BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

SECOND WRITTEN SUBMISSION OF HONG KONG, CHINA

Confidential

11 November 2021

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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
ITO	International Trade Organization
MFN	Most-Favoured-Nation
NVNI	Non-Violation Nullification or Impairment
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TFA	Trade Facilitation Agreement
TRIMs Agreement	Agreement on Trade-Related Investment Measures
USCBP	U.S. Customs and Border Protection
USITC	U.S. International Trade Commission
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
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695
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	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R / and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018 [appealed by the European Union 21 September 2018 – the Division suspended its work on 10 December 2019]
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
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
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
Saudi Arabia – IPRs	Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1, circulated to WTO Members 16 June 2020 [appealed by Saudi Arabia 28 July 2020] [short title modified on 29 July 2020]
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
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

SHORT TITLE	FULL REPORT TITLE AND CITATION
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
US – Textiles Rules of Origin	Panel Report, *United States – Rules of Origin for Textiles and Apparel Products*, WT/DS243/R and Corr.1, adopted 23 July 2003, DSR 2003:VI, p. 2309

I. INTRODUCTION AND SUMMARY

1. In its first written submission to the Panel, Hong Kong, China demonstrated that the revised origin marking requirement is inconsistent with Articles 2(c) and 2(d) of the Agreement on Rules of Origin ("ARO"), Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), and Articles I:1 and IX:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").[1]

2. Rather than contesting Hong Kong, China's claims on the merits, the United States opted in its own first written submission to rest its defence upon its assertion that the measures at issue are justified under Article XXI(b) of the GATT 1994. Through its reliance upon this exception provision, the United States effectively acknowledged that the revised origin marking requirement is inconsistent with the provisions of the covered agreements identified by Hong Kong, China. This is because claims of justification under an exception provision become relevant only once it is established that the measures at issue are inconsistent with one or more substantive provisions governed by that exception.[2]

3. Through its statements to the Panel in connection with the first substantive meeting and its answers to the Panel's questions, it is apparent that the United States continues to base its defence upon its assertion that the violations of the covered agreements established by Hong Kong, China are justified under Article XXI(b) of the GATT 1994. While the United States has made certain assertions in its answers to the Panel's questions that relate to the merits of Hong Kong, China's claims, the United States continues to make clear that, in its view, the Panel need not address the merits of Hong Kong, China's claims and that its answers to the Panel's questions "are without prejudice to the U.S. position regarding Article XXI(b)."[3]

4. The posture of this dispute therefore remains what it was coming into the first substantive meeting. The U.S. defence is based on two propositions concerning Article XXI(b) of the GATT 1994: (i) that this exception is "self-judging" in its entirety, such that the United States need not demonstrate the objective applicability of one or more of its subparagraphs to the action for which justification is sought; and (ii) that Article XXI(b) is available as a potential justification for violations of the ARO and the TBT Agreement.

5. Hong Kong, China will demonstrate in Part V of this submission that there is no credible argument that Article XXI(b) of the GATT 1994 applies to the ARO or the TBT Agreement. The U.S. position on this issue is completely unfounded as a matter of treaty interpretation and must be rejected. The Panel should therefore find that the revised origin marking requirement is inconsistent with the ARO and TBT

[1] In line with paragraph 3 of Hong Kong, China's first written submission, the term "country" as used in this submission, 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.

[2] See, e.g. Appellate Body Report, *US – Gasoline*, p.16; Panel Report, *EC – Seal Products*, para. 7.612.

[3] United States' response to Panel questions, para. 1.

Agreement for the reasons that Hong Kong, China has established and exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994. This approach would provide a satisfactory resolution of the matter in accordance with Article 3.4 of the Dispute Settlement Understanding ("DSU") and obviate the need for the Panel to interpret and apply Article XXI(b) of the GATT 1994, other than as necessary to conclude that it does not apply to the ARO or TBT Agreement.

6. In Part VI, Hong Kong, China will demonstrate that, in any event, the United States' understanding of Article XXI(b) of the GATT 1994 is mistaken. As two prior panel reports have found, and as every third party who has commented upon this issue in connection with the present dispute agrees, the applicability of the subparagraphs of Article XXI(b) to the action for which justification is sought is an objective matter reviewable in dispute settlement. Properly interpreted, Article XXI(b) requires the Member invoking the exception to demonstrate the objective applicability of one or more of the subparagraphs to the action for which justification is sought. Because the United States has made *no* effort to demonstrate the applicability of *any* subparagraph of Article XXI(b) to the revised origin marking requirement, let alone established a *prima facie* case of applicability, its attempted invocation of Article XXI(b) necessarily fails. Thus, even if the Panel had occasion to consider the United States' invocation of Article XXI(b), for whatever reason, it would need to find that the United States has failed to satisfy its burden of proof under this exception.

7. Before turning to the foundation of the United States' defence, however, Hong Kong, China in Parts II to IV below first addresses certain issues that have arisen concerning its claims under the ARO, the TBT Agreement, and the GATT 1994. The United States and certain of the third parties have made assertions and advanced certain theories that are intended to obfuscate what are, in fact, clear violations of these agreements.

8. In Part II, Hong Kong, China responds to the suggestion by the United States that the revised origin marking requirement does not involve a country of origin determination governed by the ARO, but is instead a matter of the terminology used to indicate the origin of goods manufactured or processed in Hong Kong, China. Hong Kong, China will demonstrate that the revised origin marking requirement *necessarily* involves a country of origin determination and *does in fact* involve a country of origin determination, as demonstrated by the uncontroverted evidence on the record. The measures at issue, as well as how the United States is treating the origin of Hong Kong, China goods in practice, are based on a determination by the United States that the goods subject to the revised origin marking requirement have an origin of the People's Republic of China, a different WTO Member. By acknowledging that these goods are in fact goods of Hong Kong, China origin when origin is properly determined in accordance with ARO-compliant rules of origin (i.e. under what the United States calls its "normal rules of origin"), the United States has effectively conceded that the revised origin marking requirement is inconsistent with Articles 2(c) and 2(d) of the ARO.

9. In Part III, Hong Kong, China briefly dispenses with certain arguments that the revised origin marking requirement may not be a "technical regulation" within the meaning of Article 2.1 of the TBT Agreement, and that it may not modify the

conditions of competition in the U.S. market to the detriment of products imported from Hong Kong, China. Hong Kong, China then addresses the parties' continued agreement that if the Panel concludes that the detrimental impact of the measure reflects *de jure* origin-based discrimination, the Panel should conclude that Hong Kong, China has established the "less favourable treatment" element of its claim. Hong Kong, China notes, however, that certain third parties have argued that the Panel might still take into account the United States' essential security interests even if the measure reflects origin-based discrimination on its face. Hong Kong, China therefore explains that because there is no conceivable relationship between the contested measures and the United States' essential security interests, those essential security interests are necessarily irrelevant to the Panel's analysis under Article 2.1.

10. Finally, in Part IV, Hong Kong, China recalls its claims under Articles IX:1 and I:1 of the GATT 1994. Hong Kong, China explains that because the United States has now expressly agreed that the goods subject to the revised origin marking requirement are goods of Hong Kong, China under U.S. Customs and Border Protection's ("USCBP") "normal rules of origin", the violations of Articles IX:1 and I:1 are indisputable.

II. THE REVISED ORIGIN MARKING REQUIREMENT IS INCONSISTENT WITH THE AGREEMENT ON RULES OF ORIGIN

A. Introduction

11. The measures at issue in this dispute require goods that are manufactured or processed in Hong Kong, China to be marked as having the origin of a different WTO Member, the People's Republic of China. In relation to the ARO, there are only two ways of viewing this requirement:

a. That the revised origin marking requirement is based on a determination that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China, a different WTO Member, which is, in turn, why the United States requires these goods to be marked as having an origin of the People's Republic of China; or

b. That the revised origin marking requirement is a requirement to mark goods that indisputably originate within one country of origin (Hong Kong, China) as originating in a different country of origin (the People's Republic of China), i.e. a requirement to mark goods that originate in one country of origin ("Country A") as goods that have an origin of another country of origin ("Country B").

12. Based on its submissions to the Panel, the United States appears to believe that the revised origin marking requirement is a requirement of the second type, i.e. a requirement to mark goods that originate in Country A when ARO-compliant rules of origin are properly applied as goods that have an origin of Country B. According to the United States, a requirement to mark the origin of goods other than in accordance with their actual country of origin, properly determined, "does not implicate any

discipline under the Agreement on Rules of Origin".[4] In other words, the United States appears to suggest that nothing in the ARO requires a Member to *treat* the origin of goods in accordance with their actual country of origin, as determined in accordance with ARO-compliant rules of origin.

13. If this is indeed the United States' position, it is profoundly mistaken. The United States' position, if accepted, would render the ARO a nullity, not only in relation to marks of origin but in relation to *all* of the non-preferential commercial policy instruments governed by that agreement. Properly interpreted, the rules of the ARO apply not only to formal determinations of origin, such as published determinations made in response to a request for the conferral of a particular origin based on a certain set of facts, but also determinations of origin as reflected in how a Member treats the origin of imported goods in practice. Either way, a particular treatment of origin must be based on, and must reflect, a country of origin determination made in accordance with the origin rules prescribed by the ARO. For this reason, the United States' admission that it is treating the origin of Hong Kong, China goods other than in accordance with their actual country of origin as determined in accordance with ARO-compliant rules of origin is tantamount to a concession that that revised origin marking requirement is inconsistent with Articles 2(c) and 2(d) of the ARO.

14. This section is organized as follows:

- In Part II.B, Hong Kong, China returns to first principles to sort out the United States' mistaken understanding as to the scope and disciplines of the ARO. This discussion lays the foundation for the remainder of this section. As established therein, every non-preferential commercial policy instrument governed by the ARO necessarily involves a country of origin determination. This determination must be made in accordance with ARO-compliant rules of origin, and that determination of origin must then govern how a Member treats the origin of an imported good in practice.

- In Part II.C, Hong Kong, China demonstrates that, contrary to the United States' suggestion, the revised origin marking requirement *is* based on a determination that goods made in Hong Kong, China have an origin of the People's Republic of China, a different WTO Member. This conclusion follows as a matter of U.S. law and is confirmed by how the United States has interpreted and applied the revised origin marking requirement in practice. The evidence on the record demonstrates that the United States has, in fact, determined that the People's Republic of China is the "actual country of origin" of goods made in Hong Kong, China, at least for origin marking purposes. The measures at issue are therefore of the first type identified in

[4] United States' response to Panel question Nos. 6 and 7, para. 25.

paragraph 11.a above, not the second type mentioned in paragraph 11.b above.[5]

- In Part II.D, Hong Kong, China demonstrates that even if the measures at issue were of the second type, as the United States suggests, the ARO covers not only formal determinations of origin but also how a Member treats the origin of an imported good in practice. In the case of origin marking requirements, this means that a required mark of origin must correctly indicate the actual country of origin of the imported goods, as determined in accordance with ARO-compliant rules of origin. The ARO does not, in short, allow a Member to require goods having an origin of Country A, as determined in accordance with ARO-compliant rules of origin, to be marked as having an origin of Country B.

- Finally, in Parts II.E and II.F, Hong Kong, China demonstrates that the revised origin marking requirement is inconsistent with Articles 2(c) and 2(d) regardless of whether the measures at issue are of the first or second type. Either way, the revised origin marking requirement is based on a country of origin determination (whether formally or as reflected in how the United States actually treats the origin of Hong Kong, China goods) that requires the fulfilment of a condition unrelated to manufacturing or processing as a prerequisite to the conferral of a particular country of origin, and that discriminates against goods of Hong Kong, China in respect of the determination of origin.

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

15. Article 1.1 of the ARO defines "rules of origin" as "laws, regulations and administrative determinations of general application applied by any Member *to determine the country of origin* of goods". Article 1.2 of the ARO further provides that "[r]ules of origin … shall include all rules of origin used in non-preferential commercial policy instruments", and then proceeds to provide five examples of where rules of origin are used "in the application of" such instruments: (i) MFN treatment under the MFN-related provisions of the GATT 1994; (ii) anti-dumping and countervailing duties under Article VI of the GATT 1994; (iii) safeguard measures under Article XIX of the GATT 1994; (iv) origin marking requirements under Article IX of the GATT 1994; and (v) "any discriminatory restrictions or tariff quotas".[6]

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[5] The same evidence further establishes that this dispute does not concern the *terminology* used to indicate an origin of Hong Kong, China, as the United States also implies at times, but rather a requirement to mark goods of Hong Kong, China origin as having an origin of the People's Republic of China, a different WTO Member.

[6] The last sentence of Article 1.2 also refers to "rules of origin used for government procurement or trade statistics."

16. Three conclusions follow from these definitional elements of the ARO. First, each of the five types of instruments enumerated in Article 1.2 *necessarily* involves a determination of the country of origin of imported goods. By their nature, these instruments cannot be applied without a prior determination of where imported goods originate. A country of origin determination is therefore inherent in the application of each one of these types of instruments. A Member cannot, for example, ensure that it accords MFN treatment to goods of other Members without a prior determination that goods originate within the customs territory of a Member, as opposed to the customs territory of a non-Member to which no obligation of MFN treatment is owed. The need to determine origin is inherent in the concept of MFN treatment, just as it is inherent in the other types of instruments enumerated in Article 1.2.

17. The second conclusion that follows from the definitional elements of the ARO is that rules of origin that comport with the requirements of the agreement *must* be used "to determine the country of origin of goods" for all non-preferential purposes, including for the purpose of the five types of non-preferential instruments enumerated in Article 1.2. A determination of the country of origin is required for all such purposes, and that determination must be made in accordance with ARO-compliant rules of origin. Were that not the case, the ARO would be a meaningless agreement – it would prescribe conditions with which Members' rules of origin must comply, but then not require Members to *apply* those ARO-compliant rules of origin when determining the origin of goods. Where Article 1.1 states that the ARO applies to all measures of general application applied by a Member "to determine the country of origin of goods" for non-preferential purposes, it means that Members *must* apply ARO-compliant rules of origin to determine the country of origin of goods for those purposes.[7]

18. The third conclusion, following closely from the second, is that the application of rules of origin that comport with the requirements of the ARO must govern the *actual treatment* of the origin of imported goods for all non-preferential purposes. It would be meaningless for the ARO to apply to all rules of origin used "in the application of" these types of non-preferential commercial policy instruments if the results of a lawful country of origin determination did not govern the actual treatment of the origin of imported goods for the purposes of those instruments. The principle of effectiveness requires the conclusion that where Article 1.2 refers to all rules of origin used in the application of non-preferential commercial policy instruments, including the five enumerated types, it must be interpreted to mean that rules of origin consistent with the ARO must be used to determine the country of origin for those purposes, and that the resulting country of origin determination must govern the actual treatment of a good's origin for those purposes.

