of interpretation of the term "country" in Articles 1 and 2 of the ARO? In this context what is the relevance of the Explanatory Notes to the WTO Agreement, discussed by Hong Kong, China in paragraphs 26 et al. of its first written submission and by Canada in paragraphs 7 to 8 of its third-party submission?

23. The meaning of the term "country" as that term is used in the ARO is a question of treaty interpretation, just as the meaning of any term used in the ARO is a question of treaty interpretation. In this case, however, the answer is provided by the first explanatory note to the WTO Agreement, which states that "[t]he terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO." The ARO is one of the Multilateral Trade Agreements. Hong Kong, China is a separate customs territory Member of the WTO. Hong Kong, China is therefore a "country" within the meaning of the ARO regardless of how the term "country" might otherwise be interpreted.

b. For purposes of clarifying the meaning of "country of origin" in Article 1.1 of the ARO, is it the Panel's task to clarify the meaning of "country" pursuant to Article 3.2 of the DSU? If not, why not?

[21] USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Childrens' Computer Games (26 January 1990), p. 2 [redacted].

[22] USCBP, Frequently Asked Questions - Guidance on Marking of Goods of Hong Kong – Executive Order 13936 (last modified 6 October 2020) [redacted] (emphasis added).

24. No. To begin with, as discussed above, the parties do not dispute that Hong Kong, China is a "country" within the meaning of the ARO, including as that term is used in the phrase "country of origin". There is no dispute that Hong Kong, China is a "country" in the sense of the ARO, i.e. a separate customs territory from which goods may originate. Hong Kong, China therefore respectfully submits that the Panel has no need to clarify the meaning of the term "country" in connection with the present dispute.

25. In any event, as discussed in response to Panel question No. 9(a) above, Hong Kong, China is a "country" within the meaning of the ARO by virtue of the first explanatory note to the WTO Agreement. The Panel therefore does not need to clarify the meaning of the term "country", other than to note that Hong Kong, China is a "country" within the meaning of the ARO, including as that term is used in the phrase "country of origin".

c. Do the disciplines set out in Articles 1 and 2 of the ARO limit the manner in which Members must recognize the territorial boundaries of other Members when conferring origin to products manufactured or processed in any given country?

26. There is no dispute between the parties concerning the geographic boundaries of the separate customs territory of Hong Kong, China. Indeed, as the Panel notes in Panel question No. 4 above, the measures at issue in the present dispute apply to "goods produced in Hong Kong", which by itself shows that there is no issue in the present dispute concerning the geographic boundaries of a Member. Such being the case, Hong Kong, China does not consider that it is necessary or appropriate for the Panel to evaluate how the disciplines set out in Articles 1 and 2 of the ARO would apply to a hypothetical set of facts that have no relevance to the present dispute.

d. If, as submitted by Canada, the determination of "what constitutes a 'country' for country of origin marking purposes" is not governed by the disciplines of the ARO, is it governed by any other disciplines under the covered agreements? In this context, please comment, in particular, on disciplines governing origin marking and those covering equal treatment among Members (e.g. Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994)?

27. Contrary to what Canada has suggested in its submissions to the Panel[23], a Member is not free to determine that another Member is not a "country" in the sense of the WTO Agreement (and the covered agreements), including as that term is used in the ARO. When the ARO prescribes rules that Members must apply to determine "the country of origin of goods",[24] it establishes rights that accrue to all Members, including the right to have the origin of their goods correctly determined in accordance with the rules of the ARO (including, where those rules so require, that they are goods *of that country*). If a Member were free to determine that another Member is not a "country" in the sense of the ARO, i.e. a customs territory from which goods may originate, it could effectively deprive that other Member of its rights under the ARO, contrary to the principle of *pacta sunt servanda.* Canada's submission is therefore incorrect.

[23] See Canada's third-party submission, para. 6; Canada's oral statement, para. 4.

[24] ARO, Article 1 (emphasis added).

28. As discussed in the introduction to this question, the United States has not determined that Hong Kong, China is not a "country" in the sense of the ARO or the WTO Agreement more generally. On the contrary, the United States continues to recognize that the separate customs territory of Hong Kong, China is a distinct "country" from which goods may originate. It is therefore immaterial how other covered agreements, including the TBT Agreement and the GATT 1994, may discipline the determination of what constitutes a "country". With that said, the United States has impermissibly discriminated under the TBT Agreement and the GATT 1994 with respect to the rules that it applies to determine the country of origin of a good.

29. As Hong Kong, China detailed in its first written submission, the United States' origin marking requirement is a technical regulation governed by the TBT Agreement.[25] For the purpose of this technical regulation, the United States defines the "country of origin" as "the country of manufacture, production, or growth of any article of foreign origin entering the United States," or the country in which "work or material added to an article … effect[ed] a substantial transformation" of that article.[26] An article imported into the United States must be marked with "the full English name of the country of origin", so determined.[27] In the case of Hong Kong, China, the United States applies an additional rule to determine the country of origin, namely whether Hong Kong, China is "sufficiently autonomous" from the People's Republic of China, as assessed by the United States. For the reasons that Hong Kong, China has explained, this *de jure* regulatory discrimination accords less favourable treatment to goods of Hong Kong, China origin, in violation of Article 2.1 of the TBT Agreement.

30. Under Article IX:1 of the GATT 1994, Members are required to "accord to the products of the territories of other [Members] treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country". As the United States' own regulations and practice demonstrate, a determination of the country of origin of an imported article is "treatment with regard to marking requirements".[28] For the reasons that Hong Kong, China explained in its first written submission, the United States accords less favourable treatment to goods of Hong Kong, China origin in respect of this country of origin determination, in violation of Article IX:1.[29] The same less favourable treatment is also discrimination inconsistent with the more general requirement of MFN treatment set out in Article I:1 of the GATT 1994.[30]

10. To both parties: With reference to paragraph 30 of Hong Kong, China's first written submission, under what circumstances would a country-of-origin determination be wrong or incorrect pursuant to the ARO?

31. A country of origin determination is wrong or incorrect when it is made other than in accordance with the rules prescribed by the ARO. Under Article 2 of the ARO, Members

[25] See Hong Kong, China's first written submission, paras. 50-53.

[26] 19 C.F.R. § 134.1(b) [redacted].

[27] 19 C.F.R. § 134.45(a)(1) [redacted].

[28] See e.g. 19 C.F.R. § 134.1(b) (defining "country of origin" for the purpose of the U.S. origin marking requirement) [redacted].

[29] Hong Kong, China's first written submission, paras. 70-76.

[30] See Hong Kong, China's first written submission, paras. 77-85.

must "ensure" that their rules of origin meet certain requirements, including that they may not "require the fulfilment of a certain condition not related to manufacturing or processing … as a prerequisite for the determination of the country of origin" and that they shall not "discriminate between other Members". These are mandatory disciplines governing rules of origin and origin determinations, and any country of origin determination made in violation of these disciplines is necessarily wrong or incorrect, where these terms are understood to refer to the consistency of the determination with the ARO.

32. The ARO's disciplines on rules of origin apply to all rules of origin used in the application of origin marking requirements. The specific country of origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the good so marked. It follows that any required mark of origin must *correctly* indicate the country of origin that results from the proper application of the ARO's disciplines. That was Hong Kong, China's submission at paragraph 30 of its first written submission, to which this question refers. It would be meaningless for the ARO's disciplines to apply to rules of origin used in the application of origin marking requirements if there were no required correspondence between a proper country of origin determination and the name of the country of origin with which an imported good must be marked.

11. To both parties: Canada argues that the [ARO] provisions at issue in this dispute "do not discipline or dictate what the actual country of origin of a good must be".[31] Please comment.

33. It is unclear to Hong Kong, China what Canada means when it asserts that the ARO provisions at issue in this dispute "do not discipline or dictate what the actual country of origin of a good must be",[32] or how Canada understands this assertion to be relevant to the facts and issues in this dispute.

34. In its third-party submission, Canada asserts that the ARO provisions at issue in this dispute "govern the substantive origin requirements that must be met for a good to obtain a certain origin status. This includes requirements such as manufacturing or processing that must be met before a particular origin will be conferred."[33] It is in this context that Canada asserts that the ARO provisions at issue "do not discipline or dictate what the actual country of origin of a good must be".[34]

35. It is not in dispute that the revised origin marking requirement applies to goods manufactured or processed within the separate customs territory of Hong Kong, China.[35] It is also not in dispute that the United States has denied an origin of Hong Kong, China to these goods for reasons unrelated to manufacturing or processing.[36] The United States has

[31] Canada's third-party submission, para. 6.

[32] Canada's third-party submission, para. 6.

[33] Canada's third-party submission, para. 6.

[34] Canada's third-party submission, para. 6.

[35] See August 11 Federal Register Notice, p. 48552 [redacted] (requiring that "goods produced in Hong Kong … must be marked to indicate that their origin is 'China'") (emphasis added)

[36] See August 11 Federal Register Notice [redacted]; [redacted]

therefore acted inconsistently with Article 2(c) of the ARO, which requires Members to "ensure" that their rules of origin do not "require the fulfilment of a certain condition not related to manufacturing or processing … as a prerequisite for the determination of the country of origin". In addition, the United States has acted inconsistently with Article 2(d) of the ARO by applying a rule of origin that it does not apply to goods of other Members. These are the "substantive origin requirements", as Canada calls them, with which the United States has acted inconsistently through the measures at issue.

36. Canada's assertion that these provisions of the ARO "do not discipline or dictate what the actual country of origin of a good must be", whatever that assertion means, in no way affects the conclusion that the United States has acted inconsistently with the identified provisions. If Canada means to suggest that a Member may reach a country of origin determination *other* than one that results from the proper application of the provisions of Article 2 (for example, by conditioning the conferral of a particular country of origin on considerations unrelated to manufacturing or processing), Canada is clearly wrong as a matter of treaty interpretation. Article 2(c), for example, would be *inutile* if considerations relating exclusively to manufacturing or processing require the conclusion that a good has the origin of a particular Member, and yet it were nevertheless permissible for the importing Member to accord a *different* origin to that good. Members must follow certain rules when determining the "actual country of origin", as Canada calls it, and a country of origin determination is unlawful when those rules are not followed, as in this case.

2.3 Agreement on Technical Barriers to Trade (TBT Agreement)

12. To both parties: What elements does a complainant need to demonstrate with respect to a marking requirement for it to constitute a technical regulation in the sense of Annex 1.1 to the TBT Agreement?

37. Annex 1.1 of the TBT Agreement defines the term "technical regulation" as:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, 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.

38. Annex 1.1 describes a technical regulation by reference to a "document". As the Appellate Body explained in *US – Tuna (II) (Mexico)*, the use of the term "document" could "cover a broad range of instruments or apply to a variety of measures".[37]

39. The first sentence of Annex 1.1 delineates the scope of measures that can be characterized as a technical regulation by referring to a document that "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions". The second sentence enumerates specific elements that technical

[redacted]

[37] Appellate Body Report, *US – Tuna II (Mexico)*, para. 185.

regulations "may also include or deal exclusively with", namely, "terminology, symbols, packaging, marking or labelling requirements" as they apply to a product, process or production method. As Hong Kong, China explained in its first written submission, prior Dispute Settlement Body ("DSB") reports have concluded that the use of the words "also include" and "deal exclusively with" at the beginning of the second sentence of Annex 1.1 indicates that the second sentence includes elements that are additional to, and may be distinct from, those covered by the first sentence.[38]

40. Accordingly, in relation to a marking requirement, a complainant must demonstrate that the measure at issue is a "document" containing a "marking … requirement" that "appl[ies] to a product, process or production method" in order to demonstrate that the measure is a technical regulation within the meaning of Annex 1.1.

41. In relation to the measures at issue in the current dispute, the requirement to mark an imported product with its country of origin is contained in a "document" that sets forth a "marking … requirement" that "appl[ies] to a product". The U.S. origin marking requirement in section 304 of the Tariff Act of 1930 and Part 134 of USCBP's regulations, as well as rulings and notices relating thereto, is therefore a "technical regulation" that falls within the scope of the TBT Agreement. As Hong Kong, China explained in its first written submission, the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice also form part of the United States' origin marking requirement as they apply to goods imported from the customs territory of Hong Kong, China.[39]

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

42. Canada is mistaken in its assertion that a finding of detrimental impact under Article 2.1 of the TBT Agreement depends upon whether requiring goods imported from Hong Kong, China to be marked as goods of "China" is contrary to WTO rules. Article 2.1 provides that:

> Members shall ensure that in respect of technical regulations, 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.

43. A technical regulation accords less favourable treatment to a Member when it modifies the conditions of competition in the market of the regulating Member to the detriment of the group of products imported from this Member vis-à-vis the group of like

[38] See e.g. Appellate Body Report, *EC – Seal Products*, para. 5.14; Panel Report, *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 7.147.

[39] This view is consistent with the "general understanding" reflected in the 1994 Annual Report of the Committee on Technical Barriers to Trade that "mandatory marking requirements applied in the context of marking the origin of products" are covered by the provisions of the TBT Agreement. See L/7558, (30 November 1994).

domestic products or the group of like products imported from other Members (and non-Members).

44. In this case, the measures at issue draw a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members). Section 304 of the Tariff Act of 1930 requires goods imported into the territory of the United States to be "marked … in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."[40] For the purpose of this marking requirement, the "country of origin" of an article is "the country of manufacture, production, or growth of any article of foreign origin entering the United States," or the country in which "work or material added to an article … effect[ed] a substantial transformation" of that article.[41] An article imported into the United States must be marked with "the full English name of the country of origin", so determined. [42]

45. As Hong Kong, China explained in its first written submission, the United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members). The United States has applied that condition to determine that goods imported from the customs territory of Hong Kong, China have an origin of the People's Republic of China, and consequently requires goods imported from Hong Kong, China to be marked as goods of "China". The United States has rejected a request to mark goods imported from Hong Kong, China as goods of "Hong Kong, China" origin, which is the full English name of the customs territory in which the goods originate.

46. Contrary to Canada's argument, the separate question of whether requiring goods imported from Hong Kong, China be marked as goods of "China" is contrary to *other* provisions of the covered agreements is irrelevant to the analysis of less favourable treatment under Article 2.1 of the TBT Agreement. For purposes of Article 2.1, what matters is that the United States applies a requirement for goods imported from the customs territory of Hong Kong, China (i.e. the "sufficient autonomy" requirement) that it does not apply to goods originating in other Members (and non-Members). The application of this additional requirement, and the resulting 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 vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).[43]

14. To both parties: Without prejudice to the parties' respective views on the applicability of Article XXI of the GATT 1994 to the TBT Agreement, could essential security interests be taken into account in assessing whether the revised

[40] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a) [redacted].

[41] 19 C.F.R. § 134.1(b) [redacted].

[42] 19 C.F.R. § 134.45(a)(1) [redacted].

[43] See Hong Kong, China's first written submission, para. 60.

origin marking requirement results in less favourable treatment under Article 2.1 of the TBT Agreement?

47. The United States has not argued that, within the context of the TBT Agreement, its essential security interest should somehow be taken into account when the Panel assesses whether the revised origin marking requirement results in less favourable treatment under Article 2.1 of the TBT Agreement. Rather, the United States maintains that Article XXI(b) of the GATT 1994 is applicable to the TBT Agreement, that Article XXI(b) is entirely self-judging, and that the Panel should therefore never reach the merits of Hong Kong, China's claim under Article 2.1.

48. The United States' argument regarding the applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement, as well as its argument that Article XXI(b) is entirely self-judging, are both without merit. It is therefore unsurprising that neither argument has found support from any of the third parties. In relation to the Panel's question, however, certain third parties have advanced interpretive arguments concerning Hong Kong, China's claim under Article 2.1 of the TBT Agreement that have not been advocated by the United States. In particular, certain third parties have suggested that a Member's essential security interest could potentially be relevant to the Panel's analysis of Hong Kong, China's claim under Article 2.1 in light of the language in the seventh recital of the preamble to the TBT Agreement.[44]

49. The seventh recital of the TBT Agreement preamble states: "*Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest".

50. As explained by the European Union in its third-party statement, the difference between recital language and the operative provisions of an agreement must be recognized.[45] The recital language can enlighten as to the object and purpose of an agreement, but it is not part of the rights and obligations stipulated therein.[46] The seventh recital of the TBT Agreement is therefore not a general exception that can be invoked in defence of violations of the operative provisions. As Hong Kong, China explained in its opening statement, this is particularly evident given that there are already multiple references to national or essential security considerations in the operative provisions of the TBT Agreement. In Hong Kong, China's view, 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.

51. Notably, Article 2.1 of the TBT Agreement is not one of the provisions that expressly incorporate national or essential security considerations. The Panel therefore raises the difficult question of whether a responding Member's essential security interest could nevertheless be taken into account when assessing whether a measure results in less favourable treatment under Article 2.1, while still giving effect to the drafters' choice not to

[44] Singapore's third-party statement, paras. 8 and 9; European Union's third-party submission, paras. 52-56.

[45] European Union's third-party submission, para. 50.

[46] See, e.g. Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.749 (citing GATT Panel Report, *US – Norwegian Salmon AD*, para. 369 and fn 463).

make the seventh recital an operative provision, and also to the drafters' choice to expressly include essential security considerations in certain other operative provisions.

52. Hong Kong, China considers, however, that this is a question for another day and another dispute. If the United States believed that within the context of the TBT Agreement, its essential security interest should somehow be taken into account in the Panel's analysis of whether the measure results in less favourable treatment, the burden would be on the United States to advance this argument. Hong Kong, China respectfully submits that absent such an argument by the United States, this Panel need not and should not attempt to resolve the purely theoretical question of whether and how a Member's essential security interest might be taken into account under Article 2.1 of the TBT Agreement.

15. To both parties: At the first substantive meeting the Panel understood both parties to be submitting that an origin-based distinction would exclude any consideration of the aim/objective of the measure for purposes of assessing the claim under Article 2.1 of the TBT Agreement. If this understanding is correct, please explain why you consider that an origin-based distinction excludes such consideration.

53. Article 2.1 of the TBT Agreement prohibits both *de jure* and *de facto* discrimination against imported products. Prior DSB reports have concluded, however, 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. Instead, a panel must further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[47]

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

16. To both parties: If essential security interests were taken into account in the assessment of a claim under Article 2.1 of the TBT Agreement:

a. what burden of proof would each party carry in respect of such an examination? In your response, please comment on Canada's argument in paragraph 14 of its third-party statement that Hong Kong, China has not met its burden of proof.