19. Consider the case of countervailing duties, a type of non-preferential commercial policy instrument identified in Article 1.2. Suppose that a Member

[7] This conclusion is reinforced by the title of Part I, "Definitions *and Coverage*" (emphasis added). Article 1 of the ARO not only defines what rules of origin *are,* but also specifies the scope of the agreement's coverage. It follows that the specific disciplines set forth in Article 2 of the ARO apply to all country of origin determinations specified in Article 1, i.e. all country of origin determinations required for the application of non-preferential commercial policy instruments.

lawfully applies countervailing duties to imports from France. Under Article 1.2 of the ARO, the Member is required to apply rules of origin that comport with the rules of the ARO to determine *which* imported goods are of French origin and therefore subject to the countervailing duties. The importing Member could not, for example, apply a rule of origin unrelated to conditions of manufacturing or processing to determine that goods made in South Africa are goods of French origin and on that basis apply the countervailing duties to goods made in South Africa. Having properly determined in accordance with ARO-compliant rules of origin that the goods are of South African origin, the importing Member must then *treat* those goods as goods of South African origin for the purpose of its countervailing duties. The importing Member could not disregard the actual country of origin determined in accordance with ARO-compliant rules of origin and apply the countervailing duties imposed upon goods of French origin to goods of South African origin.[8]

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

21. It cannot be disputed, and is not disputed, that the only purpose for which rules of origin are "used … in the application of … origin marking requirements" is to determine the name of the country with which a good must be marked to indicate its origin. As the U.S. International Trade Commission ("USITC") has correctly 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".[9] This determination of the country of origin must be made in accordance with ARO-compliant rules of origin, and the country of origin, lawfully determined in accordance with those rules, must govern the actual treatment of the imported good for origin marking purposes. It follows axiomatically that the required mark of origin

[8] Note that neither action – unlawfully determining that goods manufactured or processed in South Africa are goods of French origin, or disregarding the South African origin of the goods and treating them as goods of French origin for countervailing duty purposes – would violate Article VI of the GATT 1994 or the SCM Agreement. Neither the GATT 1994 nor the SCM Agreement has rules for determining the origin of goods – thus the need for the ARO. The improper determination of the *origin* of goods is a violation of the ARO, not the substantive disciplines that govern the relevant type of non-preferential commercial policy instrument. As discussed in more detail in Part II.D below, a contrary interpretation of the ARO would render the entire agreement *inutile.*

[9] 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).

(the relevant treatment of origin) must *correctly* indicate the actual country of origin of the goods as determined in accordance with ARO-compliant rules of origin.

22. The United States confirms these basic features of the ARO and their application to origin marking requirements in its response to Question 6 from the Panel. Asked to explain how rules of origin are used in the application of origin marking requirements, the United States provided the following example:

> An example of how a rule of origin is used in the application of an origin marking requirement would be: An apple is grown in the territory of Country A. The apple is imported into Country B. The law of Country B provides that, for marking purposes, the country of origin of a good is the country where the good is wholly produced. Country B applies that law and determines that the apple should be marked to indicate that its origin is Country A. Country B may allow various terminology for the mark itself – for example, an abbreviation. Now, suppose the apple is exported from Country A to Country C and processed as an ingredient in animal feed, which is then exported to Country B. The law of Country B provides that the country of origin of a good that is the product of multiple countries is the country where [the] last substantial transformation took place. Country B applies that rule and determines that the processing of the apple into animal feed constitutes substantial transformation, so the animal feed should be marked to indicate that its origin is Country C.[10]

23. As the United States' example makes clear, the required mark of origin necessarily *results from the application of rules of origin,* i.e. from "laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods". It is the country of origin, properly determined in accordance with ARO-compliant rules of origin, that governs *how* the imported good is treated for origin marking purposes (i.e. how the imported good "should be marked to indicate … its origin"). There is, in other words, a necessary and legally required correspondence between the country of origin of the goods, properly determined in accordance with ARO-compliant rules of origin, and the name of the country with which the good must be marked, which is the relevant treatment of origin in the case of origin marking requirements.

24. To be clear, there is scope, albeit not unlimited, under the ARO for a Member to determine the terminology used to *indicate* the country of origin, once that country of origin is properly determined based on the application of ARO-compliant rules of origin. A Member has scope to determine, for example, whether goods manufactured or processed in London may or should be marked as products of the United Kingdom, of Great Britain, of England, or something else, but it may not require those goods to be marked as products of France, a different country and a different WTO Member. Moreover, questions of terminology come *after* the importing Member has determined the country of origin based on the application of rules of origin. Contrary

[10] United States' response to Panel question Nos. 6 and 7, para. 30 (emphasis added).

to what the United States suggests in its answers to the Panel's questions, the present dispute is not a dispute about terminology. As discussed in Part II.C.2 below, this is confirmed, *inter alia,* by the fact that the United States has rejected any mark of origin for goods manufactured or processed in Hong Kong, China that includes the words "Hong Kong" on the grounds that such a mark would not indicate the "actual country of origin", which the United States considers to be the People's Republic of China.

25. Nor is the present dispute a dispute about the boundaries of the customs territory in which particular goods were manufactured or processed. In relation to its example of how rules of origin are used in the application of origin marking requirements, quoted above, the United States observes that "whether the territory in which the apple was grown is part of Country A, and whether the territory in which the animal feed was processed is part of Country C … is not part of Country B's rule of origin. These are political determinations of Country B, and they are not governed by the Agreement on Rules of Origin."[11] But the United States concedes, as it must, that the present dispute is not a dispute of that type. The United States acknowledges that the revised origin marking requirement applies to goods "produced in the geographic region of Hong Kong, China".[12] The United States further acknowledges that the geographical boundaries of the separate customs territory of Hong Kong, China are not in dispute,[13] and that the United States continues to treat goods manufactured or processed in Hong Kong, China as goods of Hong Kong, China origin for all other purposes.[14] The United States thereby recognizes that Hong Kong, China is a distinct "country of origin" from which goods may originate, that the geographical boundaries of the separate customs territory of Hong Kong, China are not in dispute, and that the revised origin marking requirement applies exclusively to goods produced within those boundaries.

26. Having established these foundational points, Hong Kong, China can proceed to examine the two bases (other than its primary reliance on Article XXI(b) of the GATT 1994) on which the United States appears to respond to Hong Kong, China's claims under the ARO: (i) the United States' suggestion that the revised origin marking requirement is not based on *any* country of origin determination, and in particular is not based on a determination that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China; and (ii) the United States' suggestion that the ARO does not prevent a Member from treating goods that originate in one country as having the origin of a different country, in this

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[11] United States' response to Panel question Nos. 6 and 7, para. 31.

[12] United States' response to Panel question Nos. 6 and 7, para. 25.

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

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

case by requiring goods that have an origin of Country A to be marked as having an origin of Country B. Both of these positions are unfounded.

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

27. In its responses to the Panel's questions, the United States strongly implies that, in its view, the revised origin marking requirement is not based on a determination that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China. Instead, the United States seeks to characterize the revised origin marking requirement as a matter of the terminology used to indicate the origin of goods made in Hong Kong, China.

28. In response to Question 7, for example, the United States asserts that it continues to use "its normal rules of origin" to identify goods "produced in the geographic region of Hong Kong, China" and, pursuant to the revised origin marking requirement, requires those goods to be marked as having an origin of "China".[15] In response to Question 9, the United States asserts that "the measures at issue involve the terminology used for marking goods *produced in the geographic region of Hong Kong, China*", which the United States now requires to be marked as having an origin of "China".[16] It is undisputed that, in U.S. practice, an origin mark of "China" indicates an origin of products manufactured or processed in the customs territory of the People's Republic of China, not that of Hong Kong, China.[17] Thus, according to the United States, the revised origin marking requirement is a requirement to mark goods having an origin of Hong Kong, China as goods that have an origin of the People's Republic of China. The United States characterizes this requirement as a question of "terminology" that "does not implicate any discipline under the Agreement on Rules of Origin".[18]

29. As Hong Kong, China will discuss in further detail in Part II.D below, the United States is mistaken in its belief that nothing in the ARO prevents a Member from requiring a good originating in Country A to be marked as having an origin of Country B. It should be evident already from the foundation established in Part II.B above why the U.S. position is incorrect. The United States' characterization of the revised origin marking requirement, even if accurate, would therefore not remove the measures at issue from the ARO's scope of application and from its disciplines.

30. However, the United States' characterization of the revised origin marking requirement is *not* accurate. The revised origin marking requirement does in fact involve a determination by the United States that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China. It is this

[15] United States' response to Panel question Nos. 6 and 7, para. 25.

[16] United States' response to Panel question No. 9(d), para. 38 (emphasis added).

[17] See Hong Kong, China's first written submission, para. 15.

[18] United States' response to Panel question Nos. 6 and 7, para. 25.

determination of origin, in turn, that has led the United States to require goods manufactured or processed in Hong Kong, China to be marked as having an origin of the People's Republic of China, and to prohibit the use of any mark of origin that indicates an origin of Hong Kong, China. As Hong Kong, China will demonstrate, this conclusion follows as a matter of U.S. law and is confirmed by how the United States has interpreted and applied the revised origin marking requirement in practice.

1. The revised origin marking requirement necessarily involves a determination of origin under U.S. law

31. As Hong Kong, China discussed in Part II.B above, the application of the types of non-preferential commercial policy instruments governed by the ARO necessarily requires a determination of the country of origin of imported goods. This includes origin marking requirements. As the name of the requirement itself indicates, a requirement to mark the *origin* of a good necessarily involves a determination of where the good *originated.*

32. The fact that every origin marking requirement involves a determination of the country of origin is confirmed by the provisions of U.S. law giving rise to the specific origin marking requirement at issue in the present dispute. The origin marking requirement under U.S. law, as set forth in section 304(a) of the Tariff Act of 1930, provides that "every article of foreign origin … imported into the United States shall be marked in a conspicuous place … to indicate to an ultimate purchaser … the English name of the country of origin of the article".[19] The requirement is not to mark the imported article with the name of *any* country or *some* country, but specifically *the country of origin.* A particular country name mandated by the United States under this requirement therefore indicates the United States' determination as to the country of origin of the goods to which that mandate applies.

33. This conclusion is reinforced by the USCBP's regulations implementing section 304(a). Under those regulations, USCBP has defined the term "country of origin" in section 304(a) to mean "the country of manufacture, production, or growth of any article of foreign origin entering the United States".[20] The definition additionally provides that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin'".[21] The "country of origin" under section 304(a) – i.e. the name of the country with which an imported article must be marked – is therefore the country in which the United States determines that the article was manufactured, produced, or grown, or the country in which the United States determines that the article last underwent a substantial transformation. The requirement is to mark the product with the name of the country of origin as determined by the United States in

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

[20] 19 C.F.R. § 134.1(b) [redacted].

[21] 19 C.F.R. § 134.1(b) [redacted].

accordance with its rules of origin, not the name of *any* country or the name of a country determined by the United States on some *other* basis.

34. As for the terminology used to *indicate* the country of origin as determined by USCBP, its regulations provide that "the markings required … shall include the full English name of the country of origin, unless another marking to indicate the English name of the country of origin is specifically authorized by the Commissioner of Customs".[22] This provision makes clear, as discussed in Part II.B above, that questions of terminology come after the country of origin has been determined. But whatever terminology USCBP permits or requires as the mark of origin, that terminology necessarily indicates the country of origin of the imported good as determined by USCBP.

35. The marking requirement at issue in the present dispute is the *origin* marking requirement arising from section 304(a) of the Tariff Act of 1930 and USCBP's implementing regulations. Under those provisions of U.S. law, a requirement to mark goods as having an origin of "China", which in U.S. practice refers to the People's Republic of China, is necessarily based upon a determination by the United States that those goods originate in the People's Republic of China. Under U.S. law, and consistent with the ARO, the mark required by section 304(a) indicates "the country of origin" as determined by the United States in accordance with its rules of origin, which such rules must conform to the requirements of the ARO.

2. The revised origin marking requirement involves a determination in fact that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China, a different WTO Member

36. Consistent with the provisions of U.S. law discussed above, the revised origin marking requirement entails a determination *in fact* that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China, a different WTO Member. It is on the basis of this country of origin determination that the United States now requires these goods to be marked as having an origin of "China" and prohibits any mark of origin that would indicate an origin of Hong Kong, China.

37. The title of the August 11 Federal Register notice is "Country of Origin Marking of Products of Hong Kong". The notice states that the purpose of the document is to "notif[y] the public that … goods produced in Hong Kong … must be marked to indicate that their origin is 'China' for purposes of 19 U.S.C. 1304." As discussed above, section 304(a) (19 U.S.C. § 1304) requires an imported good to be marked with "the English name of the country of origin of the article".[23] The requirement to mark goods as having an origin of "China", which in U.S. practice refers to the People's Republic of China, is therefore a determination by the United States that the goods to which the August 11 Federal Register notice applies (i.e.

[22] 19 C.F.R. § 134.45(a)(1) [redacted].

[23] See August 11 Federal Register notice [redacted] (emphasis added).

"goods produced in Hong Kong") in fact have an origin of the People's Republic of China.

38. The fact that the revised origin marking requirement entails a determination by the United States that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China is confirmed by the subsequent actions of USCBP. These actions confirm, moreover, that the revised origin marking requirement is not a question of the terminology used to indicate the origin of goods made in Hong Kong, China, as the United States now implies.

39. In August 2020, subsequent to the publication of 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" and other marks that include the words "Hong Kong" as marks of origin under 19 U.S.C. 1304 for goods manufactured or processed within the separate customs territory of Hong Kong, China. While Hong Kong, China has previously discussed the HKTDC's request and USCBP's response to that request, it is worth examining these events in greater detail given the United States' suggestion that the revised origin marking requirement does not involve a determination by the United States that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China.

40. In its request to USCBP, the HKTDC requested confirmation that the revised origin marking requirement permits the use of marks of origin that include the words "Hong Kong" in addition to the word "China". As examples of the marks of origin that it considered permissible under the revised origin marking requirement, the HKTDC identified "Made in China (Hong Kong)", "Made in Hong Kong (China)", "Made in Hong Kong, China", "Made in Hong Kong (CN)", "Made in Hong Kong – China", "Made in China – Hong Kong", "Made in CN (Hong Kong)", "Made in CN – Hong Kong", and "China (Made in Hong Kong)". The HKTDC explained that the use of the words "Hong Kong" in addition to the word "China" would be consistent with the fact that Hong Kong, China is a separate customs territory Member of the WTO, and further explained that nothing in the August 11 Federal Register notice barred the use of the words "Hong Kong" so long as the mark of origin also included the word "China".■ This treatment, had the USCBP granted it, would have been consistent with the United States' rule that marks of origin "shall include the full English name of the country of origin", which in the case of the goods at issue is "Hong Kong, China".

41. The USCBP rejected the HKTDC's request. It is worth quoting USCBP's rationale in full:

> In issuing the Executive Order, the President invoked his authority under 22 U.S.C. § 5722 and effectively required CBP to stop applying 19 U.S.C. § 1304 to Hong Kong in the manner in which the U.S. Customs Service (the predecessor agency to U.S. Customs and Border

Protection) had been applying the statute to goods produced in Hong Kong while Hong Kong was under the sovereignty of Great Britain and since the reversion of Hong Kong's sovereignty to China on July 1, 1997. In accordance with the Executive Order, the country of origin marking of goods produced in Hong Kong to indicate that their origin is "Hong Kong," pursuant to 19 U.S.C. § 1304, is no longer acceptable. Therefore, in the Federal Register Notice (85 Fed. Reg. 48551), CBP stated that goods produced in Hong Kong may no longer be marked to indicate "Hong Kong" and, instead, must be marked to indicate that their origin is "China." Accordingly, the examples of markings that you have provided are not permissible under the new policy that was specified in the Executive Order and reiterated in the Federal Register Notice.

This approach is similar to CBP's position with regard to the country of origin marking of goods produced in Hong Kong prior to the issuance of this Federal Register Notice. On June 5, 1997, the U.S. Customs Service issued a Federal Register Notice indicating that goods produced in Hong Kong must continue to be marked to indicate their origin as "Hong Kong" after Hong Kong's reversion to the sovereignty of the People's Republic of China ("China") on July 1, 1997. See 62 Fed. Reg. 30927 (June 5, 1997). Customs subsequently indicated that for goods produced in Hong Kong and entered or withdrawn from warehouse for consumption into the United States on or after July 1, 1997, the country of origin marking must continue to indicate that the origin is Hong Kong and any markings indicating that the origin of such goods is "China" will not be acceptable, including "Made in Hong Kong, China." See Headquarters Ruling Letter ("HQ") 560337, dated June 27, 1997. Similarly, CBP's position under the new 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.

42. There can be no mistaking from this rationale that the United States has made a country of origin determination, and that its determination is that goods manufactured or produced in the separate customs territory of Hong Kong, China have an origin of the People's Republic of China, at least for origin marking purposes. USCBP repeatedly acknowledges that the purpose of requiring goods to bear a mark of origin is to "indicate … *their origin*", thereby confirming the necessary correspondence between the country of origin determination and the terminology used

to describe that origin. USCBP concludes that any use of the words "Hong Kong" under the revised origin marking requirement "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". In other words, USCBP rejects any use of the words "Hong Kong" because, in its view, the resulting mark of origin would not correctly indicate what USCBP considers to be the "actual country of origin" of Hong Kong, China goods, which USCBP considers to be People's Republic of China as a result of the August 11 Federal Register notice.

43. This conclusion is confirmed by USCBP's analogy to the situation that prevailed before the revised origin marking requirement. As USCBP explains, USCBP did not previously accept the use of the word "China" in the mark of origin for goods of Hong Kong, China origin because the use of the word "China" had the potential to convey to the ultimate purchaser, incorrectly, that the goods had an origin of the People's Republic of China. "Similarly," USCBP explains, its position under the revised origin marking requirement is that any use of the words "Hong Kong" in the mark of origin "is not acceptable" because of their potential to convey to the ultimate purchaser that the goods have an origin of Hong Kong, China. This analogy leaves no doubt that USCBP has made a country of origin determination, and that its determination is that goods manufactured or produced in the separate customs territory of Hong Kong, China are goods that have an origin of the People's Republic of China. The point of USCBP's analogy is that the words used in a mark of origin must correspond to the "actual" country of origin of the goods, which as a result of the August 11 Federal Register notice USCBP considers to be the People's Republic of China.

44. USCBP's rationale also confirms that the revised origin marking requirement is not, as the United States appears to suggest, a matter of the terminology used to describe goods having an origin of Hong Kong, China. Were that the case, USCBP should readily have accepted the marks of origin proposed by HKTDC, all of which accurately convey the full English name of the separate customs territory of Hong Kong, China as required by USCBP's regulations. USCBP rejected the proposed marks of origin not on terminological grounds, but on the grounds that the proposed marks of origin would not correctly indicate "the actual country of origin", which USCBP considers to be the People's Republic of China.

45. For these reasons, the United States' suggestion that this dispute pertains to the terminology used to indicate goods having an undisputed origin of Hong Kong, China is disingenuous and contrary to the evidence. This dispute pertains to a determination by the United States that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China and the resulting requirement to mark these goods as having an origin of the People's Republic of China.

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

1. The ARO encompasses determinations of origin as reflected in how a Member treats the origin of goods, not just formal determinations of origin

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

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

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

49. To return to the example used in Part II.B, suppose that the Member imposing countervailing duties on subsidized imports from France begins applying the same countervailing duties to goods manufactured or processed in South Africa, without making a formal determination that those goods are of French origin. The importing

Member's treatment of those goods as goods of French origin (i.e. applying special duties that by law can apply only to goods of French origin) necessarily reflects a determination by that Member that the goods are of French origin. That treatment of the imported goods must reflect a country of origin determination that comports with the rules of the ARO. Thus, for example, the treatment of goods manufactured or processed in South Africa as goods of French origin would be inconsistent with Article 2(c) of the ARO, because that treatment of origin is necessarily based on conditions other than conditions relating to manufacturing or processing.

50. The same conclusion applies to marks of origin. Requiring goods to be marked as having an origin of Country B necessarily reflects a determination by the importing Member that the goods have an origin of Country B. As Hong Kong, China demonstrated in Part II.C above, the United States has *in fact* made such a determination, i.e. it has in fact determined that goods manufactured or processed in Hong Kong, China have an origin of the People's Republic of China for origin marking purposes. But even if the United States had made no formal determination to that effect, as the United States now suggests contrary to the record evidence, its treatment of goods from Hong Kong, China as having an origin of the People's Republic of China necessarily reflects a determination by the United States that the goods subject to the revised origin marking requirement have an origin of the People's Republic of China. That determination of origin must comply with the rules of the ARO.

51. If the ARO did not govern how Members treat the origin of goods in practice, the ARO would impose no meaningful or effective disciplines upon the application of rules of origin to non-preferential commercial policy instruments, which is the entire subject matter of the agreement. Through the simple expedient of avoiding a formal country of origin determination, or even denying that a country of origin determination has been made when such a determination has in fact been made, a Member could free itself from any obligation to treat the origin of goods in accordance with the rules prescribed by the ARO. The ARO would become a purely theoretical agreement having no practical effect upon the application of non-preferential commercial policy instruments. Such an interpretation would do more than "reduc[e] whole clauses or paragraphs of a treaty to redundancy or inutility"[26] – it would reduce *the entire agreement* to inutility because the agreement would no longer discipline the actual conduct of Members in relation to how they treat the origin of goods.

52. It follows from these considerations, and from the ordinary meaning of Article 1 of the ARO as discussed in Part II.B above, that the coverage of the ARO encompasses both formal determinations of origin (e.g. published determinations of origin made in response to a specific inquiry) and determinations of origin as reflected in a Member's actual treatment of the origin of particular goods. Where Article 1.2 provides that the coverage of the ARO includes "all rules of origin used in non-

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

preferential commercial policy instruments", including "in the application of" the five specified types of such instruments, it means that rules of origin *must* be used to determine the origin of goods for these purposes and that a Member acts inconsistently with the ARO when it treats the origin of goods other than in accordance with their actual country of origin, as determined through the application of rules of origin that comport with the requirements of the ARO.

2. The ARO requires a correspondence in practice between the country of origin of a good, as determined in accordance with ARO-compliant rules, and the name of a country with which a good must be marked for origin marking purposes

53. In the present dispute, the United States appears to acknowledge that the goods to which the revised origin marking requirement applies are in fact goods of Hong Kong, China origin when ARO-compliant rules of origin are properly applied. The United States nevertheless treats these goods for origin marking purposes as originating in a different country of origin, the People's Republic of China. In this way, the United States admits that its treatment of the affected goods for origin marking purposes does not comply with the rules of the ARO.

54. Based on its answers to the Panel's questions, it appears to be the U.S. position that the ARO does not prevent a Member from treating goods that have an origin of Country A as having an origin of Country B. That is, the United States believes that the ARO does not require Members to treat the origin of goods in accordance with their country of origin, properly determined in accordance with ARO-compliant rules of origin. In relation to marks of origin, the United States evidently considers that a Member may determine, in some sense, that goods have an origin of Country A but require them to be marked as having an origin of Country B, and that this marking decision "does not implicate any discipline under the Agreement on Rules of Origin".[27] The United States appears to believe, for example, that it would not be inconsistent with the ARO for a Member to determine or acknowledge that goods have an origin of South Africa when ARO-compliant rules of origin are properly applied, but nevertheless require these goods to be marked as having an origin of France. In the United States' view, the requirement to mark goods of South African origin as having an origin of France would be a matter of the "terminology" used to indicate their origin, a matter that the United States considers to fall outside the disciplines of the ARO.

55. The United States provides no interpretative support for this position. It merely asserts that the name of the country with which a good must be marked for origin marking purposes need not bear any relationship to the actual country of origin of the goods, i.e. the country of origin of the goods as determined in accordance with ARO-compliant rules of origin. Most importantly, the United States makes no effort to explain how the ARO would have any practical effect if the disciplines that the agreement imposes upon country of origin determinations did not govern a Member's actual treatment of the origin of goods. Once that critical interpretative consideration

[27] United States' response to Panel question Nos. 6 and 7, para. 25.

is taken into account, it is evident that a required mark of origin must *correctly* indicate the country of origin of the marked goods as determined in accordance with ARO-compliant rules of origin, and that a Member acts inconsistently with the ARO when no such correspondence exists.[28]

56. It is telling how the European Union and Canada, as third parties, attempt to address the same basic issue of whether the ARO requires a correspondence between the country of origin of a good, properly determined in accordance with ARO-compliant rules of origin, and the name of the country with which a good must be marked. Neither third party appears to agree with the United States, or with each other, on this fundamental question.

57. The European Union's position on this issue is not coherent. In response to Question 1 to the third parties, the EU explains that "origin" for origin marking purposes "is determined based on the conditions or 'origin criteria' contained in the rules of origin, *following which the origin marking must reflect origin in accordance with said determination*".[29] This explanation appears to acknowledge that there must be a correspondence between the country of origin, properly determined in accordance with ARO-compliant rules of origin, and the name of the country with which the good must be marked (i.e. that the mark "must reflect origin in accordance with said determination").[30]

[28] The fact that the word "China" appears in the full English name of "Hong Kong, China" does not mean that the required correspondence exists in the case of the revised origin marking requirement. It is undisputed that, in both U.S. and international practice, "China" refers to the People's Republic of China, not Hong Kong, China. For a mark of origin to indicate an origin of Hong Kong, China, the words "Hong Kong" must appear in the mark of origin (either alone or together with "China"). As discussed in Part II.C.2 above, the United States has rejected any mark of origin for goods produced in Hong Kong, China that includes the words "Hong Kong" precisely because such a mark would indicate a country of origin *other than the People's Republic of China*. The revised origin marking requirement is therefore a case of requiring goods that have an origin of Country A to be marked as having an origin of Country B.

[29] European Union's response to Panel question No. 1, para. 1 (emphasis added).

[30] To the same effect, the EU states as follows in response to Question 4 to the third parties:

> If for example a good was wholly obtained in Member A, and assume for the pure sake of simplicity that the scope of the territory and sovereignty of this Member are undisputed, yet following a determination of origin this good would be considered as originating from Member B, that would a priori not appear to be in compliance with the ARO. (European Union's response to Panel question No. 4, para. 15.)

Setting aside the EU's reference to "sovereignty", which is not relevant to determining the country of origin under the ARO, the EU has described the facts of this dispute: the United States is treating goods that indisputably have an origin of Hong Kong, China under ARO-compliant rules of origin as goods having the origin of a different Member (in the EU's language, the United States "considers" these goods "as originating" from a different Member for origin marking purposes). As the EU's statement acknowledges, this treatment is not in compliance with the ARO.

58. In response to Question 6, however, the EU claims that the required indication of a particular country of origin can be made "differently than" the determination of the country of origin of the good so marked. The EU states:

> Concretely, based on a rule of origin that determines specific goods to be originating in country A, an origin marking requirement can theoretically require that goods originating in A be *marked as* originating in B. While this surely would not make much sense, the question here is whether this could generate a breach of the ARO, and it would not.[31]

59. The EU does not reconcile this statement with its earlier recognition that a mark of origin "must reflect origin in accordance with" the country of origin determination. Oddly, the EU goes on to state that "[t]he actual application of a requirement to mark the origin of a product would *most usefully* rely on rules of origin *that are applied to determine* the origin of that product."[32] What the EU characterizes as merely "useful" is in fact what the ARO *requires.* As Hong Kong, China established in Part II.B above, the ARO requires Members to determine the origin of goods for all non-preferential purposes in accordance with ARO-compliant rules of origin, and to treat the origin of goods consistently with that determination. This is a legal requirement, not something that is merely "useful".

60. The EU goes on to state that "[t]he absence of any kind of rules of origin and the absence of a determination of origin … would render origin marking requirements senseless".[33] Hong Kong, China agrees with this observation, and the reason identified by the EU is precisely why the ARO *does* apply to rules of origin used in the application of origin marking requirements – to prevent origin marking requirements from being rendered "senseless". It would be "senseless", for example, for a Member to require goods that indisputably have an origin of Country A to be marked as having an origin of Country B. The ARO prevents this senseless result by requiring all Members to base their country of origin determinations on specified rules, including for origin marking purposes, "following which the origin marking *must reflect origin in accordance with said determination*".[34]

61. Canada, for its part, acknowledges that it is inconsistent with the ARO to require a product to be marked with the name of a country other than the country of origin that results from the proper application of rules of origin. Canada "agrees" with Hong Kong, China in this regard "that if a good, following the application of rules of origin for marking purposes, is found to have a country of origin in Canada, for instance, it could not be marked as 'Made in the United States'."[35] Thus, Canada accepts that for the ARO to apply to rules of origin used in the application of origin

[31] European Union's response to Panel question No. 6, para. 19.

[32] European Union's response to Panel question No. 6, para. 20 (emphasis added).

[33] European Union's response to Panel question No. 6, para. 20.

[34] European Union's response to Panel question No. 1, para. 1 (emphasis added).

[35] Canada's response to Panel question No. 6, para. 17.

marking requirements, as it does by its express terms, there must be a correspondence between a required mark of origin and the country of origin properly determined in accordance with ARO-compliant rules of origin. Canada further appears to accept that the *treatment* accorded to imported goods for origin marking purposes (and, logically, for any other non-preferential purpose) must reflect a valid country of origin determination, i.e. that a Member may not treat goods that have an origin of Country A as having an origin of Country B. Hong Kong, China welcomes this clarification of Canada's position.