55. Canada's argument that Hong Kong, China may not have met its burden of proof is based on Canada's view that the Panel should evaluate whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. As discussed in response to Panel question No. 15 above, however, the parties agree that a "legitimate regulatory distinction"

[47] See Appellate Body Report, *US – Clove Cigarettes*, paras. 181-182.

analysis is not called for when the technical regulation at issue distinguishes based on origin, as is the case here.

56. Setting aside the parties' agreement that no "second step" is required in cases of origin-based distinction, Hong Kong, China notes in relation to the Panel's question that the burden would be on the United States to *articulate* its essential security interests in the first instance. In no event would it be possible to take into account a Member's essential security interests if the Member does not articulate what those interests are. Given that the United States has made clear that it does not intend to do so, Hong Kong, China will not opine on the nature of what *else* the United States would need to demonstrate in order for the Panel to potentially take its essential security interests into account.

b. what would be the relevance of the sixth and seventh recitals of the preamble of the TBT Agreement for determining the contours of such an examination;

57. In the context of the present dispute, where the United States has made clear that it does not intend to articulate its essential security interests at all, Hong Kong, China does not believe that it is necessary for the parties to speculate about precisely how a respondent's articulated essential security interests might theoretically be taken into account in an analysis under Article 2.1. Hong Kong, China will simply reiterate that in evaluating the potential relevance of the TBT Agreement recitals, the fact that the recitals are not operative provisions, and that the drafters chose to expressly include essential security considerations in certain operative provisions other than Article 2.1, would need to be given due consideration.

c. how would such an examination compare to an examination of the same interests in Article XXI(b) of the GATT 1994? In this regard, please consider the European Union's submission that there are textual differences between the 7th recital of the preamble of the TBT Agreement and Article XXI(b). Specifically, there are no sub-paragraphs describing specific situations in the 7th recital, and the terms "which it considers" are missing from that recital[48];

58. The United States has made clear that its argument is not that its essential security interests should be taken into account in light of the language in the seventh recital, but rather that Article XXI of the GATT 1994 applies to the TBT Agreement and obviates the need for the Panel to consider Hong Kong, China's claim under Article 2.1 at all. Accordingly, and as stated above, Hong Kong, China does not believe that the Panel needs to address or resolve how a respondent's articulated essential security interests might theoretically be taken into account in an analysis under Article 2.1 based on the language in the seventh recital of the preamble. That being said, the European Union is of course correct that in such a circumstance, the differences between the language in the seventh recital and Article XXI(b) of the GATT 1994 would need to be taken into account. In particular, the fact that the terms "which it considers" are missing from that recital suggests that, at the very least, a respondent would need to demonstrate that the measures at issue are objectively "necessary" for the protection of its essential security interests.

d. how would such an examination compare to the necessity test carried out in respect of "national security requirements" in Article 2.2 of the TBT Agreement.

[48] European Union's third-party submission, para. 51.

In this context, what is the relevance, if any, of this term, as used in Article 2.2, to the assessment of a claim under Article 2.1?

59. As Hong Kong, China has previously explained, the fact that Article 2.2 of the TBT Agreement expressly addresses "national security requirements" is notable given that Article 2.1 does not, and this difference would need to be given meaning if a panel were to take into account in some manner a respondent's essential security interests in an analysis under Article 2.1. However, given that the measure at issue is *de jure* discriminatory, and given the United States' erroneous view that it is not even required to articulate its essential security interests, Hong Kong, China does not believe that it is necessary for the parties or the Panel to speculate about precisely how a respondent's articulated essential security interests might theoretically be taken into account in an analysis under Article 2.1.

2.4 GATT 1994

17. To both parties: What constitutes "less favorable" treatment in Article IX of the GATT 1994, and how does it compare to "less favorable" treatment under Article 2.1 of the TBT Agreement?

60. In Hong Kong, China's view, less favourable treatment in Article IX of the GATT 1994 exists where a measure modifies the conditions of competition in the relevant market to the detriment of the imported products of another Member. In light of the fact that the measure at issue draws a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members), Hong Kong, China believes that in the present case, the "less favourable" treatment standard is the same in Article 2.1 of the TBT Agreement.

18. To both parties: Hong Kong, China describes as less favourable treatment, under Article IX of GATT 1994, treatment where "goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin".[49] In this regard, please comment on the following:

a. Under what circumstances would a country indication on an origin mark be wrong or incorrect. In particular, does an origin mark, in order to be consistent with Article IX, have to indicate the "actual" country of origin?

61. Article IX:1 of the GATT 1994 does not prescribe substantive rules of origin – that is the function of the ARO. Rather, Article IX:1 is an anti-discrimination provision concerning "treatment with regard to marking requirements". It provides that, in respect of such treatment, each Member shall accord to the products of other Members treatment no less favourable than that accorded to like products of other Members (and non-Members). A measure is therefore inconsistent with Article IX:1 when, with regard to marking requirements, it provides less favourable treatment to the goods of one Member vis-à-vis the treatment accorded to like products from other Members (and non-Members).

62. As Hong Kong, China explained in its first written submission, section 304 of the Tariff Act of 1930 requires goods imported into the territory of the United States to be

[49] Hong Kong, China's first written submission, para. 72.

"marked … in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."[50] For the purpose of this marking requirement, the "country of origin" of an article is "the country of manufacture, production, or growth of any article of foreign origin entering the United States," or the country in which "work or material added to an article … effect[ed] a substantial transformation" of that article.[51] An article imported into the United States must be marked with "the full English name of the country of origin", so determined.[52] This is the baseline "treatment with regard to marking requirements" that the United States accords to the products of other Members (and non-Members).

63. It is not in dispute that the revised origin marking requirement applies to goods that have an origin of Hong Kong, China under the USCBP's definition of "country of origin".[53] It is also not in dispute that "Hong Kong, China" is the "full English name" of the country of origin of these goods while the origin mark of "Hong Kong", which was previously required and accepted by the United States for origin marking purposes, has been and is still commonly used and well recognized in the international market. The United States has expressly prohibited Hong Kong, China exporters from marking these goods as products of "Hong Kong" or "Hong Kong, China." The United States has therefore provided less favourable treatment with regard to marking requirements to goods of Hong Kong, China relative to the treatment accorded to the goods of other Members (and non-Members). For the reasons that Hong Kong, China explained in its first written submission, it is an advantage for exporters to be able to mark their products with the full English name of their actual country of origin, which is the treatment that the United States accords to goods from all other countries (including other separate customs territory Members).[54]

b. On what basis does a Member determine what the "actual" country of origin is?

64. For the purpose of Article IX:1 of the GATT 1994, what matter is whether the respondent Member provides *less favourable treatment* with respect to *how* it determines the country of origin for origin marking purposes (which is "treatment with regard to marking requirements"). The United States provides less favourable treatment to the products of Hong Kong, China in this respect by applying a condition – the condition of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States has not applied to the goods of other Members for the purpose of determining the country of origin and thus the name of the country of origin that must be marked on the imported goods.

[50] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a) [redacted].

[51] 19 C.F.R. § 134.1(b) [redacted].

[52] 19 C.F.R. § 134.45(a)(1) [redacted].

[53] As discussed in Hong Kong, China's first written submission, the United States has previously recognized that Hong Kong, China is a distinct "country" for the purpose of the USCBP's definition of "country of origin". See Hong Kong, China's first written submission at para. 15 and notes thereto. The United States treats other separate customs territory Members as distinct "countries of origin" under USCBP's origin marking regulations, including for origin marking purposes, and has continued to do so subsequent to the August 11 Federal Register notice, which applies exclusively to the products of Hong Kong, China.

[54] See Hong Kong, China's first written submission, paras. 60-75.

c. What is the relevance of the 1958 GATT Decision referred to by Hong Kong, China in paragraph 74 of its first written submission?

65. The relevance of this document is that it confirms that it is an advantage for enterprises to have the ability to mark their goods with a single mark of origin using the English name of the country of origin, and that a measure provides less favourable treatment when it requires enterprises "to mark their products differently depending upon the country of destination". The revised origin marking requirement has this detrimental effect because it deprives producers of Hong Kong, China goods of the ability to mark their goods destined for the United States with the correct country of origin (Hong Kong, China).

66. The panel in *Australia – Tobacco Plain Packaging (Dominican Republic)* found that the 1958 GATT Decision constitutes guidance under Article XVI:1 of the WTO Agreement that bears upon the interpretation of Article IX of the GATT 1994.[55] While there should not be any doubt that requiring exporters to mark their goods with an incorrect country of origin constitutes less favourable treatment under Article IX:1, and while the United States has not claimed otherwise, the 1958 GATT Decision nevertheless confirms the undisputed interpretation and application of Article IX:1 to the facts of this case.

d. On what basis should a Member determine what the correct "full English name" of a country is?

67. In matters pertaining to international trade among Members of the WTO, the full English name of a country of origin may logically be ascertained from the English name that a Member uses to participate in the WTO. The basis on which Hong Kong, China participates in the WTO is under the name "Hong Kong, China". "Hong Kong", which has been commonly used and widely accepted in the international market for origin marking purposes, is the mark of origin that the United States previously required in respect of goods manufactured or produced in Hong Kong, China. "China", on its own, denotes a different Member, the People's Republic of China, both within the WTO and under U.S. origin marking practice.

19. To both parties: For purposes of demonstrating, under Article I:1 of the GATT 1994, that an advantage is not being accorded to it immediately and unconditionally, does Hong Kong, China need to show that the name "China" on the origin mark applied to goods produced in Hong Kong, China is contrary to WTO rules?

68. No. Hong Kong, China explained in response to Panel question No. 13 above that a finding of detrimental impact under Article 2.1 of the TBT Agreement does not depend on whether requiring goods imported from Hong Kong, China to be marked as goods of "China" is contrary to WTO rules. The same is true in relation to Hong Kong, China's claim under Article I:1 of the GATT 1994.

69. Section 304 of the Tariff Act of 1930 requires goods imported into the territory of the United States to be "marked … in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."[56] For the purpose of

[55] See Panel Report, *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 7.3009.

[56] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a) [redacted].

this marking requirement, the "country of origin" of an article is "the country of manufacture, production, or growth of any article of foreign origin entering the United States," or the country in which "work or material added to an article … effect[ed] a substantial transformation" of that article.[57] An article imported into the United States must be marked with "the full English name of the country of origin", so determined. [58]

70. It is an "advantage" within the meaning of Article I:1 of the GATT 1994 for Members and their enterprises to be able to mark a product with the name of its actual country of origin. The United States has not extended this advantage "immediately and unconditionally" to like products originating in the customs territory of Hong Kong, China, based on the United States' view that Hong Kong, China lacks "sufficient autonomy" from the People's Republic of China. The "sufficient autonomy" condition is a condition relating to the country of origin of products that the United States has invoked as the basis for denying goods of Hong Kong, China origin the same advantages in respect of origin marking requirements that the United States extends to like products originating in other Members (and non-Members). For these reasons, the measures at issue are inconsistent with Article I:1 of the GATT 1994, regardless of whether applying the "China" origin mark to goods produced in Hong Kong, China is itself inconsistent with WTO rules.

3 APPLICABILITY OF ARTICLE XXI(B) TO THE CLAIMS UNDER THE ANNEX 1A AGREEMENTS AT ISSUE IN THIS DISPUTE

20. To both parties: What is the subject of, and what are the specific steps in, the interpretive exercise that the Panel needs to undertake to decide whether Article XXI(b) applies to the claims under the ARO and the TBT Agreement at issue in this dispute?

71. The subject of the Panel's inquiry in respect of this question is whether an affirmative defence available under one covered agreement, the GATT 1994, is available as a potential justification for measures that are inconsistent with two other covered agreements, the ARO and the TBT Agreement. In accordance with Article 3.2 of the Dispute Settlement Understanding ("DSU"), this is an issue of treaty interpretation that the Panel must resolve in accordance with customary rules of interpretation of public international law.

72. The Panel may properly begin its analysis of this issue with the ordinary meaning of Article XXI(b) of the GATT 1994, interpreted in its context and in the light of the object and purpose of that agreement. As Hong Kong, China explained in its opening statement, the ordinary meaning of Article XXI(b), including its reference to "this Agreement", establishes that Article XXI(b) on its face applies only in respect of violations of the GATT 1994 and not to violations of any other covered agreement.

73. Prior reports adopted by the DSB have, in accordance with customary principles of treaty interpretation, identified two circumstances in which a GATT exception may be found to apply to a different covered agreement notwithstanding the express language of those

[57] 19 C.F.R. § 134.1(b) [redacted].

[58] 19 C.F.R. § 134.45(a)(1) [redacted].

exceptions.[59] The Panel should confirm that neither one of these circumstances is present in the case of the ARO and the TBT Agreement.

74. The first circumstance is where the other covered agreement expressly incorporates the relevant GATT exception.[60] Neither the ARO nor the TBT Agreement incorporates the GATT exceptions generally or Article XXI(b) of the GATT 1994 in particular. This circumstance is therefore not present in this case.

75. The second circumstance is where an objective assessment of the relevant treaty provisions leads to the conclusion that language contained within the other agreement, while not amounting to direct incorporation, necessarily encompasses the availability of a GATT exception. Hong Kong, China discussed this issue at paragraphs 21 to 26 of its opening statement. As Hong Kong, China explained, the mere fact that an agreement contains references to or in some way elaborates upon provisions of the GATT 1994 is not a sufficient basis to conclude that the GATT exceptions apply to that agreement.[61] Rather, the responding Member seeking to invoke the exception must identify specific language in the other agreement that, by necessary implication, encompasses the right to invoke the relevant exception. The only two instances in which an adopted DSB report has identified such language both involved Protocols of Accession, where the language at issue referred to the acceding Member's right to act in conformity with its rights and obligations under the GATT 1994, which the DSB found to encompass the exceptions to that agreement.[62]

76. The United States has identified no language in either the ARO or the TBT Agreement that necessarily encompasses the availability of Article XXI(b) of the GATT 1994 as a defence to violations of that covered agreement. In point of fact, there is no such language in either the ARO or the TBT Agreement. The general references to the GATT 1994 that the United States has identified in the ARO and the TBT Agreement do not establish a specific, objective linkage to Article XXI(b) of the GATT 1994. The United States has therefore failed to demonstrate that the second circumstance is present.

77. Having followed these interpretive steps, the Panel must conclude that Article XXI(b) of the GATT 1994 is not available as a potential defence to violations of the ARO or the TBT Agreement.

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[59] See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233; Panel Report, *Russia – Traffic in Transit*, para. 7.235.

[60] See e.g. Appellate Body Report, *China – Rare Earths*, para. 5.56.

[61] See e.g. Appellate Body Report, *China – Rare Earths*, para. 5.53 ("As has been established in a number of disputes to date, 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, particularly when they are contained in different instruments that nevertheless relate to the same subject matter."); *Id.* at para. 5.56 (citing Appellate Body Report, *US – Clove Cigarettes*, paras. 96 and 101) (Article XX of the GATT 1994 not applicable to the TBT Agreement); Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.748 (Article XX of the GATT 1994 not applicable to the Customs Valuation Agreement).

[62] See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233; Panel Report, *Russia – Traffic in Transit*, para. 7.235.

21. To both parties: Should the Panel, in your view, in its analysis on the availability, or not, of Article XXI(b) to the claims at issue in this dispute follow the analytical approach applied by the Appellate Body, in for example China – Rare Earths (paragraphs 5.61-5.62 and 5.74), and by previous panels referred to by some third parties (European Union[63], Singapore[64] and Switzerland[65])? If not, do you consider this approach legally incorrect? In your response, please indicate whether there are any relevant differences between Article XX and Article XXI of the GATT 1994 for applying such an analytical approach, in determining the applicability of Article XXI of the GATT 1994 to non-GATT provisions.

78. The Appellate Body stated in *China – Rare Earths* that an examination of whether an exception provision existing in one covered agreement is available as a potential defence to violations of a different covered agreement "must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation".[66] Hong Kong, China agrees that the question of whether Article XXI(b) of the GATT 1994 is available as a potential defence to violations of the ARO and the TBT Agreement is necessarily a question of treaty interpretation to be resolved in accordance with customary rules of treaty interpretation of public international law.

79. Hong Kong, China considers that the analytical approach followed by the Appellate Body in *China – Rare Earths* is correct and should be followed by the Panel insofar as that analytical approach is based on customary rules of treaty interpretation. As the Appellate Body explained, this analytical approach must start with the text of the relevant provisions, taking into account their context, including the context provided by other covered agreements, and also taking into account "the overall architecture of the WTO system as a single package of rights and obligations", together with other relevant interpretative elements.[67] Within this analytical framework, the fact that a covered agreement refers to or elaborates upon another covered agreement is not a sufficient basis to conclude that the exceptions provisions of that other covered agreement apply.[68] Rather, it must be demonstrated that the covered agreement in question contains language that either expressly incorporates or necessarily encompasses the availability of the exception invoked under the other covered agreement.

80. Hong Kong, China does not perceive any difference in how this analytical approach would apply to an assessment of whether Article XX of the GATT 1994 is available as a potential defence under another covered agreement as compared to an assessment of whether Article XXI(b) of the GATT 1994 is available as a potential defence under another covered agreement. Both provisions are formulated as exceptions ("Nothing in this agreement shall be construed …") and serve the same function as potential justifications for actions or measures that are otherwise inconsistent with the obligations imposed by the GATT 1994.

[63] European Union's third-party submission, paras. 24 and 47 (referring to Exhibit EU-5, paras. 171-174).

[64] Singapore's third-party statement, para. 4.

[65] Switzerland's third-party submission, paras. 59-60.

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

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

[68] See e.g. Appellate Body Report, *China – Rare Earths*, paras. 5.61 and 5.63.

Nothing in the ordinary meaning, context, or object and purpose of these two provisions suggests that they have a different relationship to other WTO covered agreements.

22. To both parties: In paragraph 14 of its opening statement at the first substantive meeting, Hong Kong, China indicates that the analysis of the applicability of Article XXI of the GATT 1994 to the ARO and the TBT Agreement "begins, as it must, with the text of the agreement itself", and then turns to the text of Article XXI. Please comment on whether the text of Article XXI should be the starting point for this analysis, and if so, why.