62. In its next breath, however, Canada asserts that the same requirement of law that applies to goods of Canadian origin does not apply to goods of Hong Kong, China origin. Canada claims that "Hong Kong, China … exists entirely within the territorial boundaries of China" and claims that, for this reason, "goods manufactured in Hong Kong, China could be considered to originate in either Hong Kong, China or China".[36] Canada's assertion is incorrect: goods manufactured or processed in the customs territory of Hong Kong, China *cannot* be considered to originate in the customs territory of the People's Republic of China. As Canada itself acknowledges, Hong Kong, China is a distinct "country of origin" for the purpose of determining the origin of a good under the rules of the ARO.[37] Neither the ARO nor any other Annex 1A agreement distinguishes among different *types* of countries of origin, such as those that are sovereign states and those that are separate customs territory Members. Hong Kong, China is a country of origin just as Canada is a country of origin, and it is equally inconsistent in both cases to require goods of these origins to be marked incorrectly as having a different country of origin.[38]

63. The fact that neither the European Union nor Canada can coherently explain why the United States is not required to treat goods of Hong Kong, China origin as having this origin for origin marking purposes is compelling evidence that no such coherent explanation exists. The European Union got the answer right before it got the answer wrong. Canada should be credited for getting the answer right, but it then introduced an unfounded and unprincipled distinction in how the ARO applies to different WTO Members – a distinction that amounts to an assertion that Members may choose not to adhere to their treaty obligations in relation to separate customs territory Members, an assertion that flies in the face of the WTO Agreement and the principle of *pacta sunt servanda.*

64. Properly interpreted, the ARO requires a correspondence between how a Member treats the origin of a good in practice and the actual country of origin of that good, determined in accordance with rules of origin that comply with the

[36] Canada's response to Panel question No. 6, para. 17.

[37] See, e.g. Canada's response to Panel question No. 3, paras. 6 and 9.

[38] In any event, Canada's assertions concerning alleged differences between Canada and Hong Kong, China bear no relationship to the United States' rationale for the measures at issue in this dispute. As discussed in Part II.B above, the United States acknowledges that goods manufactured or produced in Hong Kong, China have an origin of Hong Kong, China when ARO-compliant rules of origin are correctly applied. The United States further acknowledges that Hong Kong, China is a distinct country of origin, the geographical boundaries of which are not in dispute.

requirements of the ARO. In the case of origin marking requirements, this means that a required mark of origin must correctly indicate the country of origin of the good, where origin is determined in accordance with rules that comport with the ARO. Where a Member treats a good as having a particular origin for origin marking purposes (i.e. by requiring the good to be marked with that origin), that treatment must reflect a country of origin determination that is consistent with the rules of the ARO. A Member may not, consistently with the ARO, disregard the actual country of origin of a good when it comes to the treatment of that good in practice. In the case of origin marking requirements, this means that a Member may not require goods that have an origin of Country A, properly determined in accordance with ARO-compliant rules of origin, to be marked as having an origin of Country B.

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

65. Article 2(c) of the ARO provides that "rules of origin shall 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". The panel in *US – Textiles Rules of Origin* found that this provision "requires Members to ensure that the conditions their rules of origin impose *as a prerequisite for the conferral of origin* not include a condition which is unrelated to manufacturing or processing."[39] The panel further considered that the "conditions" to which this clause refers "are those that must be fulfilled for a qualifying good *to be accorded the origin of a particular country*."[40]

66. It is undisputed that the goods subject to the revised origin marking requirement are goods that are manufactured or processed in the separate customs territory of Hong Kong, China, a distinct country of origin the boundaries of which are not in dispute. Through its answers to the Panel's questions, the United States has effectively acknowledged that the goods subject to the revised origin marking requirement are goods of Hong Kong, China origin when origin is determined exclusively by reference to conditions of manufacturing or processing, as required by Article 2(c). This is evidenced, *inter alia,* by the fact that the United States continues to treat goods manufactured or processed in Hong Kong, China as goods of Hong Kong, China origin for all purposes other than origin marking purposes.

67. These admissions by the United States confirm that the revised origin marking requirement is inconsistent with Article 2(c) regardless of how one views the measures at issue, i.e. regardless of whether one views the measures as based on a determination that goods made in Hong Kong, China are goods that originate in the People's Republic of China, or whether one views the measures as requiring that goods of an undisputed origin (Hong Kong, China) be treated as goods of a different origin (the People's Republic of China).

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

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

68. For the reasons set forth in Part II.C above, the revised origin marking requirement is necessarily based on a determination by the United States that the Hong Kong, China goods subject to the revised origin marking requirement have an origin of the People's Republic of China, thus requiring these goods to be marked as having an origin of "China". This conclusion follows as a matter of U.S. law and is confirmed by how the United States has interpreted and applied the revised origin marking requirement in practice. The United States has expressly denied a conferral of Hong Kong, China origin in response to a request for this treatment on the grounds that Hong Kong, China is not the "actual country of origin" of goods manufactured or processed in Hong Kong, China.

69. As Hong Kong, China explained in its first written submission, the United States' conclusion that goods made in Hong Kong, China have an origin of the People's Republic of China is based on a condition – the condition that Hong Kong, China remains "sufficiently autonomous" from the People's Republic of China, as assessed by the United States – that is unrelated to conditions of manufacturing or processing. The United States has applied this condition to "determine the country of origin of goods". Whereas the United States previously determined that goods made in Hong Kong, China are goods of Hong Kong, China origin, the United States has now applied the condition of "sufficient autonomy" to determine that the identical goods are goods originating in a different country of origin, the People's Republic of China. The condition of "sufficient autonomy" is therefore a rule of origin, and one that "require[s] the fulfilment of a certain condition not related to manufacturing or processing … as a prerequisite for the determination of the country of origin". It is therefore inconsistent with Article 2(c).

70. As discussed in Part II.C, the United States suggests in its answers to the Panel's questions that the revised origin marking requirement is not based on a determination that goods made in Hong Kong, China have an origin of the People's Republic of China. This suggestion is contrary to the record evidence for the reasons that Hong Kong, China has explained. But even if this characterization of the measures at issue were accurate, it would not change the fact that the United States is treating goods manufactured or processed in Hong Kong, China as having an origin of the People's Republic of China for origin marking purposes. As Hong Kong, China discussed in Part II.D, this treatment of the origin of Hong Kong, China goods is obviously inconsistent with the rules of the ARO.

71. By acknowledging that the revised origin marking requirement applies exclusively to goods manufactured or processed in Hong Kong, China, the United States has effectively conceded that its treatment of these goods for origin marking purposes does not comport with Article 2(c) of the ARO. Treating goods as having an origin other than the country in which they were manufactured or processed is necessarily inconsistent with Article 2(c). Such treatment does not and cannot reflect a country of origin determination that is based exclusively on conditions relating to manufacturing or processing, as required by Article 2(c).

72. In any event, regardless of how one characterizes the measures at issue, there is no question that the revised origin marking requirement "require[s] the fulfilment of a certain condition not related to manufacturing or processing" as a condition "that

must be fulfilled for a qualifying good to be accorded the origin of a particular country".[41] In the context of origin marking requirements, the name of the country with which a good must be marked *is* the relevant "conferral of origin".[42] The HKTDC submitted a request to USCBP seeking the conferral of Hong Kong, China origin for goods manufactured or processed in Hong Kong, China. As detailed in Part II.C.2 above, USCBP rejected this request. Its rationale for rejecting the request was that Hong Kong, China is not the "actual country of origin". But whatever the rationale, it is evident from this determination that the revised origin marking requirement requires the fulfilment of some condition unrelated to manufacturing or processing as a prerequisite to the conferral of Hong Kong, China origin. This, by itself, is sufficient to establish that the revised origin marking requirement is inconsistent with Article 2(c) of the ARO.

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

73. Article 2(d) of the ARO provides, in relevant part, that "the rules of origin that [Members] apply to imports … shall not discriminate between other Members".

74. The ordinary meaning of the term "discriminate", as it pertains here, is to "make a distinction".[43] Thus, under Article 2(d), Members may not make distinctions in how they apply their rules of origin as among different Members. The panel in *US – Textiles Rules of Origin* considered that:

> [T]he principal objective of the second clause of Article 2(d) is to ensure that, for a given good, the strictness of the requirements that must be satisfied for that good *to be accorded the origin of a particular Member* is the same, regardless of the provenance of the good in question (*i.e.*, Member from which the good is imported, affiliation of the manufacturers of the good, etc.).[44]

75. As with Article 2(c), the revised origin marking requirement is inconsistent with Article 2(d) regardless of whether one views the measures as based on a determination that goods made in Hong Kong, China are goods that originate in the People's Republic of China (the characterization of the measures supported by the evidence), or whether one views the measures as requiring that goods of an undisputed origin (Hong Kong, China) be treated (marked) as goods of a different origin (the People's Republic of China). Either way, the revised origin marking requirement is inconsistent with Article 2(d).

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

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

[43] NEW SHORTER OXFORD ENGLISH DICTIONARY, 4TH EDN, L. BROWN (ED.) (CLARENDON PRESS, 1993) (excerpts) [redacted].

[44] Panel Report, *US – Textiles Rules of Origin*, para. 6.248 (emphasis added).

76. As discussed in Part II.C above, the revised origin marking requirement is based on a determination that the Hong Kong, China goods subject to the requirement have an origin of the People's Republic of China, thus requiring these goods to be marked as having an origin of "China". This determination of the country of origin is the result of the application of a requirement – the requirement that Hong Kong, China remains "sufficiently autonomous" from the People's Republic of China, as assessed by the United States – that the United States does not apply to determine the origin of goods imported from other Members. The United States therefore discriminates in the rules of origin that it applies to goods imported from the separate customs territory of Hong Kong, China as compared to the rules that it applies to determine the origin of goods imported from other Members. The revised origin requirement is, for this reason, inconsistent with Article 2(d).

77. The same conclusion would follow even if one were to accept the U.S. view that the revised origin marking requirement is not based on a determination that goods made in Hong Kong, China are goods that originate in the People's Republic of China. Even if this characterization of the measures at issue were accurate, which it is not, it would not change the fact that the United States is treating goods manufactured or processed in Hong Kong, China as having an origin of the People's Republic of China for origin marking purposes. As Hong Kong, China discussed in Part II.D, this treatment of the origin of Hong Kong, China goods is obviously inconsistent with the rules of the ARO.

78. Under U.S. law, the name of the country with which a good must be marked for the purpose of section 304(a) of the Tariff Act of 1930 is, for all other imports, the country in which the United States determines that the good was manufactured, produced, or grown, or the country in which the United States determines that the good last underwent a substantial transformation. These are the requirements that must be satisfied for a good "to be accorded the origin of a particular Member" for origin marking purposes. The United States has effectively conceded that the application of these requirements to goods made in Hong Kong, China necessarily leads to the conclusion that these goods should be accorded the origin of Hong Kong, China for origin marking purposes.

79. This is not, however, the origin treatment that the United States accords to goods made in Hong Kong, China. With respect to these goods, the United States requires them to be marked with the name of a "country of origin" *other* than the country in which the goods were manufactured, produced, or grown, or last underwent a substantial transformation. The United States is, in this way, not according the same treatment of origin to goods made in Hong Kong, China that the United States accords to the goods of other Members. This discriminatory treatment of imports from Hong Kong, China is necessarily inconsistent with Article 2(d), because it is not and cannot be based on rules of origin that do not "discriminate between other Members".

80. In any event, regardless of how one characterizes the measures at issue, there is no question that the revised origin marking requirement is the result of measures that do not impose "the same" requirements for a good "to be accorded the origin of a

particular Member … regardless of the provenance of the good in question".[45] The HKTDC submitted a request to USCBP seeking the conferral of Hong Kong, China origin for goods manufactured or processed in Hong Kong, China. USCBP denied this request. Regardless of the USCBP's rationale, it is evident from this determination that the revised origin marking requirement is the result of a rule of origin that discriminates between Hong Kong, China and other Members. This is because it is undisputed that, under the United States' "normal rules of origin", goods made in Hong Kong, China are goods of Hong Kong, China origin and would be accorded this treatment for origin marking purposes but for the revised origin marking requirement.

III. THE REVISED ORIGIN MARKING REQUIREMENT IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

81. Hong Kong, China demonstrated in its first written submission that the U.S. origin marking requirement, as applied to goods imported from Hong Kong, China under the revised origin marking requirement, is a technical regulation in respect of which the United States has accorded goods imported from Hong Kong, China less favourable treatment than that accorded to like products originating in other Members (and non-Members) in violation of Article 2.1 of the TBT Agreement.

82. In its first written submission, the United States failed to engage with the merits of Hong Kong, China's claim under Article 2.1 in any respect. Instead, the United States relied exclusively on its contention that Article XXI(b) of the GATT 1994 is applicable to the TBT Agreement, and that Article XXI(b) is self-judging in its entirety. The fundamental flaws in these U.S. arguments have now been described at length by both Hong Kong, China and *all* of the third parties who have elected to weigh in on these issues. Accordingly, and as discussed further in Parts V and VI below, Hong Kong, China believes that the Panel should readily dispense with both arguments.

83. In relation to the merits of Hong Kong, China's claim under Article 2.1, the United States did elect to respond to certain questions posed by the Panel at the first substantive meeting and in subsequent written questions, albeit on a hypothetical basis. In particular, the United States addressed certain Panel questions regarding whether the United States' essential security interests should be taken into account in an analysis of Hong Kong, China's claim under Article 2.1. As Hong Kong, China will discuss in Part C below, the parties' views on those questions are aligned in certain fundamental respects. In particular, the parties agree that if the Panel concludes that the detrimental impact of the measure reflects *de jure* origin-based discrimination, the Panel should conclude that Hong Kong, China has established the "less favourable treatment" element of its claim.

84. Before turning to this aspect of Hong Kong, China's claim, however, Hong Kong, China will first address certain (half-hearted) suggestions that the revised origin marking requirement may not be a technical regulation, and that it may not

[45] Panel Report, *US – Textiles Rules of Origin*, para. 6.248.

modify the conditions of competition in the U.S. market to the detriment of products imported from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members). For the reasons described in Parts A and B below, Hong Kong, China has demonstrated that the revised origin marking requirement is a technical regulation that modifies the conditions of competition in the U.S. market to the detriment of products imported from Hong Kong, China.