81. Article 31(1) of the Vienna Convention of the Law of Treaties ("Vienna Convention") 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." While Article 31.1 does not establish any hierarchical relationship among its three interpretative elements (ordinary meaning, context, object and purpose), the interpretative analysis logically begins with the ordinary meaning of the terms of the treaty to be interpreted as these are the terms that must be interpreted in their context and in the light of the object and purpose of the agreement.[69]

82. In this particular case, Hong Kong, China considers that the Panel's interpretative analysis could begin with the text of either the ARO and the TBT Agreement (the two non-GATT agreements to which the United States claims that Article XXI(b) of the GATT 1994 applies) or with the text of Article XXI(b) of the GATT 1994 (the exception provision that the United States claims is applicable to the ARO and the TBT Agreement). Given that the interpretative question is whether an exception available under one agreement is available as a potential defence under two other agreements, the interpretative analysis necessarily involves the text of all three agreements.

83. Hong Kong, China began with the text of Article XXI(b) in its opening statement because it is apparent from the text of Article XXI(b) that, by its terms, the exception is available only as a defence to violations of the GATT 1994 and not to violations of any other agreement. One could just as readily begin the interpretative analysis with the observation that neither the ARO nor the TBT Agreement repeats or otherwise incorporates the exception available under Article XXI(b) of the GATT 1994. The interpretative result is the same either way.

23. [To the United States]

24. [To the United States]

25. [To the United States]

[69] See e.g. Appellate Body Report, *China – Rare Earths*, para. 5.62 ("The analysis must start with the text of the relevant provision …").

26. To both parties: Some third parties (Brazil[70], Norway[71], and Switzerland[72]) and Hong Kong, China have referred to the text "[n]othing in this agreement" in Article XXI as proof that Article XXI does not apply per se to agreements other than the GATT 1994 itself. What relevance should the Panel attribute to that text when determining the applicability of Article XXI to Hong Kong, China's claims under the ARO and the TBT Agreement?

84. It is not in dispute that the reference to "this Agreement" in Article XXI(b) is a reference to the GATT 1994 and not to any other covered agreement. This undisputed fact should be highly relevant to the Panel's interpretative analysis because it establishes, *a priori*, that the exception contained in Article XXI(b) does not apply to other covered agreements, including the ARO and the TBT Agreement. The United States must therefore demonstrate that, notwithstanding this fact, an exception that by its terms applies only to violations of the GATT 1994 is available as a potential justification for violations of other covered agreements.

85. It is worth examining how panels have approached the same issue in relation to Article XX of the GATT 1994.

86. In *China – Publications and Audiovisuals*, the panel observed that "Article XX contains the phrase 'nothing in this Agreement', with the term 'Agreement' referring to the GATT 1994, not other agreements".[73]

87. In *China – Raw Materials*, the panel noted that:

> Article XX provides that "nothing in this Agreement should be construed to prevent the adoption or enforcement ... of [certain] measures...:" *A priori*, the reference to *this* "Agreement" suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements. On occasion, WTO Members have incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements. This was done, for example, with the TRIMs Agreement, which explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994. In the Panel's view, 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.[74]

88. Finally, in *Thailand – Cigarettes (Article 21.5 – Philippines)*, the panel stated that:

> The text of Article XX establishes that the provision applies to "this Agreement", i.e. to the GATT 1994. Insofar as another covered agreement specifically cross-references Article XX and incorporates these general exceptions by reference, the Article XX exceptions will apply to that other agreement. For example, Article 3 of the TRIMs Agreement explicitly provides that "[a]ll exceptions under GATT 1994 shall apply",

[70] Brazil's third-party submission, para. 24.

[71] Norway's third-party statement, para. 3.

[72] Switzerland's third-party submission, para. 56.

[73] Panel Report, *China – Publications and Audiovisuals*, para. 7.743 (emphasis added).

[74] Panel Report, *China – Raw Materials*, para. 7.153 (italics original; underlining added).

> which plainly includes Article XX of the GATT 1994. Similarly, Article 24.7 of the TFA, which entered into force on 22 February 2017, states that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement". These are clear examples of incorporation by reference.[75]

89. As these examples demonstrate, the fact that the exceptions available under the GATT 1994 apply to "this Agreement", i.e. to the GATT 1994, means that a responding Member asserting their applicability to another covered agreement must find some other basis to establish their applicability to that agreement. The most obvious basis is where the relevant exception is incorporated by reference into the other covered agreement, in which case it is the incorporation, not the GATT exception itself, that provides the legal basis for the claimed justification. The only other basis that adopted DSB reports have identified is where the other covered agreement contains language that, while not amounting to incorporation by reference, nevertheless encompasses the availability of the relevant GATT exception by necessary implication of its terms.[76] There are only two cases in which an adopted DSB report has identified such language, both involving protocols of accession and not other Annex 1A agreements. Hong Kong, China discussed these two cases in its opening statement.[77] No such language exists in either the ARO or the TBT Agreement, which is why the United States has failed to identify any.

27. To both parties: In its first written submission, the United States argues that "[j]ust as the origin marking requirement is subject to an exception to the claims under Articles I:1 and IX:1 of the GATT 1994, so too the [requirement] is subject to an exception to the same substantive claims under the" ARO (paragraph 295), and "under the TBT Agreement" (paragraph 320). Please comment on where this consideration would be relevant in the interpretive analysis on the applicability of Article XXI to the claims at issue in this dispute.

90. These statements by the United States are nothing more than a reflection of its misguided belief that the exceptions available under the GATT 1994, including Article XXI(b), must apply to the other Annex 1A agreements merely because all of these agreements relate in some way to trade in goods. For the reasons that Hong Kong, China explained in its opening statement, the U.S. position is incorrect.[78] Most fundamentally, the U.S. position fails to give effect to the express limitation of Article XXI(b) to claims under "this Agreement", i.e. to claims under the GATT 1994, and to the clear decisions by the drafters of the Annex 1A agreements to incorporate one or both of the GATT exceptions into certain of those agreements but not others.

91. Underlying the U.S. position is its apparent belief that Hong Kong, China's claims under the ARO and the TBT Agreement are literally "*the same"* as its claims under the GATT 1994.[79] From this premise, the United States reasons that it is only "logical" to

[75] Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.743 (emphasis added).

[76] See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233; Panel Report, *Russia – Traffic in Transit*, para. 7.235.

[77] See Hong Kong, China's opening statement at the first meeting of the Panel, para. 24.

[78] See Hong Kong, China's opening statement at the first meeting of the Panel, paras. 14-20.

[79] United States' first written submission, paras. 294 and 319 (emphasis added).

conclude that an exception available under the GATT 1994 should be available for "the same" violation under a different Annex 1A agreement.

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

93. Hong Kong, China's claims under the ARO are not and cannot be "the same" as its claims under the GATT 1994 because the GATT 1994 has no disciplines relating to the determination of country of origin. In fact, the ARO was necessary precisely because the GATT 1947 contained no such disciplines. Hong Kong, China's claims under the ARO concern the rules of origin that the United States uses in the application of its origin marking requirement. Article 2(c) of the ARO imposes a substantive requirement – that rules of origin may not require the fulfilment of a condition unrelated to manufacturing or processing – that has no relationship to any obligation found in the GATT 1994. While Article 2(d) of the ARO imposes an MFN-type non-discrimination rule similar to the non-discrimination obligations found in Articles I:1 and IX:1 of the GATT 1994, Article 2(d) of the ARO relates exclusively to rules of origin, a topic that the GATT 1994 does not specifically address.

94. Hong Kong, China's claim under Article 2.1 of the TBT Agreement is likewise not "the same" as Hong Kong, China's claims under the GATT 1994. Article 2.1 of the TBT Agreement applies exclusively to technical regulations, a topic that the GATT 1994 does not specifically address. Adopted DSB reports have already concluded that Article XX of the GATT 1994 does not apply to claims under the TBT Agreement, even though Article 2.1 of the TBT Agreement contains non-discrimination obligations similar to those contained in Articles I:1 and III:4 of the GATT 1994.[80] The same conclusion would apply in respect of Article XXI of the GATT 1994. It is simply immaterial that that the two covered agreements contain obligations that have the potential to overlap in particular cases – it does not follow from this fact that the exceptions available under one agreement are available under the other. Among other considerations, the TBT Agreement strikes a different balance between rights and obligations than the GATT 1994, and that different balance must be given effect.

95. In sum, the United States' argument is not relevant *at all* to the Panel's interpretative analysis because the United States' argument is unfounded. It does not follow from the fact that violations of Articles I:1 and IX:1 of the GATT 1994 are potentially justifiable under Article XXI of the GATT 1994 that violations of the ARO and the TBT Agreement are also potentially justifiable under that exception.

[80] See e.g. Appellate Body Report, *US – Clove Cigarettes*, para. 101; Appellate Body Report, *China – Rare Earths*, para. 5.56 ("Article XX has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade").

28. To both parties: At paragraph 275 of its first written submission, the United States argues that the interpretation that Article XXI of the GATT 1994 applies throughout Annex 1A is fully consistent with the general interpretative note to Annex 1A, noting that none of the Annex 1A Agreements contains a provision stating that Article XXI is inapplicable to the obligations under those agreements. In this regard, what meaning, if any, should be attributed to silence in a particular agreement as to whether an exception from another agreement applies? Can it be inferred from such silence that the application of such an exception is permitted or prohibited?

96. The General Interpretative Note to Annex 1A provides that:

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

97. As discussed in response to Panel question No. 29 below, there is no conflict arising from the fact that Article XXI(b) is available as a potential justification for violations of the GATT 1994 but not for violations of other Annex 1A agreements. Hong Kong, China therefore does not understand the relevance of the General Interpretative Note to the United States' contention that Article XXI(b) applies to all of the Annex 1A agreements.

98. As for the United States' observation that "none of the new trade-in-goods agreements contains a provision stating that the GATT 1994 Article XXI exception is inapplicable to the obligations under those agreements"[81], the United States has its reasoning reversed. By its express terms, Article XXI of the GATT 1994 applies only to claims under the GATT 1994 ("Nothing in *this Agreement …*"). The question, then, is whether there is any interpretative basis for the conclusion that Article XXI of the GATT 1994 *applies* to other Annex 1A agreements *notwithstanding* the express limitation of that exception to the GATT 1994.

99. That this is the pertinent interpretative question is demonstrated by the fact that certain of the Annex 1A agreements incorporate one or both of the GATT exceptions, while others do not. As Hong Kong, China detailed in its opening statement, three of the Annex 1A agreements – the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), the Agreement on Import Licensing Procedures, and the Agreement on Trade Facilitation ("TFA")– expressly incorporate Article XXI of the GATT 1994. The other Annex 1A agreements do not. In this context, the *silence* of an Annex 1A agreement regarding the applicability of Article XXI to violations of that agreement strongly reinforces the inference that this exception is *not* available under that agreement. The drafters of the Annex 1A agreements knew how to incorporate Article XXI into another agreement when that was their intention, and the silence of an agreement on the applicability of Article XXI therefore supports the conclusion that this was *not* their intention in respect of that agreement.

29. To both parties: Would the supposed unavailability of an exception in respect of the claims under the ARO or the TBT Agreement, which is available to Hong Kong,

[81] United States' first written submission, para. 275.

China's claims under the GATT 1994, result in a conflict subject to the General Interpretative Note to Annex 1A?

100. There is no "conflict" arising from the fact that Article XXI applies to the GATT 1994 but not to the ARO or the TBT Agreement. A conflict is generally understood to refer to "a situation where adherence to one provision will lead to a violation of the other provision".[82] That situation is not present where violations of one agreement are potentially justifiable under an exception while violations of another agreement are not. In any event, even if there were a "conflict" arising from the unavailability of Article XXI as a defence to violations of the ARO and the TBT Agreement, the General Interpretative Note to Annex 1A would require the ARO and the TBT Agreement (where the Article XXI exception is not available) to prevail over the GATT 1994 (where the Article XXI exception is available).

30. To Hong Kong, China: Hong Kong, China and some third parties (Brazil[83], the European Union[84], Norway[85], Singapore[86] and Switzerland[87]) have noted that, while some Annex 1A Agreements specify that the GATT 1994 exceptions apply to their provisions, the ARO and the TBT Agreement do not contain such specifications. The United States, however, submits that its interpretation of the applicability of Article XXI does not deprive these explicit references of their effectiveness. The United States argues that "an article providing explicitly for incorporation is not 'ineffective' as a legal matter simply because it is not uniquely effective." (opening statement at the first substantive meeting, paragraphs 57 and 58) Please comment.

101. The United States is mistaken in its understanding of the principle of effectiveness. The Appellate Body has observed that:

> One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[88]

102. As Hong Kong, China explained in its opening statement, one of the fundamental problems with the United States' contention that Article XXI of the GATT 1994 applies to *all* of the Annex 1A agreements is that this contention fails to give effect to the three specific instances in which the Annex 1A agreements expressly incorporate Article XXI of the GATT 1994. If the United States were correct in its assertion that Article XXI of the GATT 1994 applies to all of the Annex 1A agreements, the incorporation provisions contained in those three agreements would be deprived of effect.

[82] Appellate Body Report, *Guatemala – Cement I*, para. 65.

[83] Brazil's third-party submission, paras. 25-26.

[84] Exhibit EU-5, para. 172.

[85] Norway's third-party statement, para. 4.

[86] Singapore's third-party statement, paras. 6-7.

[87] Switzerland's third-party submission, para. 58.

[88] Appellate Body Report, *US – Gasoline*, p. 23. The United States cites this understanding of the principle of effectiveness, with approval, at footnote 36 of its first written submission.

103. The application of the principle of effectiveness in this case must take into account two critical elements of context. The first is that Article XXI of the GATT 1994, by its terms, applies only to claims arising under the GATT 1994 ("Nothing in this Agreement …"). The second element of context is that certain of the Annex 1A agreements incorporate Article XXI of the GATT 1994 by reference, while others do not. Interpreted in this context, the only way that the incorporation provisions contained in the TRIMs Agreement, the Agreement on Import Licensing Procedures, and the TFA can have legal effect is if they are interpreted to make available an exception to violations of those agreements that otherwise would not be available, i.e. if these incorporation provisions are interpreted as *overcoming* the express limitation of Article XXI to violations of the GATT 1994 by *extending* the availability of the exception to the incorporating agreement.

104. The United States attempts to get around this problem with its interpretation by claiming that the principle of effectiveness does not require an incorporation provision like those contained in the three Annex 1A agreements to be "*uniquely* effective", by which the United States evidently means that it is not inconsistent with the principle of effectiveness for an incorporation provision in an Annex 1A agreement merely to restate an exception that would have applied to that agreement in any event, or, put differently, to reiterate a conclusion that would have followed from principles of treaty interpretation even in the *absence* of the incorporation provision.

105. The problem with the U.S. response is that it assumes the conclusion of the interpretative analysis. The United States begins from the premise that Article XXI of the GATT 1994 applies to all of the Annex 1A agreements and then interprets the three instances of express incorporation as merely helpful reminders of what would have been true even without the express incorporation. But the interpretative exercise at hand is precisely to determine whether Article XXI of the GATT 1994 *does* apply to the other Annex 1A agreements – that conclusion cannot be assumed. Properly evaluated as a question of whether Article XXI applies to all of the Annex 1A agreements – the interpretative question at hand – the three instances of express incorporation can only have effect if they are interpreted as incorporating an exception from another agreement that would *not* otherwise apply. In a context in which the exception in question by its terms applies only to the agreement in which it is found, and 10 of the 13 other covered agreements do *not* incorporate that exception, the three instances in which the exception *is* incorporated can only have *effet utile* if they are interpreted as making the exception available when that would not otherwise be the case.

106. In addition, the three instances of express incorporation would be redundant under the U.S. interpretation if they did nothing more than restate a right that would have existed *without* the express incorporation. The United States tries to avoid this problem by analogizing its interpretation to cases in which the covered agreements impose overlapping obligations, such as cases in which an Annex 1A agreement requires a Member to publish certain types of measures that the Member is also required to publish under Article X:1 of the GATT 1994. From these examples, the United States reasons that a provision is not redundant if it restates a right or obligation found in another agreement.

107. The examples cited by the United States are inapposite to the interpretative issue before the Panel. It is certainly the case that, in some instances, the Annex 1A agreements impose obligations that overlap in terms of subject matter. These obligations are not

redundant or ineffective because, for example, a measure can be inconsistent with more than one covered agreement simultaneously (a circumstance that occurs quite frequently in dispute settlement). Moreover, these are circumstances in which drafters of the relevant covered agreements have chosen, for whatever reason, to impose obligations that overlap *expressly*. In this case, however, the United States is reading an exception into all of the Annex 1A agreements that *cannot be found* in most of those covered agreements, and then interpreting the three instances of *express* incorporation as merely confirming the existence of this silent exception. This *is* a redundant interpretation because the three instances of express incorporation would do nothing more than repeat a right that, according to the United States, the treaty interpreter would need to read into that agreement anyway.

108. In sum, the U.S. interpretation of Article XXI of the GATT 1994 as applying to all of the Annex 1A agreements fails to give meaning and effect to the three instances in those covered agreements in which the Article XXI exception is incorporated expressly, rendering those incorporation provisions both redundant and *inutile*.

31. To both parties: Could you direct the Panel to relevant documents from the Uruguay Round negotiations that would support your view on the meaning of the inclusion or exclusion of a provision in an Annex 1A Agreement specifying that the GATT 1994 exceptions apply to its provisions?

109. For the purpose of answering this question, Hong Kong, China has reviewed the available negotiating history of the TRIMs Agreement and the Agreement on Import Licensing Procedures, the two Uruguay Round agreements that incorporate the exception available under Article XXI of the GATT 1994.

110. There are only a limited number of references to the GATT exceptions in the negotiating record of these two agreements. In neither case does the negotiating record clearly establish why the drafters chose to incorporate one or both of the GATT exceptions.