A. The Revised Origin Marking Requirement Is a Technical Regulation

85. Hong Kong, China has demonstrated that the revised origin marking requirement is a technical regulation comprised of certain specified "documents" which lay down "marking…requirements" that "apply to a product", and that compliance with the marking requirements is mandatory. The United States argues in response to Panel Question 12, however, that Hong Kong, China has not met its burden of proof in relation to this element of its claim. The United States maintains that Hong Kong, China "merely assert[ed]" that 19 U.S.C. § 1304, part 134 of USCBP's regulations, and "rulings and notices relating thereto" is a "technical regulation" because it is a "marking requirement" that "applies to a product" and that the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice "form part" of the marking requirement.[46]

86. Hong Kong, China did not "merely assert" that the revised origin marking requirement is a technical regulation. In Part II of Hong Kong, China's first written submission, entitled "Background on the Revised Origin Marking Requirement", Hong Kong, China described in detail the nature and content of the measures that comprise the revised origin marking requirement, as well as the relationship between those measures. Hong Kong, China did not repeat this detailed explanation of the individual measures when it explained that the revised origin marking requirement constitutes a technical regulation, because the repetition of the relevant detail (provided ten pages earlier in the same submission) seemed unnecessary. For the avoidance of any doubt, however, Hong Kong, China will briefly summarize the relevant explanation here.

87. Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304, requires goods imported into the United States to be marked with their country of origin.[47] USCBP is responsible for implementing section 304 of the Tariff Act of 1930, and part 134 of USCBP's regulations (19 C.F.R. Part 134) prescribes detailed rules concerning compliance with this origin marking requirement.[48]

88. Of particular relevance, USCBP has defined the term "country of origin" for the purpose of section 304 as "the country of manufacture, production, or growth of

[46] United States' response to Panel question No. 12, para. 50.

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

[48] 19 C.F.R. Part 134 [redacted].

any article of foreign origin entering the United States."[49] With regard to the specific words used on an imported article to indicate its country of origin, USCBP's regulations provide that "the markings required by this part shall include the full English name of the country of origin, unless another marking to indicate the English name of the country of origin is specifically authorized by the Commissioner of Customs".[50] Under section 304 of the Tariff Act of 1930 and USCBP's regulations, imported articles not marked as required by law are subject to additional duties of 10 percent, assessed on top of other duties that may apply.[51]

89. Section 304(a) of the Tariff Act of 1930 and part 134 of USCBP's regulations are therefore "documents" which lay down "marking…requirements" that "apply to a product", and compliance with these requirements is mandatory.

90. With respect to goods imported from the customs territory of Hong Kong, China specifically, 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.

91. Under section 201(a) of the United States-Hong Kong Policy Act of 1992, the laws of the United States apply to Hong Kong, China in the same manner that those laws applied to Hong Kong prior to the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China on 1 July 1997.[52] Under section 202(a) of that Act, the U.S. President can suspend the application of section 201(a) if the President "determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China".[53]

92. Executive Order 13936 contains a finding that Hong Kong, China is not "sufficiently autonomous" in the view of the United States and suspends the application of section 201(a) to a number of U.S. laws, including the origin marking requirement set forth in section 304 of the Tariff Act of 1930.[54]

93. The August 11 Federal Register notice makes clear that the suspension of section 201(a) of the United States-Hong Kong Policy Act of 1992 as it applies to section 304 of the Tariff Act of 1930 is what required USCBP to determine that the country of origin of goods manufactured or produced in Hong Kong, China is the

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[49] 19 C.F.R. § 134.1(b) ███.

[50] 19 C.F.R. § 134.45(a)(1) ███.

[51] See 19 U.S.C. § 1304(i) ███; 19 C.F.R. § 134.2 ███.

[52] See United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 201(a) ███.

[53] United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 202(a) ███.

[54] See The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020) ("Executive Order 13936") ███.

People's Republic of China for the purpose of the origin marking requirement. As that notice summarizes:

> [I]n light of the President's Executive Order … suspending the application of section 201(a) of the United States-Hong Kong Policy Act of 1992 to the marking statute, section 304 of the Tariff Act of 1930, with respect to imported goods produced in Hong Kong, such goods may no longer be marked to indicate "Hong Kong" as their origin, but must be marked to indicate "China."[55]

94. The United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice are therefore "documents" that form part of the "marking…requirement" that applies to all products manufactured or produced in the customs territory of Hong Kong, China. In conjunction with section 304 of the Tariff Act of 1930 and part 134 of USCBP's regulations, these measures mandate that all goods manufactured or produced in the customs territory of Hong Kong, China be marked as goods originating in the customs territory of the People's Republic of China, a different WTO Member. These measures collectively comprise what Hong Kong, China refers to as the "revised origin marking requirement", which constitutes a "technical regulation" within the meaning of Annex 1, paragraph 1, of the TBT Agreement.[56]

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[55] 85 Fed. Reg. 48551 (11 August 2020) ("August 11 Federal Register notice") [redacted].

[56] The United States also challenges Hong Kong, China's reference to "rulings and notices relating to" 19 U.S.C. 1304 or part 134 of the USCBP regulations being part of the technical regulation, because the United States maintains that "rulings and notices" were not identified in Hong Kong, China's panel request. See United States' response to Panel question No. 12, para. 51. Hong Kong, China's panel request includes "any official guidance or determinations" relating to the identified measures, which would include "rulings and notices". See Request for the Establishment of a Panel by Hong Kong, China, WT/DS597/5, p. 2 (15 January 2021). While no such "rulings and notices" are an essential part of the technical regulation, Hong Kong, China specifically had in mind USCBP's letter of 8 October 2020, in which USCBP rejected a request by Hong Kong enterprises to mark their products as goods of "Hong Kong, China" [redacted]

B. The Revised Origin Marking Requirement Modifies the Conditions of Competition to the Detriment of Products Imported from Hong Kong, China

95. In addition to establishing that the measures at issue constitute a "technical regulation", Hong Kong, China has demonstrated that the measures allow for a presumption of "likeness" because the measures draw a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members),[57] and the "likeness" element of Hong Kong, China's claim under Article 2.1 is uncontested. In relation to the question of less favourable treatment, however, the United States and Canada have suggested that Hong Kong, China may not have sufficiently demonstrated that the measures modify the conditions of competition in the U.S. market to the detriment of products imported from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).[58]

96. As an initial matter, Canada submits that Hong Kong, China may not have established that it has been denied treatment accorded to other Members.[59] The U.S. answers to Panel questions, however, make the difference in treatment incontrovertible. It is undisputed that section 304 of the Tariff Act of 1930 and part 134 of USCBP's regulations require goods imported into the United States to be marked with the full English name of the country of "manufacture, production, or growth" (or "substantial transformation"). It is also undisputed that pursuant to the revised origin marking requirement, goods that the United States agrees are "produced in the geographic region of Hong Kong, China"[60] may *not* be marked as goods from Hong Kong or Hong Kong, China. Rather, they must be marked as goods from "China", which is a *different* WTO Member.[61] Pursuant to the challenged measures, Hong Kong, China is therefore specifically denied treatment accorded to other Members – namely, the ability to mark goods with the full English name of the country in which they are manufactured or produced.[62]

[57] See Hong Kong, China's first written submission, paras. 56-58.

[58] See United States' response to Panel question No. 14, paras. 58-59; Canada's response to Panel question No. 9.

[59] See Canada's response to Panel question No. 9.

[60] See United States' response to Panel question Nos. 6 and 7, para. 25.

[61] See European Union's response to Panel question No. 9 ("Concretely, the obligation to mark as origin a different WTO Member is detrimental because the like products imported from another WTO Member do not face that requirement.").

[62] As described in Part IV.A below in relation to Hong Kong, China's claim under Article IX:1 of the GATT 1994, the revised origin marking requirement *also* accords less favorable treatment in respect of goods from Hong Kong, China because the United States' country of origin determination is based on a condition that the United States does not apply to determine the country of origin of the goods of other Members. Despite the U.S. arguments to the contrary, Hong Kong, China has explained in Part II.C.1 above that the revised origin marking requirement is necessarily based on a determination by the United States that goods manufactured or processed in Hong Kong, China originate in the People's Republic of China. In this respect, USCBP has determined that, for purposes of section 304(a)

97. Hong Kong, China demonstrated in its first written submission that the inability of Hong Kong enterprises to mark their goods as goods of Hong Kong or Hong Kong, China origin detrimentally modifies the conditions of competition in the U.S. market for these goods vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).[63] Hong Kong, China explained that there is often considerable brand and reputational value to be derived from marking a product as originating in the customs territory of the Member in which it was manufactured or processed.[64]

98. Hong Kong, China explained that the requirement to mark goods exported from Hong Kong, China as having an origin of "China" when destined for the United States has also increased the cost and complexity of exportation for Hong Kong enterprises.[65] Finally, Hong Kong, China explained that there is an inherent advantage for exporters in being able to mark their products with the actual country of origin of the product, as opposed to the origin of a different Member (in this case, the People's Republic of China).[66] Hong Kong, China noted in this respect that the inaccurate marking of the customs origin of a good is liable to cause confusion and potential error in the regulatory treatment of that good, and in fact has already had those effects pursuant to the revised origin marking requirement.[67]

99. For all of these reasons, Hong Kong, China has demonstrated that the revised origin marking requirement modifies the conditions of competition in the U.S. market to the detriment of goods imported from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).

of the Tariff Act, the People's Republic of China is the "actual country of origin" of goods manufactured or processed in Hong Kong, China. This country of origin determination is based on a condition – the condition of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to determine the country of origin of the goods of other Members. The revised origin marking requirement therefore accords less favourable treatment to goods of Hong Kong, China whether as a result of prohibiting goods of Hong Kong, China from being marked with the full English name of the country in which they are manufactured or produced, or as a result of determining the country of origin by applying a condition that the United States does not apply to the goods of other Members.

[63] See Hong Kong, China's first written submission, paras. 60-63

[64] See Hong Kong, China's first written submission, para. 61.

[65] See Hong Kong, China's first written submission, para. 62.

[66] See Hong Kong, China's first written submission, para. 63.

[67] See Hong Kong, China's first written submission, para. 63

C. The Revised Origin Marking Requirement Accords Less Favourable Treatment to Products of Hong Kong, China Origin

100. At the first substantive meeting, and in its subsequent questions, the Panel solicited the parties' views on whether Hong Kong, China's demonstration of a "detrimental impact" is sufficient to demonstrate "less favourable treatment". In its response to Panel Question 14, the United States explained that, in its view, the question depends on whether the "detrimental impact" is the result of origin-based discrimination:

> [W]hat Article 2.1 prohibits are measures that accord less favorable treatment to the concerned imported products as compared to other foreign like products *based on origin*. That is, when based on an overall evaluation and assessment of the facts and circumstances, if it is found that there is detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and if that detrimental impact is based on the administration of an origin-based discrimination, then the element of "less favorable treatment" can be established.[68]

101. In Hong Kong, China's view, this should mean that the parties agree that the element of "less favourable treatment" has been established, because the "detrimental impact" at issue here "is based on the administration of an origin-based discrimination".

102. The United States contends, however, that any detrimental impact that results from the application of the revised origin marking requirement is based on factors that are *unrelated* to the origin of the products at issue.[69] This argument is confusing at best. The revised origin marking requirement is a quintessential example of *de jure* origin-based discrimination. The August 11 Federal Register notice is entitled "Country of Origin Marking of Products of Hong Kong", and it provides that for purposes of 19 U.S.C. 1304, "*all goods produced in Hong Kong* … must be marked to indicate that their origin is 'China'".[70] The authority for the Federal Register notice is Executive Order 13936, entitled "The President's Executive Order on Hong Kong Normalization", which suspends the United States-Hong Kong Policy Act of 1992 based on the United States' determination that Hong Kong is no longer "sufficiently autonomous" from the People's Republic of China.[71]

103. Pursuant to these measures, and as explained above, products from Hong Kong, China are denied treatment accorded to foreign like products – namely, the ability to mark goods as originating in the country in which they are manufactured or produced. This differential treatment is clearly *based on origin*. On the face of the

[68] United States' response to Panel question No. 14, paras. 56-57.

[69] See United States' responses to Panel question Nos. 14 and 15.

[70] See August 11 Federal Register notice [redacted] (emphasis added).

[71] See Executive Order 13936 [redacted].

measures, the revised origin marking requirement applies *explicitly and exclusively* to all products imported from the customs territory of Hong Kong, China.

104. The United States nonetheless contends that the measures do not draw distinctions based on origin. The United States maintains that while the measures reflect a specific determination that "Hong Kong, China is no longer sufficiently autonomous with respect to the People's Republic of China", what matters is that this determination is allegedly based on "U.S. concerns for human rights, fundamental freedoms, and democratic norms".[72] The United States argues that because these underlying concerns are "origin-neutral", the measures do not reflect origin-based discrimination.[73]

105. This argument is nonsensical. Setting aside the merits of the U.S. argument that the measures are based on "concerns for human rights, fundamental freedoms, and democratic norms", the question that should be asked is whether the United States also has such concerns in relation to other Members around the world? Presumably, the answer is yes. And yet, the United States, notwithstanding having these "origin-neutral" concerns, adopted measures to address these concerns that are aimed *explicitly and exclusively* at goods originating in Hong Kong, China. This only serves to reinforce the fact that the measures reflect origin-based discrimination.[74]

106. None of the third parties has adopted the U.S. view that the measures are origin-neutral. Certain of the third parties have suggested, however, that even where the measures at issue reflect *de jure* origin-based distinctions, that may not be the end of the Panel's analysis.[75] Canada in particular has argued that the Panel should still take into account the United States' essential security interests in some sort of modified version of the "legitimate regulatory distinction" test developed by the Appellate Body.[76]

107. As Hong Kong, China explained at the first substantive meeting, the United States' steadfast refusal to articulate its essential security interests makes this line of argument entirely hypothetical. In its first written submission, the United States explained:

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

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

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

[75] See Canada's response to Panel question No. 11; European Union's response to Panel question No. 11.

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

> [I]t is difficult to imagine how a WTO panel might make an "objective determination" of the existence of such a state of affairs [i.e. an "emergency in international relations"] unless the Member in question were to provide a panel with information regarding the details of the situation and the nature of its essential security concerns – information which, as already discussed, is not required to be provided by the Member.[77]

Hong Kong, China agrees that absent "details of the situation and the nature of [the United States'] essential security concerns", it is difficult to imagine how the Panel could ever take those essential security concerns into account.

108. In its answers to Panel questions, the United States reiterates its view that "[t]hese are political matters not amenable to WTO dispute settlement", and that the fact that it is "difficult" to take into account its unarticulated essential security interests in assessing a breach of Article 2.1 is "precisely the U.S. point".[78] At the same time, however, the United States argues that the Panel *does* have enough information to take the U.S. essential security interests into account, because the United States has described those interests in broad terms in its submissions.[79] For example, the United States notes that in its oral statement at the first substantive meeting, it explained:

> [T]he United States has long valued the fundamental freedoms and human rights of the people of Hong Kong, China, and considered the continued existence of those freedoms and human rights after the resumption of sovereignty by the People's Republic of China to be relevant to U.S. interests . . . [and the] United States has determined the situation with respect to Hong Kong, China, to be a threat to its essential security.[80]

109. If the Panel wanted to "take into account" the essential security interests that the United States has broadly described in considering whether the revised origin marking requirement is inconsistent with Article 2.1, the Panel would have to address the U.S. assertion that its essential security interests are implicated in the present case, which is an unfounded assertion that Hong Kong, China strongly contests. The Panel would also have to address the relationship between those alleged essential security interests, strongly contested by Hong Kong, China as aforesaid, and the revised origin marking requirement. For purposes of this purely hypothetical discussion, Hong Kong, China will focus only on the latter issue – namely, the relationship between the

[77] United States' first written submission, para. 237.

[78] United States' response to Panel question No. 16(a), para. 69.

[79] See United States' response to Panel question No. 16(a), para. 71.

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

challenged measures and the essential security interests that the United States claims to have articulated.

110. Several of the third parties have suggested that the Panel's consideration of the U.S. essential security interests would be derived from the language in the seventh recital, which states that "no country should be prevented from taking measures necessary for the protection of its essential security interest".[81] The United States disagrees with this view, and argues that the consideration of its essential security interests follows from the text of Article 2.1 itself.[82] In the U.S. view, the question is not whether the measures at issue are "necessary" for the protection of its essential security interests. Rather, the United States maintains that the Panel would need to evaluate whether there is a "rational relationship" between the measures and its essential security interests.[83]

111. For the sake of argument, Hong Kong, China will set aside the fact that the United States has provided no textual basis whatsoever for the "rational relationship" standard that it now articulates. In Hong Kong, China's view, it is not necessary to debate the relevant standard, because it is clear that the contested measures bear *no* relationship to the U.S. essential security interests, rational or otherwise.

112. The measures at issue require products that are indisputably manufactured or produced in the customs territory of Hong Kong, China be marked with an origin of "China", which is a separate WTO Member. For all other purposes, including duty assessment, the United States continues to treat such products as having Hong Kong, China origin. In Hong Kong, China's view, it is inconceivable that the United States could argue that there is a "rational relationship" between the U.S. essential security interests and the labeling (or rather, mislabeling) of the origin of products imported from the customs territory of Hong Kong, China. It is therefore unsurprising that the United States has not even attempted to make this linkage.[84]

113. To be clear, Hong Kong, China does not believe that the Panel should ever reach a point in its analysis of Hong Kong, China's claim under Article 2.1 where it is evaluating the relationship between the measures at issue and the U.S. essential security interests. In this respect, Hong Kong, China notes that there remains significant disagreement among the parties and various third parties concerning: (1)

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[81] See Canada's responses to Panel question Nos. 10(b) and 10(c); European Union's third party submission, paras. 52-55; Singapore's response to Panel question No. 10.

[82] See United States' response to Panel question No. 14.

[83] See United States' response to Panel question No. 14, para. 58.

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

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

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

whether the U.S. essential security interests are at all relevant where the contested measures reflect *de jure* origin-based distinctions; (2) the specificity with which the U.S. essential security interests would need to be articulated in order for the Panel to take those interests into account, and (3) the standard that the Panel should apply if it did take those interests into account. But all parties must agree that absent *at least* a rational relationship between the contested measures and the U.S. essential security interests, those essential security interests are *irrelevant* to the Panel's analysis under Article 2.1.

114. Hong Kong, China has therefore chosen to highlight the obvious disconnect between the contested measures and the protection of U.S. essential security interests, because it demonstrates that there is no potential path for the Panel to conclude that there is not "less favourable treatment" based on the relationship between the measures and the protection of U.S. essential security interests. Regardless of the Panel's views on the various points of disagreement noted in the prior paragraph, the U.S. essential security interests are irrelevant to the Panel's analysis under Article 2.1, because those essential security interests have no relationship to the contested measures.

115. Based on the foregoing, the Panel should conclude that Hong Kong, China has established a *prima facie* case with respect to all elements of its claim, and that this case remains unrebutted. The U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a technical regulation that accords less favourable treatment to goods imported from Hong Kong, China as compared to the treatment accorded to like products originating in other Members (and non-Members). It is therefore inconsistent with Article 2.1 of the TBT Agreement.

IV. THE REVISED ORIGIN MARKING REQUIREMENT IS INCONSISTENT WITH ARTICLE IX:1 AND I:1 OF THE GATT 1994

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

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

117. Article IX:1 provides that "each [Member] shall 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". By its

terms, there are two steps to assessing whether a measure is inconsistent with this provision: (1) identifying the baseline "treatment with regard to marking requirements" that the responding Member accords to the like products of any third country; and then (2) evaluating whether the "treatment with regard to marking requirements" accorded to goods of the complaining Member is "less favourable" than the baseline treatment.[85]

118. The baseline "treatment with regard to marking requirements" accorded by the United States is set forth in section 304(a) of the Tariff Act of 1930 and USCBP's regulations implementing that provision. To recall, section 304(a) provides that "every article of foreign origin … imported into the United States shall be marked in a conspicuous place … to indicate to an ultimate purchaser … the English name of the country of origin of the article". Under USCBP's implementing regulations, the "country of origin" of a good for this purpose is "the country of manufacture, production, or growth" or the country in which the good last underwent a substantial transformation.[86] An imported good must be marked with "the full English name of the country of origin," so determined.[87]

119. This baseline treatment encompasses both the method of determining the country of origin and the required terminology to indicate that country of origin. Together, these two elements comprise the relevant "treatment with regard to marking requirements". With regard to the first element, Hong Kong, China explained in response to Panel Question 18 that Article IX:1 does not prescribe substantive rules for determining the country of origin for origin marking purposes – those rules are prescribed by the ARO. Under Article IX:1, the relevant question is *how* the importing Member determines the country of origin under its own municipal laws and regulations, and whether it accords less favourable treatment in that respect to goods of the complaining Member. Likewise, with regard to the second element, the relevant question is how the importing Member ordinarily determines the terminology required to indicate the country of origin, and whether it accords less favourable treatment in that respect to goods of the complaining Member. Less favourable treatment in respect of either one (or both) of these two elements is inconsistent with Article IX:1.

120. Hong Kong, China will begin with the second element, because in its answers to the Panel's questions, the United States has effectively conceded that the revised origin marking requirement accords less favourable treatment in respect of this element (i.e. the terminology that the United States requires to indicate the country of origin as determined in accordance with USCBP's rules of origin). In its answers, the United States has acknowledged that the goods subject to the revised origin marking

[85] For the reasons set forth in Hong Kong, China's first written submission, which the United States does not dispute, the requirement of likeness is satisfied in this case because the measures at issue discriminate exclusively on the basis of origin and there can or will be products imported from other Members that are like those imported from Hong Kong, China.

[86] 19 C.F.R. § 134.1(b) [redacted].

[87] 19 C.F.R. § 134.45(a)(1) [redacted].

requirement are goods of Hong Kong, China origin under USCBP's "normal rules of origin", i.e. the rules of origin described above.

121. As described above, USCBP's regulations require, and therefore permit, a good to be marked with "the full English name of the country of origin". It is undisputed that the "full English name" of the separate customs territory of Hong Kong, China is "Hong Kong, China". As explained in Part II.C.2 above, in response to the request filed by the HKTDC, USCBP expressly rejected the use of "Hong Kong, China" as the required mark of origin under the revised origin marking requirement, as well as any other variant that includes the words "Hong Kong". The United States has thereby prohibited goods of Hong Kong, China origin from being marked with the full English name of the country of origin as determined in accordance with USCBP's rules of origin. In this way, the United States has acknowledged that goods of Hong Kong, China origin are treated differently under the revised origin marking requirement in relation to the terminology required to indicate the country of origin as determined in accordance with USCBP's rules of origin.[88]

122. In Hong Kong, China's view, the revised origin marking requirement *also* accords less favourable treatment in respect of the first element, i.e. the method by which the United States determines the country of origin of Hong Kong, China goods. For the reasons set forth in Part II.C, Hong Kong, China considers that the revised origin marking requirement is necessarily based on a determination by the United States that goods manufactured or processed in Hong Kong, China originate in the People's Republic of China, and is in fact based on such a determination as confirmed by the record evidence. USCBP has determined that, for purposes of section 304(a), the People's Republic of China is the "actual country of origin" of goods manufactured or processed in Hong Kong, China. This country of origin determination is based on a condition – the condition of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to determine the country of origin of the goods of other Members.

123. Under either characterization of the measures at issue, the revised origin marking requirement therefore accords less favourable treatment to goods of Hong Kong, China "with regard to marking requirements", as compared to the baseline treatment that the United States accords to the goods of other Members. Whether as a result of prohibiting goods of Hong Kong, China from being marked with the "full English name of the country of origin" as determined under USCBP's "normal rules of origin", or as a result of determining the country of origin by applying a condition that

[88] In its response to Question 18 from the Panel, the United States claims that "the U.S. measures at issue simply involve the specification for a marking of the goods of Hong Kong, China, with which Hong Kong, China, is dissatisfied." United States' response to Panel question No. 18, para. 92. Hong Kong, China is certainly "dissatisfied" with this "specification". But for the purpose of Article IX:1, what matters is not Hong Kong, China's dissatisfaction, but rather the uncontroverted fact that the United States accords different (and less favourable) treatment in respect of the terminology required to indicate the country of origin as determined in accordance with USCBP's rules of origin. This difference in treatment involves "treatment with regard to marking requirements" that places the measures at issue squarely within the scope of Article IX:1.

the United States does not apply to the goods of other Members, the outcome is exactly the same: goods made in Hong Kong, China may not be marked with the full English name of the country of origin in which the goods were manufactured or produced.

124. For the reasons that Hong Kong, China explained in its first written submission and again in Part III.B above, it is an advantage for Members and their enterprises to have the ability to mark their goods with a single mark of origin using the full English name of the country of origin in which the goods were manufactured or produced.[89] The United States does not dispute that this is an advantage. The United States accords this favourable treatment to the goods of all other Members, but not to the goods of Hong Kong, China. The revised origin marking requirement is therefore inconsistent with Article IX:1 of the GATT 1994.[90]

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

125. Hong Kong, China has demonstrated that the measures at issue are also inconsistent with Article I:1 of the GATT 1994.

126. Article I:1 of the GATT 1994 provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

127. There is no dispute that origin marking requirements are a "rule" or "formality" "in connection with importation", or that the requirement of likeness is satisfied in respect of the challenged measures.

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[89] Hong Kong, China's first written submission, paras. 73-75.

[90] In relation to most-favoured nation treatment under Article I:1 of the GATT 1994, the European Union states that "what Hong Kong, China needs to show is that goods originating in Hong Kong, China may not be marked as 'Made in Hong Kong' whereas like products originating in other countries may be marked as 'Made in' those countries. European Union's response to Panel question No. 14, para. 51. The same observation would apply to MFN treatment under Article IX:1 of the GATT 1994. Under the United States' characterization of the measures at issue (i.e. as involving the terminology used to indicate goods originating in Hong Kong, China), Hong Kong, China has shown precisely what the EU says Hong Kong, China must demonstrate: that "goods originating in Hong Kong, China may not be marked as 'Made in Hong Kong' whereas like products originating in other countries may be marked as 'Made in' those countries".

128. A measure confers an "advantage" within the meaning of Article I:1 when it creates "more favourable competitive opportunities" for products of a particular origin or otherwise affects the commercial relationship between products of different origins.[91] Hong Kong, China has explained in relation to its claims under Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994 that it is an "advantage" for enterprises to be able to mark their goods with a single mark of origin using the full English name of "the country of manufacture, production, or growth" or the country in which the good last underwent a substantial transformation. Among other benefits, this advantage allows enterprises to benefit from any brand or reputational characteristics associated with a product's country of origin, and to minimize the costs and complexities of complying with different origin marking requirements or objectives.

129. The United States has not extended these advantages "immediately and unconditionally" to like products originating in the customs territory of Hong Kong, China. For these reasons, the measures at issue are inconsistent with Article I:1 of the GATT 1994.

V. ARTICLE XXI(B) OF THE GATT 1994 DOES NOT APPLY TO THE ARO OR THE TBT AGREEMENT

130. There is little more that needs to be said on the subject of whether Article XXI(b) of the GATT 1994 applies to the ARO and the TBT Agreement. The answer to this question is "no". Rather than repeating its previous analysis of this issue as set forth in its opening statement at the first substantive meeting and in response to questions from the Panel, Hong Kong, China will in this second written submission focus on certain statements and assertions made by the United States in its opening statement and in its answers to the Panel's questions.

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

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

[91] See, e.g. Panel Report, *EU – Energy Package*, para. 7.1309; Panel Report, *Colombia – Ports of Entry*, paras. 7.341-7.346; Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.

agreements. This proposition overlooks both the text of Article XXI(b) itself and the context provided by the other Annex 1A agreements.

133. Beginning with the text of Article XXI(b), the United States does not dispute that the reference to "this Agreement" in the phrase "Nothing in this Agreement shall be construed" is a reference to the GATT 1994 and not to any other agreement. Thus, on its face, Article XXI(b) applies only to claims arising under the GATT 1994. The United States attempts to dismiss this fact as "not particularly significant" because the reference to "this Agreement" was original to the GATT 1947, which at the time of its drafting was the only agreement pertaining to trade in goods.[92] The implication of the U.S. argument is that the drafters of the GATT 1994 somehow overlooked the express limitation of Article XXI(b) to claims under that agreement, when they actually meant for the exception to apply to *all* of the Annex 1A agreements. But as the United States acknowledges, the GATT 1947 was incorporated by reference into the GATT 1994.[93] The incorporation language modified the GATT 1947 in a variety of ways, relating both to drafting conventions and to matters of substance.[94] If the drafters of the GATT 1994 had meant for Article XXI(b) of the GATT 1947 to apply to *all* of the Annex 1A agreements, they could have modified the language of Article XXI(b) to this effect when they incorporated the GATT 1947 into the GATT 1994. They did not.

134. The United States' assertion that Article XXI(b) of the GATT 1994 applies to all of the other Annex 1A agreements merely by virtue of the fact that each of these agreements pertains to trade in goods also disregards the context provided by those other agreements. As Hong Kong, China and many of the third parties have stressed, certain of the Annex 1A agreements incorporate one or both of the GATT exceptions, while others (including the ARO and the TBT Agreement) do not. Especially in a context in which the relevant exception applies by its terms only to claims arising under the agreement in which the exception appears, the only way that the incorporation provisions found in the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), the Agreement on Import Licensing Procedures, and the Trade Facilitation Agreement ("TFA") can have meaning and effect is if they are interpreted as making available an exception that otherwise would not apply. Also in this context, the *silence* of the other Annex 1A agreements on this issue must

[92] United States' response to Panel question No. 26, para. 134.