111. In the case of the TRIMs Agreement, it appears likely that the inclusion of Article 3 in the final draft of the agreement reflects a compromise between those parties that wanted a total prohibition on trade-related investment measures (or at least a total prohibition on enumerated types of TRIMs) and those parties that wanted any prohibition on TRIMs to be subject to evidence of adverse trade effects, i.e. a prohibition subject to an "effects test". The "prohibition" vs. "effects test" issue was one of the central issues in the negotiation of the TRIMs Agreement. Advocates of the "effects test" approach believed that some TRIMs have legitimate public policy objectives, such as the protection of the environment, and that an outright prohibition on TRIMs would therefore be inappropriate. The apparent compromise was that TRIMs would be prohibited under Article 2 of the final text, but that the exceptions available under the GATT would be incorporated into the TRIMs Agreement so that Members could seek justification for TRIMs that meet the requirements of those exceptions.

112. For purposes of the present dispute, what matters is that the negotiators of the TRIMs Agreement understood that, in the absence of incorporation, the GATT exceptions *would not apply*. Consider the following statement by the U.S. delegate:

> Some exceptions would be needed to the disciplines established in a TRIMs agreement, but his delegation *had not yet decided which ones would be appropriate and it looked forward to hearing proposals from others on this*. Exceptions for national security and

> for health and morality reasons would be perfectly acceptable, and exceptions for government procurement were well accepted in the GATT system where, for example, a local content requirement was used to define products that were eligible for preferences.[89]

The U.S. delegate clearly understood that the exceptions available under the GATT would not apply automatically to the new TRIMs Agreement (the position advocated by the United States in the present dispute), but rather that it was a question of "which ones would be appropriate". The U.S. delegate further understood that some affirmative action by the drafters of the TRIMs Agreement would be required to establish exceptions to the agreement's disciplines (which is why the delegate "looked forward to hearing proposals from others on this").

113. There is even less indication of the reasons for the incorporation of Article XXI of the GATT 1994 into the Agreement on Import Licensing Procedures. Article 1.10 of the Tokyo Round Agreement on Import Licensing Procedures already incorporated Article XXI, and that language was carried over unchanged into Article 1.10 of the Uruguay Round Agreement on Import Licensing Procedures. It seems possible that Article XXI was incorporated into the Agreement on Import Licensing Procedures because import licensing may be used in some cases to administer import restrictions relating to national security concerns.[90] In that context, Article XXI would be available, for example, as a potential justification for import licensing procedures that discriminate based on the source of the import.

114. There is no indication in the negotiating record of either agreement that any party considered that the GATT exceptions would apply automatically merely because the two agreements relate to trade in goods (i.e. the position advocated by the United States in the present dispute). On the contrary, as discussed above in relation to the TRIMs Agreement, the drafters understood that the GATT exceptions would *not* apply in the absence of express incorporation. The negotiating record therefore confirms that Article XXI of the GATT 1994 is not available as a potential defence to violations of other Annex 1A agreements unless that exception is incorporated into the relevant agreement.

32. [To the United States]

33. To both parties: In paragraph 29 of its opening statement at the first substantive meeting, Hong Kong, China argues that "[i]f 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". Please comment on

[89] Negotiating Group on Trade-Related Investment Measures, Meeting of 29-30 January 1990, Note by the Secretariat (MTN.GNG/NG12/15) (19 February 1990), para. 56 (emphasis added).

[90] This is suggested by Multilateral Trade Negotiations Group "Non-Tariff Measures", Quantitative Restrictions and Import Licensing Procedures, Note by the Secretariat (3 April 1975) (MTN/NTM/W/2) at Annex I, para. 1 (defining "automatic import licensing" as "licensing which is not used to administer import restrictions such as those employed pursuant to the relevant provisions of inter alia Articles XI, XII, XVII, XVIII, XIX, XX and XXI of the General Agreement"); Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Quantitative Restrictions", Licensing Procedures (22 May 1975) (MTN/NTM/W/11), para. 2 ("No automatic licensing shall be required for the importation of goods … except in special cases where this system is appropriate or justified by particular circumstances for sanitary or security reasons").

where in the interpretive analysis on the applicability of Article XXI to the claims at issue in this dispute this consideration would be relevant.

115. Hong Kong, China considers that its observation at paragraph 29 of its opening statement is pertinent to both context and object and purpose.

116. It is pertinent to context because Article XXI of the GATT 1994, by its terms, applies only to claims arising under that agreement. If the drafters of the ARO had considered that policy considerations of the types enumerated in Article XXI of the GATT 1994 may permissibly enter into a country of origin determination, they would have incorporated Article XXI of the GATT 1994 by reference, as the drafters of the TRIMs Agreement and the Agreement on Import Licensing Procedures chose to do (and, later, the drafters of the TFA). As context, this confirms that the reference to "this Agreement" in Article XXI of the GATT 1994 refers exclusively to the GATT 1994 and does not include the ARO (or, for that matter, the TBT Agreement).

117. Hong Kong, China's observation is pertinent to object and purpose because the fact that the ARO does not incorporate either or both of the GATT exceptions helps to reveal the objectives of the ARO. 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". Articles 2(c) and 3(b) of the ARO demonstrate that the "clear and predictable rules of origin" established by the agreement are ones that are based exclusively on where a good was *made*, i.e. where it was manufactured or processed (or, in the language of Article 3(b), where the good was wholly obtained or last substantially transformed). It is consistent with the object and purpose of the agreement that the application of these rules is unaffected by considerations of the types enumerated in Articles XX and XXI of the GATT 1994. After all, a good is made where it was made – that is an objective, predictable, neutral, impartial, and demonstrable fact. Reading policy considerations into the ARO that bear no relationship to where a good was made, as the United States seeks to do, would not be consistent with the object and purpose of the ARO.

34. [To the United States]

35. To Hong Kong, China: In paragraphs 288, 308 and 309 of its first written submission, the United States considers that the references to Articles XXII and XXIII of the GATT 1994 and to the DSU in Articles 7 and 8 of the ARO and Article 14 of the TBT Agreement, respectively, support its view that Article XXI of the GATT 1994 would be applicable to the ARO and the TBT Agreement. Please comment on this argument.

118. The U.S. argument is a non-sequitur. Article 8 of the ARO and Article 14 of the TBT Agreement establish nothing more than that claims under these two agreements are subject to the consultation and dispute settlement provisions of Articles XXII and XXIII of the GATT 1994, as elaborated in the DSU. It simply does not follow that Article XXI of the GATT 1994, which by its terms applies only to claims arising under that agreement, is applicable to claims arising under the ARO and TBT Agreement. The fact that claims under all three agreements are subject to dispute settlement under the same rules does not mean that the exceptions provisions of the GATT 1994 apply to the other two agreements.

36. To both parties: Please elaborate on how with respect to the TBT Agreement, the reference to "essential security interest(s)" in the seventh recital of the preamble and Article 10.8.3, the references to "national security requirements" in Articles 2.2 and 5.4 and the references to "national security" in Articles 2.10 and 5.7 inform the assessment of the applicability of Article XXI(b) of the GATT 1994 to that agreement. In your response, please elaborate on any differences between these concepts and the relevance of such differences, if any, for the assessment of the applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement.

119. Broadly speaking, and as Hong Kong, China explained in its opening statement, the references to "essential security interest(s)" and "national security requirements" throughout the TBT Agreement make clear that the Members considered these issues carefully in drafting the agreement and expressly elected not to incorporate Article XXI(b) of the GATT 1994 into the agreement. Hong Kong, China does not believe that any difference that may exist between a Member's "essential security interest(s)" and its "national security requirements" is 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 TBT Agreement, but did not elect to incorporate Article XXI(b) of the GATT 1994.

37. To Hong Kong, China: Please comment on the relevance of the Tokyo Round negotiating documents referred to in paragraphs 312 to 315 of the United States' first written submission in assessing the applicability of Article XXI(b) to the TBT Agreement.

120. In Hong Kong, China's view, there is no need for the Panel to have recourse to the Tokyo Round negotiating documents when assessing the applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement, because the analysis under Article 31 of the Vienna Convention leads inexorably to the conclusion that Article XXI(b) does not apply to the TBT Agreement, and this interpretation is neither absurd nor unreasonable.

121. In any event, the negotiating documents do not support the U.S. argument that Article XXI(b) of the GATT 1994 is applicable to the TBT Agreement. The fact that a draft of the Standards Code noted that the preamble of that agreement should "[r]efer to Articles XX and XXI of the General Agreement" does not change the fact that Article XXI(b) was not incorporated as an operative provision in the TBT Agreement, or the fact that the language in the preamble that was ultimately included differs from the language in Article XXI(b) in certain important respects. Hong Kong, China addresses both of these points in greater detail in response to Panel questions Nos. 40 and 41 below.

38. To both parties: Please comment on the relevance of the Tokyo Round Agreement on Technical Barriers to Trade being open to accession by non-GATT contracting parties in assessing whether Article XXI(b) of the GATT 1994 applies to the TBT Agreement.

122. The fact that the Tokyo Round Agreement on Technical Barriers to Trade was open to accession by non-GATT contracting parties supports the conclusion that Article XXI(b) of the GATT 1994 does not apply to the TBT Agreement. Given that the Tokyo Round Agreement on Technical Barriers to Trade was open to accession by non-GATT contracting parties, the drafters of the Tokyo Round Agreement on Technical Barriers to Trade would

have needed to expressly incorporate the language in Article XXI(b) into the agreement if they wanted the exception to be applicable. This is precisely what they did in relation to the language in Article XXI(a), which is reflected in Article 10.5.3 of the Tokyo Round Agreement on Technical Barriers to Trade. The same choice was not made in relation to Article XXI(b), and no general exception for measures necessary for the protection of essential security interests was included in the agreement.

123. The TBT Agreement reflects the same "essential security interest" provisions that were contained in the Tokyo Round Agreement on Technical Barriers to Trade. Accordingly, given that it would have been nonsensical to silently read GATT exceptions into the Tokyo Round Agreement on Technical Barriers to Trade, which was open to accession by non-GATT contracting parties, it likewise makes no sense to do so in relation to the TBT Agreement, which reflects the same "essential security interest" provisions.

39. To both parties: Please clarify what is the meaning of the phrase added at the end of the sixth recital of the TBT Agreement during the Uruguay Round (i.e. "and are otherwise in accordance with the provisions of this Agreement"), and whether the absence of any such language in the seventh recital has any bearing on determining the applicability of Article XXI(b) to the TBT Agreement?

124. The sixth recital of the TBT Agreement states that Members should be able to pursue the objectives listed therein, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the TBT Agreement. The absence of similar language in the seventh recital has no bearing on the applicability of Article XXI(b) to the TBT Agreement.

125. The United States argues that the language in the seventh recital demonstrates that "measures taken to protect a Member's essential security interests are not subject to additional requirements or scrutiny".[91] But as Hong Kong, China has previously explained, the multiple references to national or essential security considerations contained within the TBT Agreement prove the opposite. The most obvious example is Article 2.2, which 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.

40. To both parties: Please comment on the argument by the European Union in paragraph 50 of its third-party submission regarding the difference between an operative article of an agreement and a recital of the preamble. What is the relevance, if any, of this argument for the question of applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement?

126. As Hong Kong, China noted in response to Panel question No. 14 above, it agrees with the European Union that the difference between recital language and the operative

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

provisions of an agreement must be recognized.[92] The recital language can enlighten as to the object and purpose of an agreement, but it is not part of the rights and obligations stipulated therein.[93] The seventh recital of the TBT Agreement is therefore not itself a general exception that can be invoked in defence of violations of the operative provisions, and the language in the seventh recital lends no support to the argument that Article XXI(b) is applicable to the TBT Agreement. To the contrary, the existence of the seventh recital demonstrates that the drafters had expressly considered the relevance to the TBT Agreement of measures necessary for the protection of a Member's essential security interests, but chose *not* to incorporate Article XXI(b) of the GATT 1994 into the TBT Agreement.

41. To both parties: Please comment on the argument by the European Union in paragraph 51 of its third-party submission regarding the textual differences between Article XXI and the seventh recital of the TBT Agreement. What is the relevance, if any, of this argument for the question of applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement?

127. As Hong Kong, China has explained in response to Panel question No. 40 above, the existence of the seventh recital demonstrates that the drafters had expressly considered the relevance of measures necessary for the protection of a Member's essential security interests, and chose not to incorporate Article XXI(b) of the GATT 1994 into the TBT Agreement. The fact that there are textual differences between Article XXI and the seventh recital further bolsters the argument that the drafters did not intend to incorporate Article XXI(b) into the TBT Agreement through the seventh recital. Rather, 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. The preambular language reflects the fact that the TBT Agreement itself embodies the balance that the Members struck regarding the interplay between technical regulations and national security considerations. This balance does not include the general exception in Article XXI(b) of the GATT 1994.

42. To both parties: Please comment on the relevance of the practice of Members to notify to the TBT Committee certain measures as taken for "national security", as well as raising Specific Trade Concerns on this type of measures, in determining the applicability of Article XXI(b) to the TBT Agreement.[94]

128. The practice of Members to notify to the TBT Committee certain measures as taken for "national security" supports the view that Article XXI(b) does not apply to the TBT Agreement. The fact that a measure is taken for "national security" purposes does not, as the United States contends, exempt such measures from additional requirements or scrutiny.

[92] See European Union's third-party submission, para. 50.

[93] See, e.g. Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines)*, para. 7.749 (citing GATT Panel Report, *US – Norwegian Salmon AD*, para. 369 and fn 463).

[94] See "The WTO Agreement Series: Technical Barriers to Trade" (third edition), https://www.wto.org/english/res e/booksp e/tbt3rd e.pdf, pp. 161-164.

43. To both parties: Article XXI of the GATT 1994 covers three distinct situations described in each of its paragraphs (a), (b), and (c). Please comment on whether there are any relevant distinctions to be made when considering the applicability of each of these situations to Annex 1A specific agreements (e.g. incorporation of language similar to Article XXI(a) in Article 10.8.3 in the TBT Agreement).

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

4 NATURE OF ARTICLE XXI(B) OF THE GATT 1994

44. To Hong Kong, China: In paragraph 7.63 of the panel report in *Russia – Traffic in Transit,* in the course of its analysis, the panel commented that the adjectival clause "which it considers" in Article XXI(b) could be read as applying to the provision in three ways: (i) to qualify only the word "necessary", "i.e. the necessity of the measures for the protection of "its essential security interests"; or (ii) to qualify also the determination of those "essential security interests"; or (iii) to qualify the entire introductory clause to Article XXI(b) and the determination of the matters described in the three subparagraphs of Article XXI(b).

a. Which of the three possible readings do you consider to be correct?

130. Before responding to subpart (a) of the Panel's question, Hong Kong, China would like to take this opportunity to set forth its interpretation of the ordinary meaning of Article XXI(b) of the GATT 1994. This interpretation will put in context not only Hong Kong, China's response to this question, but also its responses to the questions that follow, many of which relate to steps in the interpretative analysis required under Article 31 of the Vienna Convention subsequent to the interpretation of the ordinary meaning of the terms of Article XXI(b).[95]

131. For ease of reference, Hong Kong, China sets forth Article XXI(b):

> Nothing in this Agreement shall be construed
>
> > (*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

[95] As Hong Kong, China noted above, while Article 31(1) does not establish any hierarchical relationship among its three interpretative elements (ordinary meaning, context, and object and purpose), the interpretative analysis logically begins with the ordinary meaning of the terms of the treaty to be interpreted as these are the terms that must be interpreted in their context and in the light of the object and purpose of the agreement.

> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations[.]

132. The term "it" in the adjectival clause (which may also be referred to as a relative clause) "which it considers" refers to the Member taking action pursuant to Article XXI(b). The relative clause "which it considers" contemplates a unilateral determination by the invoking Member, subject to the obligation of good faith mentioned in paragraph 134 below.

133. The relative clause "which it considers" is preceded by the noun "action" and followed immediately by the phrase "necessary for the protection of its essential security interests". In light of placement of the language of "which it considers" *after* the noun "action" and before the phrase "necessary for the protection of its essential security interests", the correct reading of the *chapeau* is that subject to the obligation of good faith mentioned in paragraph 134 below, it is up to the invoking Member to determine whether an action is "necessary for the protection of its essential security interests".[96] That is, the relative clause "which it considers" introduces a qualification the type of "action" that may be taken, i.e. it must be considered necessary to protect the Member's essential security interests.

134. Pursuant to Article 26 of the Vienna Convention, which codifies the general principle of international law that treaties must be performed in good faith, the invoking Member must determine whether an action is "necessary for the protection of its essential security interests" in good faith.[97]

135. The parties disagree as to how the enumerated subparagraphs relate to the qualification provided in the adjectival clause "which it considers". The U.S. position, elaborated below, is that this qualification extends to the enumerated subparagraphs of Article XXI(b), rendering them "self-judging". Hong Kong, China's position is that it does not.

136. Hong Kong, China's interpretation of the ordinary meaning of the terms of Article XXI(b), including the manner in which the subparagraphs relate to the chapeau, can be depicted as follows:

> Nothing in this Agreement shall be construed … to prevent any contracting party from taking any **action** which it considers necessary for the protection of its essential security interests

[96] See also Hong Kong, China's opening statement at the first meeting of the Panel, para. 39.

[97] Vienna Convention, Article 26 (*Pacta sunt servanda*) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); Commentary on Draft Articles, [1966] *Yearbook of the ILC*, vol. II, p. 219, para. 5 (US-12) ("the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning.").

> (i) **relating** to fissionable materials or the materials from which they are derived;
>
> (ii) **relating** to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) **taken** in time of war or other emergency in international relations[.]

137. As the bolded text indicates, Hong Kong, China considers that all three subparagraphs can be understood to modify the noun "action". Each of the enumerated subparagraphs describes a type of GATT-inconsistent action for which a Member may seek justification.

138. As noted above, the term "action" is placed *before* the phrase "which it considers". Thus, the identification of the type or types of GATT-inconsistent action comes *before* the relative clause that commits to the invoking Member's judgment the determination of whether that action is *necessary* for the protection of its essential security interests. Accordingly, the existence of an action of the type described in the enumerated subparagraphs is not "self-judging" – it is for a Panel to decide on the basis of an objective review.

139. This interpretation is consistent with the principle of effective treaty interpretation. Pursuant to that principle, as Hong Kong, China explained above, a treaty interpreter may not "'adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'".[98] A proper interpretation of Article XXI(b) must therefore give meaning to all of the terms of that provision, including the enumerated subparagraphs.[99]

140. If the applicability of the subparagraphs to a particular GATT-inconsistent action for which justification is sought were committed to the invoking Member's discretion due to the adjectival clause "which it considers", the meaning and effect of Article XXI(b) *would be exactly the same as if the subparagraphs did not exist*.[100] Reading the adjectival clause "which it considers" as qualifying the determination of the matters described in the three subparagraphs of Article XXI(b) *in addition* to the language "necessary for the protection of its essential security interests" renders the subparagraphs inutile and therefore cannot be correct.

141. As Hong Kong, China explained in its opening statement, the U.S. interpretation of the ordinary meaning of Article XXI(b), in particular the U.S. understanding of how the subparagraphs of Article XXI(b) relate to the chapeau, leads to absurd results and is

[98] Appellate Body Report, *US – Gasoline*, p. 23. See also Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12; Panel Report, *US – Gambling*, para. 6.49 ("[t]he requirement that a treaty be interpreted in 'good faith' can be correlated with the principle of 'effective treaty interpretation', according to which all terms of a treaty must be given a meaning. We also note that 'the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable'".).

[99] See Appellate Body Report, *Korea – Dairy*, para. 82 (explaining that "*all of the provisions* of a treaty must be given meaning and legal effect", including individual clauses within a particular provision) (emphasis original).

[100] See Hong Kong, China's opening statement at the first meeting of the Panel, para. 37.

inconsistent with accepted principles of treaty interpretation, notably the principle of effectiveness.

142. In contrast to Hong Kong, China's interpretation, wherein each subparagraph modifies the noun "action", the U.S. interpretation of Article XXI(b) is as follows:

> Nothing in this Agreement shall be construed … to prevent any contracting party from taking any **action** which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) **taken** in time of war or other emergency in international relations[.]

143. That is, the United States believes that the first two subparagraphs of Article XXI(b) (the "relating to" subparagraphs) modify the term "interests" within the chapeau, whereas the third subparagraph ("taken in time of") relates to the term "action".[101]

144. The reason the United States adopts this interpretation is to bring at least subparagraphs (i) and (ii) within a "single relative clause" that begins "which it considers". It is the U.S. position that all of the elements of that single relative clause – including the determination of whether the invoking Member's security interests "relate to" the subject matter of the subparagraphs – are committed to the Member's own judgment and may not be reviewed to any extent by a WTO panel.[102] In this way, the United States attempts to extend the self-judging element of Article XXI(b) – "which it considers necessary for the protection of its essential security interests" to the subject matter applicability of its subparagraphs.

145. There are several fundamental issues with the U.S. interpretation. First, as the United States acknowledges, the third subparagraph modifies the term "action", not "interests". Consequently, the third subparagraph is *not* a part of the "single relative clause" that begins "which it considers". Rather, the third subparagraph forms a noun phrase with the word "action".[103] A noun phrase, or nominal, is a group of words that functions as a noun. Typically (and also in this particular case) a noun phrase begins with a noun ("action")

[101] United States' first written submission, paras. 43 and 45 ("subparagraphs (i) and (ii) modify the phrase 'essential security interests' and thus illustrate the types of 'essential security interests' that Members considered could lead to action under Article XXI(b)"; "the temporal circumstance in subparagraph (iii) modifies the word 'action,' rather than the phrase 'essential security interests.'").

[102] United States' first written submission, para. 34 ("The relative clause that follows the word 'action' describes the circumstances which the Member 'considers' to be present when it takes such an 'action.' The clause begins with 'which it considers it (sic) necessary' and ends at the end of each subparagraph ending. All of the elements in the text, including each subparagraph ending, are thus part of a single relative clause, and they are left to the determination of the Member.").

[103] Because the third subparagraph forms a noun phrase with the word "action", if Article XXI(b)(iii) were drafted as a stand-alone provision, it would read: "Nothing in this Agreement shall be construed to prevent any contracting party from taking any action in time of war or other emergency in international relations which it considers necessary for the protection of its essential security interests".

followed by additional words that modify the noun. As the noun phrase does not form part of the relative clause, following the United States' logic, it would not be self-judging.

146. The U.S. interpretation thus leads to a nonsensical result: the first two subparagraphs are "self-judging" under the U.S. interpretation, while the third subparagraph is not "self-judging" because it does not form part of the relative clause that begins "which it considers". Hong Kong, China sees no rational explanation for why Article XXI(b) would have been drafted so that the first two subparagraphs relate to the term "interests" while the third subparagraph relates to the term "action", such that the subject matter applicability of the first two subparagraphs is "self-judging" while the subject matter applicability of the third subparagraph is not.

147. Although both Hong Kong, China's and the United States' understandings are possible grammatically in the English text, the U.S. understanding of the English text is highly implausible. All three subparagraphs evidently serve the same function in relation to the chapeau. Given that all three subparagraphs can be understood to modify the term "action", the far more plausible reading of the English text is that all three subparagraphs were meant to modify "action". As Hong Kong, China elaborates in response to Panel question No. 54 below, the understanding that all three subparagraphs can be understood to modify the term "action" is consistent with the equally authentic French text of Article XXI(b) and is the only possible understanding of the equally authentic Spanish text.

148. On top of being grammatically implausible, the U.S. interpretation suffers from the fundamental flaw of rendering the subparagraphs ineffective. As Hong Kong, China explained in its responses to questions from the Panel at the first substantive meeting, the U.S. interpretation that the subparagraphs serve merely to "guide a Member's exercise of its rights" does not give meaning and effect to the text of Article XXI(b). If this interpretation were correct, the text would have no objective meaning among the parties that are bound by it, contravening the principle of *effet utile*. Hong Kong, China elaborates on this flaw in response to Panel question No. 46 below.

149. It is on the basis of this analysis of the ordinary meaning of Article XXI(b) that Hong Kong, China now responds to subpart (a) of the Panel's question. Of the possible readings articulated by the panel in *Russia – Traffic in Transit*, the correct reading is the second reading: the adjectival clause "which it considers" qualifies the word "necessary" and also to the identification of "essential security interests", but does not extend to the enumerated subparagraphs, which are objectively reviewable.

150. As the panel in the *Russia – Traffic in Transit* dispute correctly found, although the invoking Member retains the discretion to determine the necessity of the measure at issue and to define for itself what it considers to be its essential security interests,[104] this does not mean, that the invoking Member is free to label any interest an "essential security interest".[105] Nor

[104] Panel Report, *Russia – Traffic in Transit*, para. 7.131.

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

does it mean that the invoking Member is free to assert that any measure, however remote from the proffered essential security interest, is a measure protective of that interest.[106] These limitations reflect the fact that the entirety of the adjectival clause is subject to the overarching obligation of good faith. Thus, the legal effect of the phrase "which it considers" does not require complete and total deference to the respondent's assertion that an action is necessary for the protection of its essential security interests. Rather, the invoking Member's asserted essential security interests and the relationship between those interests and the measures at issue are subject to review by a panel for the limited purpose of evaluating whether the Member has acted in good faith.

151. Under this interpretation, the United States cannot prevail. The United States has failed to identify which subparagraph(s) of the Article XXI(b) is applicable to its measures, and it has failed to provide any explanation or production of evidence to substantiate its assertion that its measures are justified under Article XXI(b). The United States (1) has not attempted to make a *prima facie* case that one or more of the subparagraphs applies; (2) has not articulated its essential security interests so as to allow the Panel to assess whether the asserted interests rise to the level of essential security interests; and (3) has not submitted any argument or evidence of a plausible relationship between the measures at issue and any asserted essential security interests. In sum, the United States has not met and cannot meet its burden of proof under any part of Article XXI(b).

b. Does the qualification of a particular element of Article XXI(b) by the phrase "which it considers" make that element partially self-judging or entirely self-judging?

152. Hong Kong, China considers that as the chapeau is subject only to good faith review based upon the language "which it considers", the chapeau could be characterized as a "partially self-judging", however, Hong Kong, China does not think that it is necessary to use this terminology. To avoid confusion, Hong Kong, China suggests simply describing the function of the chapeau: it grants discretion to the invoking Member to determine whether an action of the types enumerated in the subparagraphs of Article XXI(b) is necessary for the protection of its essential security interests, subject to the obligation that it must make this determination in good faith.

45. [To the United States]

46. To both parties: Please elaborate on your views about the role of the subparagraphs in Article XXI(b) in light of the effectiveness principle as discussed in paragraphs 56 and 58 of the United States' opening statement.

153. Under an entirely self-judging interpretation of Article XXI(b), the subparagraphs of Article XXI(b) would not serve to constrain the circumstances in which a Member could take

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

action in protection of its essential security interests and would therefore be deprived of any meaning, in contravention of the principle of effective treaty interpretation. The fact that the subparagraphs would be deprived of meaning under an entirely self-judging interpretation is clear from the fact that under that interpretation, as Hong Kong, China explained in its opening statement, the meaning of Article XXI(b) would be exactly the same as if the subparagraphs did not exist.[107]

154. At paragraphs 55 and 56 of its opening statement, the United States acknowledges the Appellate Body's finding in *US – Gasoline* that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[108] The United States then argues that "redundancy cannot be equated with inutility or ineffectiveness" and that "Article 31[] does not require interpretation in way that affords 'maximum' effectiveness."[109]

155. As Hong Kong, China explained in its responses to questions from the Panel at the first substantive meeting, the U.S. arguments in this dispute indicate that it fundamentally misunderstands the principle of effectiveness. This principle does not permit Members to read legal obligations out of a treaty by reimagining them as mere suggestions. The United States would apply the principle of effectiveness in a manner that renders the subparagraphs wholly ineffective by depriving them of any objective meaning among the Members.

156. The principle of effectiveness stems from the requirement to interpret the terms of a treaty in good faith found in Article 31(1) of the Vienna Convention.[110] In its Commentary on the draft articles of what became the Vienna Convention, the International Law Commission ("ILC") stated in relation to the maxim *ut res magis valeat quam pereat* (otherwise referred to as the rule or principle of effectiveness, or *effet utile*) that this general rule of interpretation "requires that a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty and *in the light of its object and purpose*."[111] The ILC continued:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[112]

157. The United States appears to believe that under an entirely self-judging interpretation of Article XXI(b), the enumerated subparagraphs have "appropriate effects" because they "guide a Member's exercise of its rights" under that provision.[113] Hong Kong, China

[107] Hong Kong, China's opening statement at the first meeting of the Panel, para. 37.

[108] Appellate Body Report, *US – Gasoline*, p. 23.

[109] United States' opening statement at the first meeting of the Panel, para. 55.

[110] See, e.g. Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12 (recognizing that the principle of effectiveness is "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31" of the Vienna Convention).

[111] Commentary on Draft Articles, [1966] *Yearbook of the ILC*, vol. II, p. 219, para. 6 (US-12) (emphasis original).

[112] Commentary on Draft Articles, [1966] *Yearbook of the ILC*, vol. II, p. 219, para. 6 (US-12).

[113] United States' first written submission, para. 46.

disagrees. The result of an entirely self-judging interpretation of Article XXI(b) would be to permit Members to circumvent their treaty obligations under the GATT 1994 by disguising discriminatory measures as "essential security interests". Such a result cannot be reasonably construed as enabling the GATT 1994 to have "appropriate effects". Hong Kong, China elaborates further on the flaws in the U.S. interpretation of Article XXI(b) in response to Panel question No. 62 below, and explains that even if Article XXI(b) were open to two interpretations (*quod non)*, good faith would demand that Hong Kong, China's proposed interpretation be adopted.

158. Hong Kong, China is not aware of any jurisprudential authority for the proposition that language governing the exercise of a unilateral right may be interpreted as a mere suggestion consistent with the principle of effective treaty interpretation. If it remains entirely within the discretion of the invoking Member to determine whether one or more of the circumstances describe in the enumerated subparagraphs exist *and* whether an action is necessary for the protection of its essential security interests arising from that circumstance, the subparagraphs are not merely denied their "maximum" effectiveness, whatever the United States may mean by that term, they are rendered superfluous.[114] Such an interpretation is not consistent with the overarching obligation in Article 31(1) to interpret the terms of a treaty in good faith, which underlies the principle of effectiveness.

159. The United States expresses concern that the effectiveness principle may be used to give meaning to "technically redundant provisions". Whether or not such provisions may exist, Hong Kong, China considers it implausible that "for reasons of convenience, emphasis, clarity, or simple inadvertence", the drafters negotiated the inclusion of three, very precisely worded subparagraphs in Article XXI(b). This view is directly contradicted by the negotiating history cited by the United States in its first written submission as well as the history of the preparation of the equally authentic English, French and Spanish texts of the GATT 1994, as Hong Kong, China elaborates below.[115]

47. To both parties: In light of the principle of *effet utile*, is it possible for a provision of the WTO covered agreements to remain effective if it is not subject to review by a dispute settlement panel?

160. No, it is not possible for a provision of the WTO covered agreements to remain effective if it is not subject to review by a dispute settlement panel as a non-reviewable provision would have no objective meaning among the Members. In the WTO context, the Members have explicitly agreed that WTO panels and the Appellate Body may determine the

[114] Hong Kong, China notes the ILC's comment that "[p]roperly limited and applied, the maxim [of effectiveness] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty." Commentary on Draft Articles, [1966] *Yearbook of the ILC*, vol. II, p. 219, para 6 (US-12). Attributing objective meaning to the subparagraphs of Article XXI(b) is precisely what a "properly limited" application of the principle of effectiveness entails. There is nothing "extensive", "liberal", or "maximalist" in ensuring that all of the terms expressly stated in Article XXI(b) have meaning. It is the United States that is ignoring the limitations on the principle of effectiveness by suggesting that this principle permits it to interpret Article XXI(b) in a manner that deprives all elements aside from "which it considers" of meaning. Against the express guidance of the ILC, the United States is using the principle of effectiveness as the basis to "adopt an interpretation which r[uns] counter to the clear meaning of the terms" of the treaty. Ibid.

[115] United States' opening statement at the first meeting of the Panel, para. 56.

objective meaning of the provisions of the WTO covered agreements in accordance with the rules of the DSU. The effectiveness of a provision of the WTO covered agreements is thus contingent on the availability of objective review by a dispute settlement panel.

161. In this regard, Hong Kong, China recalls that the Members have agreed that the rules of the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements")", without exception;[116] that panels "shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute";[117] and, critically, that a panel must make an "objective assessment of the matter before it".[118] Hong Kong, China further recalls that Members shall not make a determination that a violation of a provision of the covered agreements has occurred, except through recourse to the dispute settlement in accordance with the DSU.[119]

162. The Members have not agreed to carve out any provision of the WTO covered agreements from objective review by a dispute settlement panel in accordance with the rules of the DSU. Thus, no provision of the WTO covered agreements may remain effective unless it remains subject to review by a dispute settlement panel.

48. [To the United States]

49. To Hong Kong, China: In paragraph 50 of its first written submission, the United States argues that "a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests. In this way, Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to 'test' a Member's invocation of Article XXI(b)." Please comment.

50. To Hong Kong, China: In paragraph 51 of its first written submission, the United States argues that "a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b). While it may not be that such a conflict would arise in every instance, the Panel must avoid any interpretation of one provision that could undermine or even invalidate the effectiveness of another." Please comment.

163. Hong Kong, China will respond to Panel question Nos. 49 and 50 together. For ease of reference, Hong Kong China sets forth Article XXI(a):

> Nothing in this Agreement shall be construed
>
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests[.]

[116] DSU, Article 1.1.

[117] DSU, Article 7.2.

[118] DSU, Article 11.

[119] DSU, Article 23.

164. At the outset, Hong Kong, China notes that the United States has not invoked Article XXI(a) in the present dispute, and thus does not appear to believe that this is a case in which it is unable to disclose sufficient facts to establish the *prima facie* applicability of one of the subparagraphs under Article XXI(b). Indeed, the United States made clear in its responses to questions from the Panel at the first substantive meeting that its failure to articulate its essential security interests is not due to an inability to submit information concerning those interests, but rather is an intentional choice based on the United States' flawed interpretation of Article XXI(b) as entirely self-judging.

165. Hong Kong, China disagrees that Article XXI(a) "anticipates that there may not be facts on the record before a panel that could be used to 'test' a Member's invocation of Article XXI(b)."[120] Hong Kong, China observes that whether a measure falls within the scope of one of the subparagraphs of Article XXI(b) will generally be objectively determinable from publicly available information. While there may be specific details concerning the circumstances described in the subparagraphs that a Member would not wish to disclose for reasons relating to its essential security interests, Hong Kong, China finds it difficult to imagine the circumstance in which a Member could not disclose sufficient facts to establish the *prima facie* applicability of each subparagraph, in cases where a subparagraph is, in fact, applicable. Panels have ample experience in adopting procedures to protect certain sensitive information. Therefore, even in the event that a Member were to invoke Article XXI(a) in relation to a measure purportedly justified under Article XXI(b), it does not necessarily follow that a panel could not objectively evaluate whether that measure is in fact justified. The purpose of Article XXI(a) is not to provide a means of evading the burden of proof imposed on the invoking Member under Article XXI(b).

166. For the same reasons, Hong Kong, China disagrees that interpreting Article XXI(b) as anything other than entirely self-judging would lead to a conflict with Article XXI(a) or undermine or invalidate the effectiveness of either provision. A Member may choose to invoke Article XXI(a) with respect to information it considers contrary to its essential security interests and still exercise fully its right to invoke Article XXI(b) by submitting information concerning those interests. Hong Kong, China considers relevant in this regard that Article XXI(a) refers to information that a Member considers "contrary" to its essential security interests, not to any and all information relating to those interests.

167. Hong Kong, China thus considers that Article XXI(a) does not "anticipate[] that there may not be facts on the record before a panel that could be used to 'test' a Member's invocation of Article XXI(b)." In Hong Kong, China's view, Article XXI(a) further undermines the U.S. interpretation of Article XXI(b) as self-judging. Specifically, the fact that Article XXI(a) does not contain an exhaustive list of the circumstances in which the exception may objectively apply confirms that the Members intentionally drafted Article XXI(b) to apply only to the limited circumstances specified in the enumerated subparagraphs.

51. To Hong Kong, China: In paragraph 52 of its first written submission, the United States argues that "the phrase 'which it considers necessary' is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the

[120] United States' first written submission, para. 50.

Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase 'which it considers' in Article XXI(b), and not reduce these words to inutility." Please comment.