[93] United States' response to Panel question No. 25, para. 129.

[94] For example, the GATT 1994 incorporation language contains an exception from the obligations under Part II of the GATT 1947 as they relate to the use of foreign-built vessels in commercial applications between points in national waters (an exception demanded by the United States to exempt the Jones Act from its obligations under the GATT 1994). The GATT 1994 also modifies or clarifies the GATT 1947 through a series of understandings pertaining to the interpretation and application of different provisions of the agreement, as set forth in paragraph 1(c) of the GATT 1994.

be interpreted to mean that the GATT exceptions are *not* available under those agreements.[95]

135. The United States has no coherent answer to this fundamental problem with its interpretation. In its opening statement in connection with the first substantive meeting, the United States suggested that the three instances of express incorporation in the Annex 1A agreements are merely helpful (but, evidently, randomly inserted) reminders of how the treaty would need to be interpreted even in the absence of those reminders. Hong Kong, China addressed this argument in its answers to the Panel's questions, explaining that the U.S. position is contrary to the principle of effective treaty interpretation because it would render the three instances of express incorporation both redundant and *inutile.*[96] In its answers to the Panel's questions, the United States now suggests that the three instances of express incorporation were in the nature of a drafting mistake, a mere artifact of how the Annex 1A agreements were negotiated.[97] But treaty interpretation proceeds on the basis of the words actually used in the treaty, interpreted in their context and in the light of the object and purpose of the agreement, not on the basis of unfounded assertions that the drafters of the treaty didn't mean what they wrote down. The fact is that certain of the Annex 1A agreements expressly incorporate one or both of the GATT exceptions, while others do not – those distinctions must be given effect.

136. There is, in short, no basis for the U.S. proposition that Article XXI(b) of the GATT 1994 applies to all of the Annex 1A agreements merely because each of these agreements pertains to trade in goods and forms part of a single undertaking.

137. Evidently aware of the shortcomings of its first interpretative approach, the United States attempts to apply something more closely resembling accepted interpretative methods for evaluating whether an exception contained in one of the covered agreements is available as a potential justification for violations of a different covered agreement. Here again the United States falls short.

138. The United States appears to accept that, under the interpretative framework articulated in previous panel and Appellate Body reports adopted by the Dispute Settlement Body ("DSB"), the fact that an Annex 1A agreement refers to or elaborates in some way upon the GATT 1994 is not a sufficient basis to conclude that the

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[95] As the European Union explains, "[i]t cannot be inferred from simple silence that the application of an exception is permitted or prohibited. However, silence in certain agreements is relevant in conjunction with express references in others. If certain agreements contain an express reference, *a contrario* it can be inferred that silence means the lack of availability" of the exception. European Union's response to Panel question No. 18, para. 59.

[96] Hong Kong, China's response to Panel question No. 30, paras. 101-108.

[97] United States' response to Panel question No. 31, para. 156 ("The negotiation of different Annex 1A agreements, conducted in different negotiating groups, did not ensure consistency of language regarding GATT exceptions across those agreements.").

exceptions available under the GATT 1994 apply to that agreement.[98] At times, the United States also appears to recognize that the relevant question under this interpretative framework is whether there is a specific textual linkage between the agreement under examination and *the relevant GATT exception,* i.e. a specific textual linkage between the agreement that has been violated and the GATT exception under which justification is sought (as opposed to *any* textual linkage between the two agreements).[99] This is a proper understanding of this interpretative framework. As Hong Kong, China has explained, the only instances in which an adopted DSB report has found a GATT exception applicable to a non-GATT agreement is where language contained in the other agreement (being Protocols of Accession in all those instances) encompassed the availability of that exception by the necessary implication of its terms.[100]

139. The problem for the United States is that no such language exists in either the ARO or the TBT Agreement. Nothing in either agreement refers to the GATT 1994 in a way that can be interpreted, even remotely, as encompassing the availability of Article XXI(b) as a potential justification for violations of that agreement. The references to the GATT 1994 in the ARO are mostly for the purpose of identifying the types of non-preferential commercial policy instruments to which the rules of origin prescribed by the ARO apply.[101] The TBT Agreement contains only one non-preambular reference to the GATT 1994, for the purpose of establishing that the consultation and dispute settlement provisions of Articles XXII and XXIII of the GATT 1994, as interpreted by the DSU, apply to claims arising under the TBT Agreement.[102] None of these references, in either agreement, encompasses the availability of Article XXI(b) as a potential justification for violations of that agreement.

140. Unable to identify any language in either the ARO or TBT Agreement that establishes a specific textual linkage to Article XXI(b), the United States appears to suggest that what matters under the interpretative framework articulated in reports such as *China – Raw Materials* and *Russia – Traffic in Transit* is whether there is some sort of "overlap" between the *claims* that a party may choose to advance under

[98] See, e.g. United States' response to Panel question No. 23, para. 119 ("the United States has not suggested that the application of the customary rules of treaty interpretation is limited to examining whether those agreements 'refer to' or 'elaborate on' the GATT 1994.").

[99] See, e.g. United States' response to Panel question No. 23, para. 122 (observing that the panel in *Thailand –Cigarettes (Article 21.5 – Philippines)* found that Article XX of the GATT 1994 does not apply to the Agreement on Customs Valuation because of the absence of specific textual links in that agreement *to Article XX*).

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

[101] See ARO, Articles 1.1, 1.2. The ARO also contains references to the GATT 1994 for the purpose of establishing publication requirements comparable to those set forth in Article X of the GATT 1994 (ARO, Articles 2(g) and 3(e)) and for the purpose of establishing that the consultation and dispute settlement provisions of Articles XXII and XXIII of the GATT 1994, as interpreted by the DSU, apply to claims arising under the ARO (ARO, Articles 7 and 8).

[102] TBT Agreement, Article 14.1.

the two agreements in question, either in terms of their subject matter or the nature of the discipline imposed. The United States suggests that where a claim under a non-GATT agreement "overlaps" with a claim that a party could advance under the GATT 1994, the exceptions available in respect of the latter claim must apply to the former claim as a matter of "logic".[103]

141. There are multiple problems with the United States' argument. To begin with, the United States ignores the fact that each of the Annex 1A agreements is a distinct agreement, representing its own balance of rights and obligations in respect of the subject matter of that agreement. In some cases the availability of potential exceptions forms a part of that balance of rights and obligations (as in the case of the TRIMs Agreement, the Agreement on Import Licensing Procedures, and the TFA) and in other cases it does not (as in the case of the ARO and the TBT Agreement). The TBT Agreement, for example, strikes its own balance in relation to matters affecting Members' essential security interests by recognizing national security requirements as a legitimate objective of technical regulations, and by using the language of Article XXI(a) of the GATT 1994 to establish that Members are not required under the TBT Agreement to disclose information which they consider contrary to their essential security interests.[104] The TBT Agreement does not, however, establish any general or security exceptions of the types found in Articles XX and XXI of the GATT 1994, either expressly or by incorporation. That is the balance that the Members struck under the TBT Agreement in respect of these issues, and that balance must be respected.

142. The balance struck in connection with each of the Annex 1A agreements cannot be disregarded merely because claims that a party might advance under a non-GATT agreement "overlap" with potential claims under the GATT 1994, either in terms of their subject matter or the nature of the discipline imposed. As the United States acknowledges, each of the non-GATT agreements in Annex 1A in some way elaborates upon, or relates to, the subject matter of the GATT 1994. This is an inevitable consequence of the fact that all of the Annex 1A agreements relate to trade in goods. In addition, the Annex 1A agreements frequently apply the WTO's core obligations of non-discrimination (i.e. national and most-favoured nation treatment) to the particular subject matter of each agreement, with the result that the disciplines imposed by each agreement are often similar. Seen in this light, the United States' theory of "overlapping claims" is just another way of expressing its view that Article XXI(b) of the GATT 1994 applies to all of the Annex 1A agreements merely because each of these agreements pertains to trade in goods and forms part of a single undertaking. This view is mistaken, for the reasons that Hong Kong, China has explained.

143. The United States' theory of "overlapping claims" is, in addition, based on the erroneous premise that there is no meaningful or relevant difference between potential

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

[104] TBT Agreement, Articles 2.2 and 10.8.3. Of note is also that Hong Kong, China's claims under the TBT Agreement are based on its Article 2.1 rather than Article 2.2.

claims under the non-GATT agreements and potential claims under the GATT 1994. The United States treats provisions in different agreements that relate to the same general subject matter or impose similar disciplines as if they were identical legal obligations giving rise to "the same substantive claims". From this mistaken premise, the United States argues that the exceptions available under the GATT 1994 in relation to certain claims must, as a matter of "logic", be available for "the same substantive claims" under other Annex 1A agreements.

144. As Hong Kong, China explained in response to Panel Question 27, Hong Kong, China's claims under the ARO and TBT Agreement are not and cannot be "the same" as its claims under Articles I:1 and IX:1 of the GATT 1994. The GATT 1994 has no disciplines relating to a Member's determination of the country of origin of goods – that is precisely why the ARO was negotiated. The TBT Agreement applies to technical regulations, a topic that the GATT 1994 does not specifically address. While it is certainly possible for the same *measure* to violate a non-GATT agreement as well as the GATT 1994, sometimes even for the same general *reason* (e.g. because the measure is discriminatory), it does not follow that these are "the same substantive claims". They cannot be, because each agreement has its own subject matter, its own scope of application, and, as Hong Kong, China has noted, its own balance of rights and obligations.

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

VI. ARTICLE XXI(b) OF THE GATT 1994 IS NOT ENTIRELY SELF-JUDGING

A. Introduction

146. Before proceeding to review the numerous reasons why the U.S. interpretation of Article XXI(b) of the GATT 1994 as entirely self-judging is completely unfounded under accepted principles of treaty interpretation, Hong Kong, China recalls three undisputed points worth emphasizing at this juncture in this dispute.

147. First, not one, but <u>two prior panels</u> have adopted the interpretation of Article XXI(b) advocated by Hong Kong, China in this dispute, i.e. that Article XXI(b) is not entirely self-judging.[105]

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

148. Second, none of the third parties to this dispute has endorsed the contrary interpretation advocated by the United States.

149. Third, the United States has made no attempt to satisfy its burden of proof under Article XXI(b) when that provision is interpreted in accordance with customary rules of treaty interpretation, i.e. as consisting of both objective and subjective elements, specifically, an exhaustive list of objectively reviewable circumstances in which the exception may be invoked, set forth in the enumerated subparagraphs, and a series of discretionary conditions that must be fulfilled in good faith, set forth in the chapeau.

150. As Hong Kong, China explained in its responses to questions from the Panel, 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 in a manner that would 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.[106] This remains the case following the United States' submission of its responses to questions from the Panel.

151. The Panel posed many questions to the parties and third parties concerning the interpretation of Article XXI(b) of the GATT 1994 following the first substantive meeting. Hong Kong, China appreciates the Panel's thoroughness with respect to this important and sensitive interpretive issue. Hong Kong, China respectfully submits, however, that in view of the arguments submitted by the parties thus far, in particular the unrebutted *prima facie* cases established by Hong Kong, China with respect to its claims under the ARO and TBT Agreement, to which Article XXI of the GATT 1994 does not apply, it remains unnecessary for the Panel to reach and interpret Article XXI(b).

152. Moreover, even if the Panel were to conclude otherwise, there would be no need for it to decide any interpretative issue other than the fundamental question of whether the subparagraphs of Article XXI(b) are objectively reviewable – a question that has already been decided in the affirmative by two prior panels. In short, unless and until the United States identifies and invokes a particular subparagraph of Article XXI(b) and submits arguments and evidence to demonstrate its objective applicability to the present case, there is no need for the Panel to proceed with an evaluation of whether the U.S. measures may be justified under that exception.

[106] Hong Kong, China's response to Panel question No. 44, para. 151.

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

1. The ordinary meaning of the English text of Article XXI(b) of the GATT 1994 establishes that it is not entirely self-judging

153. As Hong Kong, China explained in its responses to Panel questions, the ordinary meaning of Article XXI(b)[107] is that a Member may take any action which it considers necessary for the protection of its essential security interests, subject to the obligation of good faith, when one or more of the circumstances described in the enumerated subparagraphs of Article XXI(b) exist. This interpretation follows from the ordinary meaning and placement of the adjectival clause "which it considers" and the application of the interpretative principle of *effet utile*.

154. The word "it" in "which it considers" refers to the invoking Member. Hong Kong, China does not disagree with the ordinary meaning of the word "considers" submitted by the United States (i.e. "'[r]egard in a certain light or aspect; look upon as' or 'think or take to be'"). "[W]hich it considers" thus refers to the view of the invoking Member. To give meaning to "which it considers", the words that it qualifies must be left to the determination of the invoking Member. This cannot be equated with an entirely self-judging determination, however, due to the overarching obligation of good faith that applies to all treaty terms.

155. As Hong Kong, China demonstrated in response to Panel Question 44, properly interpreted, each of the subparagraphs of Article XXI(b) qualifies the noun "action".[108] Accordingly, the "action" must "relate to" the specific circumstances set

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[107] Article XXI(b) provides that:

> 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
> >
> > > (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[.]

[108] For ease of reference, Hong Kong, China repeats the graphical depiction of this relationship provided at paragraph 136 of its response to Panel Question 44 below.

> 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[.]

forth in subparagraph (i) or (ii) or be "taken in time of war or other emergency in international relations" under subparagraph (iii). This is the only interpretation that allows for a consistent reading of the relationship between all three subparagraphs and the chapeau in the English text due to inclusion of the words "taken in" in subparagraph (iii). The "action" taken by the invoking Member must therefore be covered by one or more of the enumerated subparagraphs. In light of the placement of the word "action" in relation to the adjectival clause "which it considers", there is no basis upon which to apply a more deferential standard of review with respect to the conditions set forth in the subparagraphs – the standard must be an objective one. The phrase "which it considers" does not enter into the analysis of the justifiability of the Member's action unless and until it is confirmed that the action is objectively covered by one or more of the enumerated subparagraphs.