168. Hong Kong, China agrees that the Panel should recognize and give meaning to the deliberate use of the phrase "which it considers" in Article XXI(b). As explained in its response to Panel question No. 44 above, Hong Kong, China's interpretation of Article XXI(b) acknowledges that this phrase commits to the invoking Member's discretion the determination of whether an action is necessary for the protection of essential security interests, subject to the overarching obligation of good faith. This interpretation gives meaning and effect to this phrase without depriving all other elements of Article XXI(b) of meaning, unlike the U.S. interpretation.

169. Hong Kong, China considers that the absence of the phrase "which it considers" in Article XXI(c) would render this exception objectively reviewable in its entirety. This conclusion further confirms that Hong Kong, China is not in any way denying meaning to the deliberate use or non-use of the phrase "which it considers" in Article XXI.

52. To Hong Kong, China: Please comment on the relevance of the textual differences between Articles XX and XXI(b) of the GATT 1994 to an interpretation of the phrase "relating to" in Article XXI(b)(i) and (ii) as entailing "an objective relationship between the ends and the means, subject to objective determination", as stated by the panel in *Russia – Traffic in Transit* in paragraph 7.69 of its report.

170. At the outset, Hong Kong, China recalls that the United States has not invoked one or more of the subparagraphs of Article XXI(b). Unless and until the United States attempts to make a *prima facie* case that one or more of the subparagraphs apply to the measures at issue, Hong Kong, China considers there is no need for the Panel to interpret the meaning of any of the terms of the subparagraphs of Article XXI(b), including the phrase "relating to" in Article XXI(b)(i) and (ii).

171. For purposes of responding to the Panel's question, while Hong Kong, China acknowledges that there are textual differences between Articles XX and XXI(b), Hong Kong, China considers that the similarities between these two provisions render the jurisprudence interpreting the term "relating to" in the context of Article XX (as well as the jurisprudence interpreting the structure of Article XX more generally) relevant to the interpretation of Article XXI(b).

172. Like Article XXI, Article XX consists of a chapeau followed by an enumeration of the specific types of measures that a Member may adopt notwithstanding other provisions of the GATT 1994, so long as the adopted measures objectively fall within the scope of at least one of the enumerated types of measures and the requirements of the chapeau are satisfied. Like Article XXI, each of the enumerated items under the chapeau of Article XX begins with a relational standard that is appropriate to the particular subject matter of that item ("necessary to", "relating to", "imposed for", "undertaken in pursuance of", "involving", "essential to"). As acknowledged by the panel in *Russia – Traffic in Transit* and consistent with Hong Kong, China's interpretation of the ordinary meaning of Article XXI(b) set forth above, the relational standards under Article XXI(b), including the term "relating to", are objective standards that a panel must interpret and apply as part of its objective assessment of the matter.

173. Given the similarities in the structure and language of Articles XX and XXI(b), Hong Kong, China considers that the term "relating to" in Articles XXI(b)(i) and (ii) could in theory be interpreted as requiring an assessment of whether there is "an objective relationship between the ends and the means, subject to objective determination". As noted above, the United States has not invoked either of these subparagraphs in defence of the measures at issue. Hong Kong, China will therefore not opine as to how a panel would properly conduct its objective examination of the applicability of either Article XXI(b)(i) or (ii) practice.

53. To both parties: Please comment on the relevance of the DSU provisions referred to in certain third-party submissions[121], specifically Articles 3.2, 3.3, 7.2, 11, 23.1, and 23.2(a) of the DSU, as context in interpreting Article XXI(b) of the GATT 1994.

174. All of the provisions cited in the Panel's question are relevant to the interpretation of Article XXI(b) of the GATT 1994 and support Hong Kong, China's interpretation and that of prior panels that Article XXI(b) is not entirely self-judging.

175. Article 3.2 of DSU provides that:

> The dispute settlement system is a central element in *providing security and predictability to the multilateral trading system*. The Members recognize that it *serves to preserve the rights and obligations of Members under the covered agreements*, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law […].

176. Article 3.2 establishes that a critical objective of the DSU is to bring "security and predictability to the multilateral trading system" and "preserve the rights and obligations of Members under the covered agreements". An interpretation of Article XXI(b) as entirely self-judging would not serve that objective. Indeed, it would do the opposite by offering Members "'carte-blanche'" to "circumvent" or "evade" their treaty obligations through disguising protectionist and discriminatory measures as "essential security" measures.[122] The resulting insecurity and unpredictability would threaten the viability of the multilateral trading system.

177. Article 3.3 of the DSU provides that:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the

[121] See Brazil's third-party submission, para. 7 (concerning Article 7.2 of the DSU); China's third-party submission, para. 16 (concerning Article 3.2 of the DSU); Exhibit EU-5, paras. 39-45 (concerning Articles 3.2, 7.1, 7.2, 11, and 23 of the DSU); Switzerland's third-party submission, paras. 40-48 (concerning Articles 3.3, 11, 23.1, and 23.2(a) of the DSU); and Ukraine's third-party submission, paras. 7-8 (concerning Articles 3.2, 3.3, 7.2, and 11.

[122] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.642 and fn 1376, quoting Appellate Body Report, *US – Shrimp*, para. 114; Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 8.75-8.76; Appellate Body Report, *US – Softwood Lumber IV*, para. 64; Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.39 ("it is evident that the interpretation [of 'revenue foregone'] advanced by the United States would be irreconcilable with th[e] object and purpose ...given that it would offer governments 'carte-blanche' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability").

WTO and the maintenance of a proper balance between the rights and obligations of Members.

178. An interpretation of Article XXI(b) as entirely self-judging would similarly be in tension with the objective of settling disputes promptly.[123] If, as the United States contends, a panel faced with an invocation of Article XXI(b) may do no more than acknowledge that invocation in its report and must forego making any further findings, the dispute would not be settled, let alone promptly. The parties (and the DSB) would not know which, if any, of the elements of the respondent's measures were, in fact, justified under Article XXI(b) and which needed to be revoked or modified. There would also be no basis upon which to determine the compliance obligations of the respondent, if any; the extent of the respondent's compliance following the adoption of the panel's report; or the measures that the complaining party could take consistently with the DSU in the event of findings of non-compliance.

179. Article 7.2 provides that "[p]anels *shall* address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."[124] Accordingly, it is not left to a panel's discretion whether to address the relevant provisions cited by the parties to the dispute. Rather, a panel is required to address such provisions. There is no indication in Article 7.2 that a panel is precluded from addressing any provision of the WTO covered agreements, including Article XXI(b). Article XXI(b) has been invoked by the United States. Article XXI(b) is therefore a "relevant provision" that forms part of the matter that must be reviewed by the Panel in this dispute. Hong Kong, China agrees with Brazil that if a defense based on Article XXI(b) could not be reviewed by a panel, this would create a "dangerous gap" in the dispute settlement mechanism.[125] Article 7.2 therefore further supports the view that no part of Article XXI(b) is entirely unreviewable by a WTO panel.

180. Article 11 of the DSU provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB …" Where a Member invokes Article XXI(b) and the parties have agreed to the standard terms of reference, as they have in this dispute,[126] Article XXI(b) necessarily forms part of the matter before the panel. Interpreting Article XXI(b) of GATT 1994 as entirely self-judging would make it impossible for a panel to comply with its obligation under Article 11 of DSU to "make an objective assessment of the matter before it" as a panel would be precluded from determining the objective meaning of Article XXI(b).[127] Nor would a panel be able to make the necessary findings to assist the DSB in determining whether the invoking Member's measures were, in fact, justified under Article XXI(b), in a manner consistent with the ordinary meaning of the terms of Article XXI(b).

[123] See also ARO, Preamble, 8th Recital ("Recognizing the availability of a consultation mechanism and procedures for the speedy, effective and equitable resolution of disputes arising under this Agreement").

[124] Emphasis added.

[125] Brazil's third-party submission, para. 7.

[126] See European Union's third-party submission, Exhibit EU-5, para. 39.

[127] See Switzerland's third-party submission, para. 42 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51 ("[i]t is difficult to see how a panel would fulfil that obligation [under Article 11] if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it").

181. Finally, Article 23 similarly supports the view that Article XXI(b) is not entirely self-judging. Article 23.1 entitled "Strengthening of the Multilateral System", provides that "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." Article 23.2(a) further provides that "[i]n such cases, a Member shall (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding …" If Article XXI(b) were to be interpreted as entirely self-judging, the invoking Member would be determining the outcome of the matter before the panel and not the panel itself, as is required under Article 23.[128] The complaining Member would also be denied a ruling by a panel as to whether the respondent's measures had impaired the benefits accruing to it, as is its legal right.[129] Both outcomes are avoided by interpreting Article XXI(b) as objectively reviewable in part by a panel.

54. To Hong Kong, China: Please comment on the relevance of the DSU provisions referred to in paragraphs 59 to 64 of the United States' first written submission, specifically Articles 3.7, 22.3(c), 26.1, and 26.2 of the DSU, as context in interpreting Article XXI(b) of the GATT 1994.

182. Hong Kong, China disagrees that the provisions cited in the Panel's question support the U.S. understanding that Article XXI(b) is entirely self-judging. The fact that these provisions refer to action that a Member judges or considers appropriate or necessary is consistent with the view that a provision may be drafted to reserve varying degrees of discretion to the invoking Member without rendering that provision entirely self-judging, as is the case for Article XXI(b).

183. In its first written submission, the United States argues that Article 3.7 provides an example of a provision that "imposes an obligation on a Member, and – similar to Article XXI(b) – does not permit a panel to look behind a Member's decision."[130] This argument is incorrect. Article 3.7 provides in relevant part that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful." The fact that Article 3.7 reserves discretion to a complaining Member to determine whether action under the DSU would be fruitful is not contrary to the view that Article XXI(b) is not entirely self-judging, but rather reserves some element of discretion to the invoking Member, i.e. in the limited circumstances specified in the enumerated subparagraphs, the discretion to determine what action is necessary for the protection of its essential security interests. Article 3.7 does not establish that Article XXI(b) is entirely self-judging.

[128] See European Union's third-party submission, Exhibit EU-5, para. 45.

[129] See Switzerland's third-party submission, para. 47 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52 ("[t]he fact that a Member may initiate a WTO dispute whenever it considers that 'any benefits accruing to [that Member] are being impaired by measures taken by another Member' implies that that Member is *entitled* to a ruling by a WTO panel.") (emphasis original).

[130] United States' first written submission, para. 59.

184. The Appellate Body's finding in *Peru – Agricultural Products* confirms that Article 3.7 is not an entirely self-judging provision:

> [A]lthough the language of the first sentence of Article 3.7 of the DSU states that 'a Member shall exercise its judgement', the considerable deference accorded to a Member's exercise of its judgement in bringing a dispute is not entirely unbounded. For example, in order to ascertain whether a Member has relinquished, by virtue of a mutually agreed solution in a particular dispute, its right to have recourse to WTO dispute settlement in respect of that dispute, greater scrutiny by a panel or the Appellate Body may be necessary.[131]

185. The Appellate Body continued on to conduct an objective assessment of whether the complainant "could be considered as having acted contrary to its good faith obligations under Articles 3.7 and 3.10 of the DSU when it initiated these proceedings."[132]

186. In support of its argument concerning Article 3.7, the United States cites the panel's statement in the *Saudi Arabia – IPRs* dispute that "[g]iven the discretion granted to complainants in deciding whether to bring a dispute under the DSU, the Panel does not consider that Qatar failed to exercise its judgment within the meaning of Article 3.7 in bringing this case."[133] The panel did not find that Article 3.7 is "self-judging" in its entirety, however. Rather, the panel considered the extent of the discretion granted to Members under Article 3.7 in light of prior findings by the Appellate Body and concluded that Qatar had not acted inconsistently with Article 3.7.

187. Similarly, Article 22.3(c) of the DSU reserves an element of discretion to the complaining party ("if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement … it may seek to suspend concessions or other obligations under another covered agreement"). It is not entirely self-judging. Indeed, the United States acknowledges that "while the text of DSU Article 22.3(c) provides that the judgment whether to suspend concessions or other obligations resides with the party in question, the provision expressly limits that discretion by imposing an obligation to apply certain principles and procedures."[134] The subparagraphs of Article XXI(b) similarly serve to limit the discretion of the invoking Member by specifying the circumstances in which the exception may apply.

188. The same is true of Articles 26.1 and 26.2 of the DSU. Neither of these provisions are entirely self-judging. Like Article XXI(b), these provisions reserve some, but not total discretion to the complaining Member by including the phrase "where a party to the dispute considers", followed by the phrase "and a panel or the Appellate Body determines". The U.S. view that these provisions support an interpretation of Article XXI(b) is based on its view that in these provisions, in contrast to Article XXI(b), the Members explicitly agreed to an "additional check" on the discretion of the party in the form of a determination by a panel or the Appellate Body.[135] In fact, the provisions are similar. In Article XXI(b), it is the

[131] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18-5.19.

[132] Appellate Body Report, *Peru – Agricultural Products*, para. 5.28.

[133] United States' first written submission, fn 40 (citing *Saudi Arabia – IPRs*, para. 7.19).

[134] United States' first written submission, para. 62.

[135] United States' first written submission, para. 63.

objectively reviewable subparagraphs that serve as an "additional check" on the Member's discretion. In sum, the provisions of the DSU that allocate discretion to a Member cited by the United States are not themselves entirely self-judging and do not support the view that Article XXI(b) is entirely self-judging.

55. To Hong Kong, China: Which aspects of the object and purpose of the GATT 1994, the WTO Agreement, and the covered agreements inform an interpretation of Article XXI(b) of the GATT 1994? In your response, please indicate whether such aspects support the view that Article XXI(b) is self-judging or the view that it is at least partly subject to an objective review by a panel.

189. Several aspects of the object and purpose of the GATT 1994, the WTO Agreement, and the covered agreements are relevant to the interpretation of Article XXI(b) and support the view that Article XXI(b) is not entirely self-judging.

190. The preamble to the GATT 1994 affirms the Members' desire to "enter[] into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations". The preamble to WTO Agreement reiterates this objective and further affirms the Member's resolution "to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations".

191. The U.S. view of Article XXI(b) as self-judging is anathema to these fundamental objectives. As the panel in the *Russia – Traffic in Transit* dispute correctly observed:

> Previous panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade. … It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.[136]

192. In contrast to the interpretation of Article XXI(b) as entirely self-judging, an interpretation of Article XXI(b) as imposing objectively reviewable constraints upon the circumstances in which a Member may seek to justify a GATT-inconsistent measure under this provision protects the "reciprocal and mutually advantageous arrangements" Members have made to reduce tariffs and other barriers to trade over successive rounds of negotiations and allows for the predictable implementation of the obligations negotiated by the Members.

[136] Panel Report, *Russia – Traffic in Transit*, para. 7.79.

56. To Hong Kong, China: With respect to the 1949 GATT Council Decision in *United States – Export Measures* referenced by the United States in its first written submission[137]:

a. Does this decision constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention, as argued by the United States?

b. To what extent does this decision express an agreement between Members on the interpretation of the GATT 1994 or the application of its provisions?

c. If this decision does constitute a "subsequent agreement", to what extent does this decision establish the self-judging nature of Article XXI?

193. Hong Kong, China will respond to all three sub-parts of the Panel's question together. Before proceeding, Hong Kong, China would emphasize that the 1949 GATT Council Decision in *United States – Export Measures* ("1949 Decision") does not support the proposition that Article XXI(b) is self-judging. In fact, it is directly contradictory and thus serves only to underscore that the U.S. interpretation is entirely unfounded.

194. The 1949 Decision does not constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention.

195. Pursuant to Article 31(3)(a) of the Vienna Convention, "[t]here shall be taken into account, together with the context … any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". The Appellate Body has held that a decision adopted by Members may qualify as "subsequent agreement" under Article 31(3)(a) if "(i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law."[138]

196. The 1949 Decision concerned a claim by Czechoslovakia that the United States had acted inconsistently with Article I of the GATT through its administration of a system of licences governing the export of certain articles to Czechoslovakia. The United States defended its measures under Article XXI. The Contracting Parties rejected Czechoslovakia's claim by a vote of 17 to 1, with three abstentions.[139]

197. The 1949 Decision does not constitute a "subsequent agreement" for the following reasons: First, the 1949 Decision was taken under Article XXIII.2 of the GATT 1947, the predecessor to the DSU. It therefore represents no more than a decision in a particular case, with legal effects comparable to those of recommendations and rulings adopted by the DSB. If the 1949 Decision were considered a "subsequent agreement", logically all panel and Appellate Body reports would constitute "subsequent agreements". This would contradict the

[137] United States' first written submission, paras. 68-78.

[138] Appellate Body Report, *US – Clove Cigarettes*, para. 262.

[139] See Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 9, 1949), & GATT/CP.3/SR.22/Corr.1 (June 20, 1949), p. 9 (US-16).

well-established principle that "interpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute."[140] As the United States itself has emphasized, panels cannot add to or diminish the rights and obligations provided in the covered agreements. Treating the decision of a panel, or the Contracting Parties, as a subsequent agreement would have this effect.

198. Second, the 1949 Decision does not concern the interpretation of Article XXI(b). Rather, it concerns its application to a particular set of facts in a particular case. As it does not "bear upon" how Article XXI should be interpreted and applied generally and in subsequent cases, it does not qualify as an agreement "regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention.[141]

199. Third, the 1949 Decision was not adopted by consensus of all the Contracting Parties. As the proceeding record establishes, seventeen votes were cast in favour and one against. There were also three abstentions and two Contracting Parties were absent. Thus, there was no agreement by the Contracting Parties as to meaning of Article XXI(b) that could serve as a source of interpretation of the meaning of that provision by all the Contracting Parties. In this regard, Hong Kong, China recalls the Appellate Body's finding in *US – Clove Cigarettes* that a "subsequent agreement" under Article 31(3)(a) must, at a minimum, "clearly express[] a common understanding" of a treaty term "and an acceptance of that understanding among Members".[142] While the Appellate Body did not expressly hold that a "subsequent agreement" within the meaning of Article 31(3)(a) must express a common understanding of a treaty term accepted by all Members, the Appellate Body did note that the decision at issue in that dispute was adopted by consensus.[143] Thus, the 1949 Decision does not express the agreement of the Contracting Parties on the interpretation and application of the provisions of the GATT 1994, including Article XXI(b).

200. Moreover, as noted above, even if the 1949 decision were to be misconstrued as a "subsequent agreement", it would not support an interpretation of Article XXI(b) as entirely self-judging. Czechoslovakia's complaint was based on its view that the United States' export control measures covered articles unrelated to the purpose of supplying a military establishment in the sense of Article XXI(b)(ii). In its responsive statement in defense of its measures, the U.S. representative did not merely assert that its measures were for the protection of its essential security interests. Instead, the U.S. representative sought to demonstrate that the measures did, in fact, relate to the subject matter of Article XXI(b)(ii) and that the United States was not arbitrarily denying licences for exports to Czechoslovakia of products falling outside the scope of Article XXI(b)(ii).

201. In defending the U.S. measures to the Contracting Parties, the U.S. representative emphasized that the licence controls were "selective and are within the specific exceptions

[140] Appellate Body Reports, *US – Clove Cigarettes*, para. 258; *US – Stainless Steel (Mexico)*, para. 158.

[141] Appellate Body Reports, *Peru - Agricultural Products*, para. 5.101; *EC – Bananas III (Article 21.5 – Ecuador II / EC – Bananas III (Article 21.5 – US)*, para. 390; *US – Clove Cigarettes*, para. 266; *US – Tuna II (Mexico)*, para. 372.

[142] Appellate Body Report, *US – Clove Cigarettes*, para. 267.

[143] Appellate Body Report, *US – Clove Cigarettes*, para. 263.

provided by the GATT" and called upon other Contracting Parties to reject Czechoslovakia's claim "on the grounds that it is unsupported by the facts".[144] The U.S. representative's view of the importance of the factual basis for the invocation of Article XXI was echoed by the Contracting Parties that expressed an opinion on the matter, all of which emphasized the factual nature of the dispute between the two countries.[145]

202. In addition, no contracting party, including the United States, asserted at any point during the proceedings that merely by invoking Article XXI(b), the matter was at an end. Rather, it is clear from the records of the proceeding that the United States felt that it bore the burden of demonstrating that the measures at issue were, in fact, "within the specific exceptions provided by the GATT", i.e. within the scope of one of the subparagraphs. Had the Contracting Parties accepted that the mere invocation of Article XXI(b) by the United States was sufficient to bring the matter to the end, Hong Kong, China could understand the U.S. attempt to construe this decision as a "subsequent agreement". As the actual course of events undermines the U.S. position in this dispute that Article XXI(b) is entirely self-judging, Hong Kong, China finds the U.S. reliance on the 1949 decision perplexing.

57. To both parties: With respect to the GATT/ITO negotiating history discussed by the United States in its first written submission, please comment on the following:

a. whether the GATT/ITO negotiating history would constitute "the preparatory work of the treaty" and/or "the circumstances of the conclusion" of the GATT 1994, as part of WTO Agreement; and

b. whether it would be appropriate for the Panel to seek recourse to the GATT/ITO negotiating history in the light of Article 32 of the Vienna Convention.

203. For the reasons Hong Kong, China has explained, the ordinary meaning of the terms of Article XXI(b), read in context and in light of the object and purpose of the GATT 1994 confirms that Article XXI(b) is not entirely self-judging and that the three subparagraphs that set for the circumstances in which Article XXI(b) may apply are subject to objective review. This interpretation is neither absurd nor unreasonable. Thus, in Hong Kong, China's view, there is no reason for the Panel to seek recourse to supplementary means of interpretation as provided under Article 32 of the Vienna Convention. Hong Kong, China notes that the United States agrees that recourse to supplementary means of interpretation, including negotiating history, is not necessary in this dispute.[146]

204. Should the Panel nevertheless consider it necessary to have recourse to Article 32, Hong Kong, China observes that although Article 32 does not define precisely what materials should be considered "preparatory work", such materials normally pertain to the specific

[144] Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949), p. 14 (US-15) (emphasis added). See also id., pp. 3, 8 (stating that the relevant question is whether "the United States has in practice gone further in limiting its exports than is clearly permitted by the provisions of Article XXI", or whether "in the operation of our security controls we are exceeding the scope of the security exceptions in article XXI").

[145] Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & GATT/CP.3/SR.22/Corr.1 (June 20, 1949) pp. 9-10 (US-16).

[146] United States' first written submission, para. 79.

treaty in question. The Havana Charter, GATT 1947, and GATT 1994 are three different treaties. That being said, to the extent the provisions of different treaties are similar, the preparatory work for a predecessor or similar treaty may be considered preparatory work to the treaty at issue.

58. To Hong Kong, China: Can it be discerned from the GATT/ITO negotiating history whether the negotiating parties considered the draft security exception to be self-judging?

205. The GATT/ITO negotiating history serves to confirm that the negotiating parties did not consider the draft security exception to be self-judging. As Hong Kong, China does not consider recourse to supplementary means of interpretation necessary, Hong Kong, China will limit is response to a particularly illuminating exchange between the delegate of the Netherlands and the delegate of the United States on July 24, 1947, in connection with the negotiation of the draft provision in the ITO Charter that eventually became Article XXI(b) of the GATT 1947. The United States discusses this exchange in its first written submission.[147]

206. In this exchange, the delegate from the Netherlands raised a concern about the meaning of the phrase "essential security interests", cautioning that this phrase was "difficult to understand" and had the potential to open "a very big loophole in the whole Charter." The delegate from the United States responded:

> We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests" *because that would permit anything under the sun*. Therefore we thought it well to draft provisions which would take care of real essential security interests and, *at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance*.[148]

207. The U.S. delegate continued:

> I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. *On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose*.
>
> We have given considerable thought to it and this is the best we could produce *to preserve that proper balance*.[149]

[147] See United States' first written submission, para. 89.

[148] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), pp. 20-21 & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30) (emphasis added).

[149] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), p. 21 & Second Session of the Preparatory

208. If the subparagraphs of Article XXI(b) were interpreted as merely illustrative, as the United States now advocates, they would in fact "permit anything under the sun". The drafters avoided creating a "very big loophole" in the treaty by "limit[ing] the exceptions" to particular circumstances – namely, the three circumstances described in the subparagraphs.[150]

59. To Hong Kong, China: With respect to the internal documents of the US delegation discussed in paragraphs 7.89 to 7.91 of the panel report in *Russia – Traffic in Transit*, please comment on the following:

a. whether the internal documents constitute "supplementary means of interpretation" in the meaning of Article 32 of the Vienna Convention, for example, as the "preparatory works of the treaty" or "circumstances of the conclusion" of the treaty;

209. The internal documents of the U.S. delegation discussed in paragraphs 7.89 to 7.91 of the panel report in *Russia – Traffic in Transit* constitute "circumstances of the conclusion" of the GATT 1947 within the meaning of Article 32 of the Vienna Convention. These documents form part of the "historical background against which the treaty was negotiated" and, as such, may be taken into account as a supplementary means of interpretation under Article 32.[151]

210. In *EC – Chicken Cuts*, the Appellate Body observed that a particular event, act or instrument may qualify as a "circumstances of the conclusion" where "it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or [a] specific provision."[152] The Appellate Body further observed that "not only 'multilateral' sources, but also 'unilateral' acts, instruments, or statements of individual negotiating parties may be useful in ascertaining 'the reality of the situation which the parties wished to regulate by means of the treaty' and, ultimately, for discerning the common intentions of the parties."[153]

211. The internal documents of the U.S. delegation illustrate how a unilateral act, instrument, or statement of an individual negotiating party can help to discern the common intentions of the parties. In the July 24, 1947 exchange above, the U.S. delegate explained that the United States had given "a good deal of thought to the question of the security exception which we thought should be included in the Charter". The internal deliberations of the U.S. delegation in the weeks leading up to this exchange help to clarify and reinforce the

Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30) (emphasis added).

[150] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), pp. 19-20 & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30).

[151] Appellate Body Report, *EC – Computer Equipment*, para. 86.

[152] Appellate Body Report, *EC – Chicken Cuts*, para. 289.

[153] Appellate Body Report, *EC – Chicken Cuts*, para. 289 (citations omitted).

meaning of the July 24, 1947 exchange, which took place during the official negotiating session.

212. On July 4, 1947 at a meeting of the U.S. delegation, certain members of the delegation proposed modifying what would ultimately become Article XXI(b) to add the words "and to relate to" following the phrase "which [a Member] may consider to be necessary".[154] It was expressly understood by the delegation that the effect of this change would have been to place the applicability of the subparagraphs within the scope of what a Member could self-determine, and thereby permit entirely "unilateral action" under this provision. The proposal by these members was considered and rejected. The majority of the delegation considered that the proposed revision would "destroy[] the entire efficacy of the Charter" by allowing any country "under the pretext of national security … [to] take any measure whatsoever it might wish in complete disregard of all provisions of the Charter."[155]

213. The legal adviser to the U.S. delegation summarized the debate that had occurred within the delegation in a memorandum prepared 10 days later. In this memorandum, the legal advisor reiterated his reasons for voting against the proposed revision:

> As correctly pointed out by Mr. Neff [who had proposed the revision], his suggested change would make it perfectly clear that any Member had the unilateral power to decide that any action which it proposed to take *did relate to the matters contained in the lettered paragraphs*. This would make unchallengeable by the Organization or any other member a justification, however far-fetched, of any action on this basis. To the extent that the wording approved by the Delegation does not permit this completely open escape from the Charter, *it may be said, as Mr. Neff argues, to limit the scope of the unilateral interpretation portion of the security exceptions*.[156]

214. The legal adviser further explained that "the security exceptions are as drafted sufficiently broad to take care of any reasonable case."[157] He pointed out that the exceptions

[154] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, p. 2 (US-76).

[155] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, p. 3 (US-76). Mr. Leddy, for the State Department, "argued that it would be far better to abandon all work on the Charter than to place a provision in it by which, under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter." Ibid.

[156] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, p. 1 (US-70) (emphasis added).

[157] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, p. 2 (US-70).

had been drafted "to provide for unilateral determination by each Member, unchallenged by any other Member, as to what action it deems necessary *in a field "relating to" the listed subjects*."[158] Consequently, "the unilateral interpretation portion of the security exceptions" was "limit[ed]" to the determination of the necessity of the action for the protection of essential security interests, and did *not* include the determination of whether that action "did relate to the matters contained in the lettered paragraphs"[159] This was the balance that the U.S. delegation agreed upon to ensure that the Charter did not become "an illusory document".[160]

215. At the July 24, 1947 official negotiating session ten days later, the U.S. delegate explained the efforts of the U.S. delegation to achieve this balance in the proposed draft text of the exception to the ITO charter. As the U.S. delegation drafted the text in question and subsequently explained the meaning of that text to other delegations in an official negotiating session, the internal documents of the U.S. delegation clearly form part of the historical context against which the treaty was negotiated. Such internal delegation documents are particularly relevant here, where the principal drafter of the text is now advocating an interpretation of the text that is the opposite of what it intended and the opposite of how it explained that text to other delegations at the time it was concluded.

b. whether, as argued by the European Union in paragraph 106 of Exhibit EU-5, a panel has discretion to rely on publicly available facts and evidence, especially to confirm or support a conclusion on the interpretation of Article XXI(b) of the GATT 1994 that could be reached independently of those facts and evidence; and

216. Hong Kong, China agrees with the proposition advanced by the EU in Exhibit EU-5 at paragraph 106. Hong Kong, China does not consider it necessary for the Panel to determine the scope of its discretion in this area, however. For the reasons Hong Kong, China has explained, the internal documents of the U.S. delegation may be properly considered a means of supplementary interpretation under Article 32 of the VLCT, and specifically as part of the circumstances of the conclusion of the GATT 1947. Although unnecessary, the Panel may therefore examine these documents if it so chooses consistent with customary rules of treaty interpretation.

[158] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, p. 3 (US-70). (emphasis added).

[159] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, p. 1 (US-70).

[160] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, p. 3 (US-70).

c. whether it is possible to draw any firm conclusions from the internal documents about the self-judging nature of Article XXI.

217. Again, Hong Kong, China considers it unnecessary for the Panel to have recourse to supplementary means of interpretation, including negotiating history, to determine the meaning of Article XXI(b). To the extent that the Panel considers it necessary to refer supplementary means of interpretation, Hong Kong, China considers that the internal documents of the U.S. delegation support the conclusion that Article XXI(b) is not entirely self-judging and confirm what is evident from the official negotiating record, including the exchange that the United States had with the delegate from the Netherlands excerpted by Hong Kong, China in its response to Panel question No. 58 above.

218. As discussed above, the internal documents of the U.S. delegation record the United States' consideration and rejection of an internal proposal under which the subparagraphs of what became Article XXI(b) would have been "self-judging". These documents confirm that the United States drafted Article XXI(b) so as to exclude the subparagraphs from elements of the provision that are subject to "unilateral interpretation".[161]

60. To Hong Kong, China: Please comment on: (a) the relevance of the statements of GATT contracting parties referenced by the United States[162] under the Vienna Convention, and (b) whether these statements reflect a consensus position that invocations of Article XXI(b) of the GATT 1994 are not meant to be subject to review by a dispute settlement panel.

219. Hong Kong, China does not consider the statements of the GATT Contracting Parties referenced by the United States to be relevant under the Vienna Convention. Nor does Hong Kong, China consider these statements to reflect a consensus position that invocations of Article XXI(b) are not meant to be subject to review by a dispute settlement panel.

220. At the outset, Hong Kong China observes that the United States does not contend that the "views" previously expressed by certain Members constitute evidence of a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention. Hong Kong, China perceives no other rule as permitting consideration of such "views". Notably, the title of the section of the United States' first written submission containing these statements is entitled, "WTO Members have repeatedly expressed the view that Article XXI(b) is self-judging", without any reference to which customary rule of interpretation such views relate to, including Article 31(3)(b). The United States has thus implicitly conceded that no such "subsequent practice" exists.

221. The U.S. approach is understandable, as the select Contracting Party statements that it cites would not satisfy the requirement under Article 31(3)(b) to establish "a common,

[161] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, p. 1 (US-70) (emphasis added).

[162] United States' first written submission, paras. 191-210.

consistent, discernible pattern of acts or pronouncements… [that] imply *agreement* on the interpretation of the relevant provision."[163] The statements cited by the United States are those of a select group of Members and do not constitute a "pattern of acts or pronouncements by Members as a whole."[164]

222. Even if the views of the Contracting Parties cited by the United States were relevant, they do not establish a consensus view on the correct interpretation of Article XXI(b). Hong Kong, China recalls that the panel in the *Russia – Traffic in Transit* dispute reviewed the pronouncements of the GATT contracting parties and WTO Members relating to Article XXI at length and found "differences in positions and the absence of a common understanding regarding the meaning of Article XXI."[165] The panel ultimately concluded that these pronouncements did "not reveal any subsequent practice establishing an agreement between the Members regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the Vienna Convention."[166]

223. Two examples suffice to confirm that the same conclusion is warranted in this dispute. First, the United States refers to the lack of opposition to Ghana's invocation of Article XXI during the negotiations for Portugal's accession to the GATT.[167]

224. In relation to the statements concerning Ghana's invocation of Article XXI, the panel in *Russia – Traffic in Transit* stated:

> In particular, the Panel notes that statements made by Ghana to justify the imposition of an import ban against Portugal in 1961 were made prior to Portugal's accession, during which the parties had not yet assumed any obligations to one another under the GATT 1947. In the Panel's view, invocations of Article XXI by a contracting party in order to defend measures taken against a non-contracting party, as well as any invocations of Article XXI by non-contracting parties during accession negotiations, cannot establish a pattern of practice between "the parties" in the sense of Article 31(3)(b) of the Vienna Convention.[168]

225. Second, the United States references statements made by certain of the contracting parties relating to the application of measures against Argentina in the *European Communities – Argentina* dispute.[169] The United States acknowledges that while certain of the contracting parties expressed views consistent with a self-judging interpretation in discussions relating to that dispute, "other contracting parties, such as Argentina and Brazil" rejected this interpretation.[170] The panel in *Russia – Traffic in Transit* examined statements by

[163] Appellate Body Report, *US – Gambling*, para. 192 (emphasis original).

[164] Appellate Body Report, *US – Gambling*, para. 194.

[165] Panel Report, *Russia – Traffic in Transit*, para. 7.80.

[166] Panel Report, *Russia – Traffic in Transit*, Appendix, para. 1.90.

[167] See United States' first written submission, paras. 191 and 192.

[168] Panel Report, *Russia – Traffic in Transit*, Appendix, para. 1.3. The same conclusion would also apply to the statements made by Egypt during its accession cited by the United States. See United States' first written submission, paras. 193 and 194.

[169] See United States' first written submission, paras. 195-200.

[170] United States' first written submission, para. 200.

the "other contracting parties" alluded to by the United States, which included "Peru, Brazil, Uruguay, Zaire, Colombia, Dominican Republic, Cuba, Pakistan, Romania and Poland".[171] The panel noted that all of these countries "expressed opposition to, or concern at, what they considered was a dangerous precedent involving the use by contracting parties of trade and economic measures for non-trade reasons, and which were not justified under the GATT."[172] The panel also noted Argentina's statements stressing that the measures were not justified under Article XXI and that they "violated the letter and the spirit of the GATT.[173]

61. To both parties: With respect to the 1982 decision adopted by the GATT CONTRACTING PARTIES concerning invocations of Article XXI:

d. Does this decision constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention?

e. If this decision does constitute a "subsequent agreement", to what extent does this decision establish the self-judging nature of Article XXI?

f. To what extent does this decision express an agreement between Members on the interpretation of the GATT 1994 or the application of its provisions?

g. If this decision does not constitute a "subsequent agreement", should the Panel give it any legal weight under any other provision (such as Article 1(b) of the GATT 1994 or Article XVI:1 of the WTO Agreement)?

226. Hong Kong, China will respond to all four subparts of the Panel's question together. Similarly to the 1949 GATT Council Decision in *United States – Export Measures* discussed above, the United States has again cited a decision that, whatever its legal relevance, only serves to undermine its own interpretation of Article XXI(b) as entirely self-judging.

227. Hong Kong, China does not consider the 1982 Decision adopted by the GATT CONTRACTING PARTIES concerning invocations of Article XXI ("1982 Decision") to constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention. As Hong Kong, China explained in response to Panel question No. 56 above, to qualify as a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention, the "terms and content" of the 1982 Decision would need to "express an agreement between Members on the interpretation or application of a provision of WTO law."[174]

228. The 1982 Decision sets forth procedures contracting parties should follow in respect of measures that they considered to be justified under that provision. It does not address the interpretation of the terms and content of Article XXI or its application. The fact that the

[171] Panel Report, *Russia – Traffic in Transit*, Appendix, para. 1.24, citing GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, pp. 4-9.

[172] Panel Report, *Russia – Traffic in Transit*, Appendix, para. 1.24, citing GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, pp. 4-9.

[173] Panel Report, *Russia – Traffic in Transit*, Appendix, para. 1.23, citing GATT Council, Minutes of Meeting held on 7 May 1982, C/M/157, p. 4.

[174] Appellate Body Report, *US – Clove Cigarettes*, para. 262.

Contracting Parties agreed to these procedures does not express their agreement as to the separate issue of the interpretation and application of Article XXI. Hong Kong, China notes that the 1982 Decision helpfully confirms that the CONTRACTING PARTIES had not adopted any "formal interpretation of Article XXI" as of 1982. The 1982 Decision states that "until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application". The Contracting Parties thus expressly distinguished the issue of interpretation from the procedural requirements agreed in the 1982 Decision.

229. The Panel should not give this decision any legal weight under Article 1(b) of the GATT 1994 or Article XVI:1 of the WTO Agreement. With regard to Article 1(b) of the GATT 1994, there are no relevant "decisions of the CONTRACTING PARTIES to GATT 1947" that had "entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement", within the meaning of Article 1(b)(iv) of the GATT 1994 concerning Article XXI(b). As the Appellate Body observed in *US – FSC*, "not every decision of the CONTRACTING PARTIES to the GATT 1947 is an 'other decision' within the meaning of paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the WTO Agreement."[175]

230. Even if a relevant adopted GATT panel report existed, such a report would not constitute an "other decision" within the meaning of paragraph 1(b)(iv). Adopted panel reports relate only to the particular dispute and do not "constitute a *definitive interpretation of the relevant provisions of GATT 1947*."[176] The only type of potentially relevant decision of the CONTRACTING PARTIES, an official interpretation of Article XXI(b) adopted pursuant to Article XXV of the GATT 1994, does not exist.

231. Similarly, there are no relevant "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947", within the meaning of Article XVI:1 of the WTO Agreement. The 1982 Decision, while within the meaning of Article XVI:1, is not relevant. As Hong Kong, China has explained, this decision concerned the procedures that contracting parties should follow in respect of measures that they considered to be justified under that provision, not the interpretation of Article XXI.

232. Finally, as noted above, to the extent that the Panel considers the 1982 Decision relevant to its analysis, it does not support a self-judging interpretation of Article XXI(b). The 1982 Decision states that "when action is taken under Article XXI, all [Members] affected by such action retain their full rights under the General Agreement." The phrase "full rights under the [GATT]" includes the right to challenge a measure on the basis of its inconsistency with one or more provisions of the covered agreements. The 1982 Decision thus confirms that Article XXI does not prevent a panel from objectively reviewing whether the conditions for the applicability of Article XXI(b) are satisfied.

62. To Hong Kong, China: Please comment on the relevance of the textual differences in the three linguistic versions of Article XXI(b) of the GATT 1994 for purposes of interpreting the provision. In your responses, please discuss, inter alia, that the

[175] Appellate Body Report, *US – FSC*, para. 108.

[176] Appellate Body Report, *US – FSC*, para. 108 (emphasis original) (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13).

Spanish-language version of Article XXI(b) of the GATT 1994: (a) places the word "relativas" (relating) in the introductory clause to Article XXI(b) as opposed to at the beginning of subparagraphs (i) and (ii); (b) place a comma before the word "relativas"; (c) uses the phrase "a las aplicadas" (to those applied/taken) at the beginning of subparagraph (iii); and (d) uses a colon at the end of the introductory clause, like the French text.

233. Article 33(1) of the Vienna Convention provides, in relevant part, that "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language". Article 33(3) of the Vienna Convention, in turn, provides that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text." Consistent with these principles, the Appellate Body has held that "the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language."[177]

234. The Spanish text of Article XXI(b) is thus equally authentic to the English and French texts and vice versa. To the extent that the U.S. interpretation cannot be reconciled with one or more of the three authentic texts, it must be rejected in favour of interpretation that can achieve that objective.[178] As Hong Kong, China will now demonstrate, the U.S. interpretation may be reconcilable with the French text, but it is irreconcilable with the equally authentic Spanish text. In an effort to avoid the legal consequences of this fact, the United States is forced to resort to an alternative interpretation that further exposes the flaws in its own interpretation of the English text.

235. Turning first to the French text. The French text is similar to the English text and consistent with Hong Kong, China's understanding of how the subparagraphs of Article XXI(b) relate to the chapeau. The French text states:

> Aucune disposition du présent Accord ne sera interprétée … comme empêchant une partie contractante de prendre toutes **mesures** qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:
>
> (i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;
>
> (ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destines directement ou indirectement à assurer l'approvisionnement des forces armées;

[177] Appellate Body Report, *US – Softwood Lumber IV*, para. 59 (citations omitted). See also Appellate Body Report, *US – Stainless Steel (Mexico)*, fn 200 to para. 88; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, fn. 153 to para. 123. The Appellate Body has also noted, in discussing the draft article eventually adopted as Article 33(3) of the Vienna Convention, that the ILC has observed that the '"presumption [that the terms of a treaty are intended to have the same meaning in each authentic text] requires that every effort should be made to find a common meaning for the text before preferring one to another'." Appellate Body Report, *US – Softwood Lumber IV*, para. 59, fn. 50 (citing Yearbook of the International Law Commission (1966), Vol. II, p. 225).

[178] Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the ILC*, 1966, vol. II, at 219 (US-12) (""[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.").

(iii) **appliquées** en temps de guerre ou en cas de grave tension internationale[.]

236. Given its similarity to the English text, the United States' understanding that the first two subparagraphs modify the term "intérêts" is again at least grammatically possible in French. The gender agreement in the French text (indicated in bold) confirms once again, however, that the third subparagraph can only modify the term "mesures" ("action", in the English text), raising all of the issues Hong Kong, China identified above with respect to the English text. Hong Kong, China's understanding of the French text – that all three subparagraphs modify the term "mesures" and therefore do not form part of the relative clause (beginning "qu'elle estimera" in the French text) that, under the U.S. theory, defines the portion of Article XXI(b) that is "self-judging" – avoids these issues.

237. Although both of the Parties' understandings of the English text are possible in a grammatical sense and reconcilable with the French text, the understanding advocated by the United States is not possible in the equally authentic Spanish text.

238. For ease of reference, Hong Kong, China sets forth Article XXI in the Spanish text:

> No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que … impida a una parte contratante la adopción de todas las **medidas** que estime necesarias para la protección de los intereses esenciales de su seguridad, **relativas**:
>
> (i) a las materias fisionables o a aquellas que sirvan para su fabricación;
>
> (ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;
>
> (iii) **a las aplicadas** en tiempos de guerra o en caso de grave tensión internacional[.]

239. The feminine gender agreement in the Spanish text (indicated in bold) confirms that each of the subparagraphs in the Spanish text relates to the term "action." The word "relativas" is in feminine gender agreement with the word "medidas" ("action", in the English text). It does not relate to the term "intereses", which is masculine. In addition, the feminine gender agreement in the third subparagraph ("a las aplicadas") confirms that the third subparagraph can only modify the term "medidas", a conclusion that the United States cannot dispute in the English text in view of the fact that "interests" are not "taken".

240. Hong Kong, China also notes the placement of a comma between "seguridad" and "relativas". The comma suggests a grammatical separation between the clause "las medidas que estime necesarias para la protección de los interese s esenciales de su seguridad" and the adjective "relativas", which introduces each of the enumerated subparagraphs. This separation is consistent with the interpretation of "which it considers/estime" as qualifying only the necessity element of chapeau and not the subparagraphs. This punctuation is therefore inconsistent with the U.S. understanding of the subparagraphs of Article XXI(b) in the English text as forming part of a single relative clause that begins "which it considers" and ends at the end of each subparagraph.

241. In response, the United States simply asserts these are "idiosyncrasies"[179] "that this different phrasing does not warrant departure from the understanding that the provision is self-judging" and "may be a translation error."[180] This is how the United States seeks to distract from the fact that its interpretation of the Spanish is wholly unsupported by the Spanish text – by casting aspersions on the authenticity of the Spanish text. Essentially, the United States seeks to justify its own flawed interpretation by suggesting that there are mistakes in the Spanish text.

242. This approach is highly problematic and entirely unsupported by the history of the drafting of the Spanish text, noting in particular that Spanish is an official language of many WTO Members. Consider the description in the WTO Analytical Index of the careful process of correcting and conforming the three authentic texts:

> During the final Uruguay Round legal drafting process, participants noted a lack of concordance between the French and Spanish versions of the Uruguay Round texts and the French and Spanish texts respectively of the GATT 1947. They also noted instances of a lack of concordance between the English, French and Spanish texts of the GATT 1947. Upon discussion participants concluded that the preferable course would be to conform the French and Spanish texts of the GATT 1947 to the linguistic usage reflected in the English language text and in the Uruguay Round Agreements. In addition, Spanish-speaking participants sought to establish an authentic text of Parts I-III of the General Agreement in Spanish.
>
> Participants decided to implement these objectives by preparing lists of rectifications to the French and Spanish texts of the GATT 1947, and providing in paragraph 2 of the GATT 1994 incorporation text that the GATT 1994 would reflect those rectifications. With the agreement of participants, a list of agreed corrections to the authentic French text of the GATT 1947, and to the Spanish text published in Volume IV of the BISD, were drawn up by the Secretariat Translation and Documentation Division and were circulated as annexes to MTN.TNC/41, a Decision of the Trade Negotiations Committee (TNC) on "Corrections to be Introduced in the General Agreement on Tariffs and Trade". The French and Spanish language texts of the GATT 1994 published by the Secretariat incorporate those rectifications.[181]

243. As this passage notes, the rectifications to the French and Spanish texts were incorporated directly into the GATT 1994. The GATT 1994 Incorporation Language provides in section 2(c) that:

> (i) The text of GATT 1994 shall be authentic in English, French and Spanish.
>
> (ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.

[179] United States' first written submission, para. 162.

[180] United States' first written submission, paras. 32 and 172.

[181] WTO Analytical Index, 1.3.2, paras. 8 and 9.

> (iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.

244. Four points regarding this history should be emphasized. First, the rectifications to the French and Spanish texts were intended to conform those texts "to the linguistic usage *reflected in the English text*".[182] The corrected texts thus presumptively reflect the English text of the GATT 1994, the text on which the U.S. interpretation of Article XXI(b) is based. Second, participants in the Uruguay Round had every opportunity to identify and correct errors in the French and Spanish texts in relation to the English text. While a correction was made to the Spanish text of Article XXI(b)(i) (by replacing "desintegrables" with "fisionables"), *no change was made to the position of the word "relativas" and its agreement with the word "medidas*". Third, the corrections to the Spanish text were made with the express objective of "establish[ing] an authentic text of Parts I-III of the General Agreement in Spanish".[183] Fourth, and consistent with that objective, the Spanish text, as corrected, was established by the GATT Incorporation Language as the authentic Spanish text.

245. In light of this history, the United States has no basis to imply that in its view, there is a mistake in the authentic Spanish text of Article XXI(b).[184] The notion that the Spanish text is somehow inconsistent with the English and French texts rests entirely on the assumption that the United States' understanding of the English text is correct. The Spanish text, however, is, in fact, fully consistent with the English and French texts once it is understood that each subparagraph modifies the word "action" ("medidas", "mesures"). This is a grammatically correct understanding of the English text (to say nothing of its consistency with the object and purpose of the GATT 1994 and principles of treaty interpretation), and that understanding is confirmed by the equally authentic Spanish text. There is no error or inconsistency in the texts.

246. The United States apparently believes that the participants in the Uruguay Round somehow overlooked the rather essential fact that the subparagraphs of Article XXI(b) are not "self-judging" in the Spanish text, but *did* manage to discover that the original drafters of the Spanish text used the word "disintegrables" when they should have used the word "fisionables". This is not a plausible understanding of these events. The far more plausible understanding is that no correction was proposed to the Spanish text of the chapeau to Article XXI(b) *because no participant believed that it was inconsistent with either the English or French texts*. Contrary to the U.S. assertion, the placement of the word "relativas" in the chapeau of the Spanish text is structurally *different* from the English and French texts, but it does not change the *meaning* of Article XXI(b) in relation to the other two authentic texts.[185] In all three authentic texts, each subparagraph modifies the term "action" ("medidas", "mesures") with the result that the determination of whether a measure is of a

[182] Emphasis added.

[183] Emphasis added.

[184] See, e.g. United States' first written submission, para. 172 ("An examination of the Spanish text of the essential security exception in the GATT 1994, GATS, and TRIPS confirms that the inclusion of a comma and "relativas" in the chapeau may be a translation error.").

[185] United States' first written submission, para. 169.

type for which justification can be sought under Article XXI(b) is a determination to be made by a reviewing panel, not the Member invoking Article XXI(b).

247. Apparently aware that the Panel is unlikely to be persuaded by its attack on the Spanish text, the United States ultimately acknowledges that its interpretation "is not fully supported by the Spanish text of the subparagraphs" and that "under Article 33 of the [Vienna Convention], the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted."[186] According to the United States:

> The interpretation that best reconciles the three texts is that the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b). Under this reading, the terms of the provision still form a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" still modifies the entirety of the main text and the subparagraph endings.[187]

248. On account of the Spanish text, the United States is forced to assert that the interpretation that best reconciles the three texts is one that directly contradicts its own "single relative clause" theory of the English text. The alternative U.S. interpretation requires reading the language "which it considers" to qualify the language that comes *before and after* it. The U.S. "single relative clause theory", however, is based on the proposition that that the relative clause that contains the self-judging elements of Article XXI(b) *begins* with the phrase "which it considers". The United States asserts that the terms of Article XXI(b) still form a single relative clause that begins in the main text and ends with each subparagraph ending, but that relative clause now includes the noun that precedes it, i.e. the noun that it is supposed to modify. The alternative interpretation proposed by the United States to reconcile the three authentic texts is thus necessitated by, and inconsistent with, its own flawed interpretation of the English text.

249. By contrast, the interpretation advocated by Hong Kong, China in this dispute and adopted by two prior panels[188] does not create any difference in meaning across the three authentic texts. In all three texts, the subparagraphs modify the word "action" ("medidas", "mesures"); and the words "which it considers" do not qualify the subparagraphs. Hong Kong, China's interpretation thus would not require the Panel to seek out an alternative interpretation that supposedly reconciles all three authentic texts. The need for such an alternative interpretation arises as a result of the serious flaws in the U.S. interpretation. The interpretation of the three subparagraphs in each text as relating to the term "action" and therefore as falling outside the portion of Article XXI(b) that is committed to the Member's judgment is based squarely on the terms of each text and simultaneously gives harmonious effect to all authentic versions of the text.

63. [To the United States]

[186] United States' first written submission, para. 47.

[187] United States' first written submission, para. 48.

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

64. To both parties: What bearing does the issue of the availability of a non-violation nullification or impairment claim in relation to Article XXI have on whether the security exception in Article XXI(b) of the GATT 1994 is self-judging?

250. As Hong Kong, China explained in its responses to Panel questions at the first substantive meeting, the availability of a non-violation nullification or impairment ("NVNI") claim does not support the view that Article XXI(b) is self-judging. Notably, the availability of NVNI claims does not establish the effectiveness of the subparagraphs of Article XXI(b) under the U.S. interpretation of Article XXI(b) as entirely self-judging.

251. Furthermore, the fact that a Member could pursue an NVNI claim in response to an invocation of Article XXI(b) sheds no light on whether Article XXI(b) is entirely self-judging. The negotiating history to which the United States refers in its first written submission indicates that the Contracting Parties considered a finding that an inconsistent measure is justified under Article XXI(b) would not preclude a finding of non-violation nullification or impairment. This view does not address how Article XXI(b) should be interpreted when determining whether an inconsistent measure is, in fact, justified under that exception. The statements concerning the availability of NVNI claims cited by the United States do not bear upon the question of whether the Contracting Parties considered Article XXI(b) to be entirely self-judging (the answer to which, as Hong Kong, China has demonstrated, is they did not).[189]

65. [To the United States]

66. To both parties: At paragraphs 47 and 48 of Exhibit EU-5, the European Union states that footnote 2 to the KORUS FTA comes close to expressing the idea of non-justiciability, providing that, where a party invokes Article 23.2 of that FTA, "the tribunal or panel hearing the matter shall find that the exception applies". The European Union notes that the WTO covered agreements contain no such text. What meaning do you attribute to the absence of such a provision in the GATT 1994 or elsewhere in the covered agreements as to whether the security exception of Article XXI(b) is self-judging?

252. Hong Kong, China considers that it would be inappropriate for the Panel to consider agreements outside the WTO framework in interpreting the ordinary meaning of Article XXI(b). Such agreements are not among the sources for interpreting the meaning of Article XXI(b) provided for by Articles 31 and 32 of the Vienna Convention. Hong Kong, China observes that the terms "justiciable" and "non-justiciable" do not appear in the DSU or in any of the WTO-covered agreements and that the proposition that the invocation of Article XXI(b) of the GATT 1994 is a "non-justiciable" issue was addressed and firmly rejected by the panel in *Russia – Traffic in Transit*.[190]

67. To Hong Kong, China: In paragraph 123 of its first written submission, the United States notes that the Treaty of Rome and the Agreement on the European Economic Area reflect significant deviations from the text of Article XXI of the GATT 1994, including by omitting the "which it considers necessary" language, by expressly

[189] See United States' first written submission, paras. 91-105.

[190] See Panel Report, *Russia – Traffic in Transit*, para. 7.103 and fn 183.

providing for the review of measures taken by a government for essential security purposes, and by using language that goes beyond that contained in subparagraph (iii). What meaning do you attribute to these differences in language in the above-mentioned treaties as to whether the security exception of Article XXI(b) is self-judging?

253. As Hong Kong, China explained in response to Panel question No. 66 above, it would be inappropriate for the Panel to consider agreements outside the WTO framework in interpreting the ordinary meaning of Article XXI(b). Such agreements are not among the sources for interpreting the meaning of Article XXI(b) provided for by Articles 31 and 32 of the Vienna Convention.