156. Not only is this interpretation of the English text grammatically sound, it is fully consistent with the principle of *effet utile*, reflected in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). Interpreting the adjectival clause "which it considers" as providing for a more deferential standard of review that does not extend to the subparagraphs gives meaning both to that clause and the language it qualifies, and to each of the subparagraphs. By contrast, if the adjectival clause were interpreted to also qualify the subparagraphs such that they were not objectively reviewable, they would serve no purpose. As Hong Kong, China has explained, in order to be effective, the subparagraphs must be objectively reviewable by a panel. How the principle of *effet utile* may apply to treaty provisions outside the context of the WTO, where all Members have consented to binding dispute settlement in accordance with the terms of the DSU in respect of their obligations under the covered agreements, is irrelevant.[109]

157. Critically, the interpretation of the English text provided above is consistent with the equally authentic French and Spanish texts. As Hong Kong, China has explained, under Article 33(1) and 33(3) of the Vienna Convention, "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" and "'every effort should be made to find a common meaning for the text'" of Article XXI(b) "'before preferring one to another'".[110] Hong Kong, China demonstrated in response to Panel Question 62 that the gender agreement in the equally authentic French text (indicated in bold) confirms, as in the English text, that the third subparagraph can only modify the term "mesures" ("action", in the English text). Hong Kong, China further demonstrated that the equally authentic Spanish text can only be reasonably interpreted so that each subparagraph modifies the noun "action" rather than the words "essential security

[109] See Hong Kong, China's response to Panel question No. 46. See also Canada's response to Panel question No. 48, para. 133; European Union's response to Panel question No. 49, paras. 153-155; Norway's response to Panel question No. 32, paras. 3 and 4; Russia's response to Panel question No. 32.

[110] Hong Kong, China's response to Panel question No. 62, para. 233 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 59 (citations omitted)) and fn 177 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 59, fn. 50) (citing Yearbook of the International Law Commission (1966), Vol. II, p. 225).

interests" due to the feminine gender agreement of the word "relativas" with the word "medidas" ("action", in the English text), in addition to the feminine gender agreement of the word "medidas" with the term "a las aplicadas" in the third subparagraph.[111]

158. Turning to the U.S. interpretation of Article XXI(b), the U.S. view is that all of the elements in the text, including each subparagraph, are part of a single relative clause, and left to the determination of the Member.[112] This is the basis for the U.S. view that Article XXI(b) is entirely self-judging. The U.S. interpretation must be rejected, because it is grammatically unsound, inconsistent with the principle of *effet utile*, and irreconcilable across the three equally authentic English, Spanish, and French texts.

159. The U.S. interpretation is grammatically unsound because it interprets the relationship between the subparagraphs and the chapeau in an inconsistent manner: under the U.S. interpretation, the first two subparagraphs modify the term "essential security interests", whereas the third modifies the noun "action".[113] The more fundamental problem with the U.S. interpretation, however, is that it renders the subparagraphs *inutile*. The United States continues to argue that the subparagraphs retain meaning by offering "guidance" to the invoking Member. However, as Hong Kong, China has previously explained,[114] the principle of *effet utile* demands that the subparagraph endings do more than merely "help guide a Member's exercise of its rights under Article XXI(b) by identifying the circumstances in which it is appropriate for a Member to invoke those rights".[115] The subparagraphs must have *objective* meaning among the Members.

160. Unsurprisingly, the U.S. position that the phrase "which it considers" introduces a single relative clause that renders Article XXI(b) self-judging in its entirety has been rejected by all of the third parties to comment on the issue.[116]

[111] See also Canada's response to Panel question No. 45, paras. 127 and 128; European Union's response to Panel question No. 45, paras. 132-137; Russia's response to Panel question No. 45; Switzerland's response to Panel question No. 45, paras. 37 and 38.

[112] See, e.g. U.S. response to Panel question No. 46, para. 210.

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

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

[115] United States' response to Panel question No. 46, para. 210.

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

161. Finally, the U.S. interpretation remains irreconcilable with the equally authentic Spanish text of Article XXI(b). Faced with this incontrovertible fact, the United States jettisons the "logic" underlying its own relative clause theory in the English text in order to advance what it admits to be an incoherent interpretation that "reconciles" all three treaty texts.[117] Any need to reconcile the three texts is easily avoided, however, by rejecting the United States' flawed interpretation of the English text in favour of the interpretation advocated by Hong Kong, China, adopted by two prior panels, and overwhelmingly endorsed by the third parties.

2. Relevant context confirms that Article XXI(b) of the GATT 1994 is not entirely self-judging

162. The U.S. interpretation of the ordinary meaning of the exception must also be rejected because it fails to properly take into account the relevant context, notably that provided by Article XX of the GATT 1994. Instead, the United States cites other provisions that do not support its interpretation and, in several cases, they are directly contradictory.

163. As Hong Kong, China has explained, Article XX of the GATT 1994 and the jurisprudence interpreting that provision support the interpretation of Article XXI(b) as not entirely self-judging and confirm that the United States has not met even its initial burden of proof under that exception. Although there are textual differences between Articles XX and XXI, the textual and structural similarities between the two provisions render Article XX relevant context for the interpretation of Article XXI(b).[118]

164. To recap, Articles XX and XXI of the GATT 1994 are both affirmative defences and are structured in the same manner, consisting of a chapeau followed by enumerated subparagraphs. It is well-established that the subparagraphs of Article XX are objectively reviewable and serve to limit the subject matter applicability of the exception to the specific circumstances enumerated therein.[119] It is similarly well-established that an evaluation of whether a measure is justified under Article XX entails a two-step test that commences with an evaluation of whether the invoking Member has demonstrated the *prima facie* subject matter applicability of one of the subparagraphs.[120] Only if this first step of the test is satisfied does it become necessary for a panel to evaluate the conformity of the measure with the requirements of the chapeau.[121] Article XX thus supports both interpreting the enumerated subparagraphs of Article XXI(b) as objectively reviewable limitations on

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

[118] Hong Kong, China's response to Panel question No. 52, paras. 171 and 172.

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

[120] See Appellate Body Report, *US – Gasoline*, pp. 20-21.

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

the circumstances in which Article XXI(b) may be invoked, and applying a two-step analysis that commences with those subparagraphs.

165. Multiple third parties agree with Hong Kong, China that Article XX is relevant context for the interpretation of Article XXI(b) and that it supports the interpretation of the enumerated subparagraphs as objectively reviewable.[122]

166. In its responses to Panel questions, the United States persists in its attempt to distinguish Article XX. The United States argues that the "fundamental structure and logic of Article XXI(b) is simply different", and that "the Appellate Body's finding [regarding a two-step analysis] based on the structure and logic of Article XX of the GATT 1994 is therefore not applicable".[123] The U.S. argument rests entirely on the flawed premise that the qualifying language "which it considers" extends to the enumerated subparagraphs. Once this premise is rejected, there is no basis upon which to disregard either the two-step analysis of Article XX adopted by the Appellate Body as context for interpreting Article XXI(b) or the objective nature of the subparagraphs of Article XXI(b).

167. In support of its flawed interpretation of Article XXI(b), the United States reaches for other provisions of the covered agreements as supportive context.[124] None of the other provisions cited by the United States supports an interpretation of Article XXI(b) as entirely self-judging, with the subparagraphs serving only to "guide a Member's exercise of its rights".[125] In its responses to questions from the Panel, Hong Kong, China explained why Articles 3.7, 22.3(c), 26.1, and 26.2 of the DSU do not support the U.S. interpretation of Article XXI(b) as entirely self-judging.[126] Hong Kong, China further explained that Articles 3.2, 3.3, 7.2, 11, 23.1, and 23.2(a) of the DSU in fact support the contrary view.[127]

168. In its response to Panel Question 45, the United States adds Annex A(5) of the Agreement on the Application of Sanitary and Phytosanitary Measures, Article IX:6

[122] See Canada's response to Panel question No. 36, para. 93; European Union's response to Panel question Nos. 49 and 59, paras. 153-154 and 172-175; Switzerland's response to Panel question No. 36, paras. 15-17; Norway's response to Panel question No. 59, para. 37; Brazil's response to Panel question No. 36, paras. 59-63.

[123] United States' first written submission, para. 57.

[124] United States' first written submission, paras. 59-64.

[125] United States' response to Panel question No. 45, para. 199.

[126] See Hong Kong, China's response to Panel question No. 54. No third party has endorsed the U.S. view of these provisions as supporting an interpretation of Article XXI(b) as entirely self-judging. See Brazil's response to Panel question No. 55(b) and (c), paras. 78-82; Canada's response to Panel question No. 37, para. 94; European Union's response to Panel question No. 37, paras. 105-114; Russia's response to Panel question No. 37.

[127] See Hong Kong, China's response to Panel question No. 53. See also Norway's response to Panel question No. 35, para. 10 ("Total deference would also fail to give effect to the requirement under Article 11 of the DSU for a panel to make an 'objective assessment'. A panel fails to act with objectivity if it accepts mechanically and blindly a respondent’s unsubstantiated assertions, without assessing whether it has complied with the conditions in Article XXI(b)").

of the GATT 1994, Article 4.3 of the DSU, and Article 7.3 of the Agreement on Textiles and Clothing to its list of provisions purportedly supportive of a self-judging interpretation. These provisions similarly do nothing to advance the U.S. argument. None of these provisions provides for an entirely "self-judging standard" that may not be second-guessed by a panel.[128] Such provisions simply do not exist under the covered agreements. As Hong Kong, China has explained, although different provisions reserve varying amounts of discretion to the Members, all provisions of the WTO covered agreements must be subject to Panel review in order to be effective.[129] Thus, contrary to the U.S. assertion, there are no examples in the covered agreements that support its interpretation of Article XXI(b) as entirely self-judging.

169. In its responses to questions from the Panel, the United States also persists in its attempt to justify its interpretation of Article XXI(b) by reference to Article XXI(a) of the GATT 1994.[130] According to the United States, by confirming that Members have the right not to disclose information contrary to their essential security interests, Article XXI(a) confirms that Article XXI(b) does not require a Member to establish a *prima facie* case of applicability of the relevant subparagraph. There is no basis for this conclusion. As the United States acknowledges, Article XXI(a) does not preclude a Member from disclosing any and all information relating to its essential security interests.[131] Article XXI(a) does not therefore prevent a Member from submitting information sufficient for a Panel to evaluate objectively whether one or more of the circumstances described in the enumerated subparagraphs exist. Article XXI(a) is not a license to circumvent the conditions imposed by Article XXI(b). Hong Kong, China observes that none of the third parties that have commented on this issue agree with the United States that Article XXI(a) supports the interpretation of Article XXI(b) as entirely self-judging.[132]

3. The object and purpose of the GATT 1994 confirms that Article XXI(b) is not entirely self-judging

170. Hong Kong, China has established that its interpretation of Article XXI(b) is consistent with the object and purpose of the GATT 1994. As Hong Kong, China explained in response to Panel Question 55, and as the panel in *Russia – Traffic in Transit* correctly found, the objectives of the Members set forth in the preambles to the GATT 1994 and the WTO Agreement, including, *inter alia*, the "reduction of tariffs and other barriers to trade" and the "elimination of discriminatory treatment in

[128] United States' response to Panel question No. 45, para. 201.

[129] See Hong Kong, China's response to Panel question No. 47, para. 162.

[130] See United States' response to Panel question No. 63, para. 268. See also United States' first written submission, paras. 50-52.

[131] United States' response to Panel question No. 63, para. 268.

[132] See Brazil's response to Panel question No. 33, para. 52; Canada's responses to Panel questions Nos. 33 and 34, paras. 88 and 90; European Union's responses to Panel questions Nos. 33 and 34, paras. 95-98; Russia's response to Panel question No. 33; Norway's response to Panel question No. 33, paras. 5 and 6; Switzerland's response to Panel question No. 33, paras. 11-14; Singapore's response to Panel question No. 33.

international trade relations" are irreconcilable with an entirely self-judging interpretation of Article XXI(b). Such an interpretation would threaten the security and predictability of the multilateral trading system.

171. There is no defensible argument that an entirely self-judging interpretation of Article XXI(b) is consistent with the object and purpose of the GATT 1994, as evidenced by the circular reasoning relied upon by the United States. According to the United States, the preamble to the GATT 1994 contemplates that Members will make use of the exceptions "consistent with their text", therefore, because Article XXI(b) is a self-judging exception, the object and purpose of the GATT 1994 establishes that Article XXI(b) is self-judging.[133] The U.S. logic is entirely circular. All third parties who have commented on this issue agree with Hong Kong, China that the U.S interpretation of Article XXI(b) is unsupported by the object and purpose of the GATT 1994.[134]

4. No "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention supports the U.S. interpretation of Article XXI(b) of the GATT 1994 as entirely self-judging

172. The United States' desperate search for context in support of its flawed interpretation of Article XXI(b) culminates in its reliance on the 1949 GATT Council decision in *United States – Export Measures* ("1949 Decision") and the 1982 decision adopted by the GATT Contracting Parties concerning invocations of Article XXI ("1982 Decision"). As Hong Kong, China has explained, the 1949 Decision does not constitute a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention, nor does it support the U.S. interpretation of Article XXI(b) of the GATT 1994 as entirely self-judging.[135]

173. In its responses to Panel questions, the United States again asserts that the 1949 Decision resulted in an "'agreement' among the parties" pertaining to the "actual application of Article XXI".[136] Hong Kong, China has shown that no such "agreement" was reached among the Contracting Parties, nor does the decision concern the interpretation of Article XXI(b). Rather, as the United States acknowledges, it concerns the application of the exception to a particular set of facts in a particular case. Most problematic for the United States, the 1949 Decision does not support the self-judging interpretation of Article XXI(b) advocated by the United

[133] United States' first written submission, paras. 65-67.

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

[135] See Hong Kong, China's response to Panel question No. 56.

[136] United States' response to Panel question No. 61, para. 253.

States. If anything, as the European Union has also observed, it demonstrates the opposite conclusion.[137]

174. The United States takes a somewhat more reasonable position with respect to the 1982 Decision in that it acknowledges that the decision is not a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention but rather a "decision" within the meaning of paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement.[138] However, similarly to the 1949 Decision, the United States misreads the 1982 Decision as relevant context and as supporting its interpretation of Article XXI(b) as entirely self-judging.[139] In fact, the language of the decision confirming that all Contracting Parties affected by actions under Article XXI retain their full rights under the GATT suggests the opposite, as Hong Kong, China observed in its response to Panel Question 61, and as several of the third parties have also noted.[140]

175. Tellingly, the United States does not even attempt to construe the "views" expressed by the GATT Contracting Parties prior to the entry into force of the WTO Agreement as a "subsequent agreement" or "subsequent practice" within the meaning of Articles 31(3)(a) and (b) of the Vienna Convention. As Hong Kong, China has explained, such statements are not relevant under either of these provisions, nor do they establish a consensus view on the correct interpretation of Article XXI(b), as the panel in *Russia – Traffic in Transit* correctly found, and as several of the third parties have also noted in their responses to questions from the Panel.[141]

176. In sum, there are two interpretations of the ordinary meaning of Article XXI(b) before the Panel. One is the interpretation advocated by Hong Kong, China, which is that Article XXI(b) is not entirely self-judging because the phrase "which it considers" qualifies only the language "necessary for the protection of its essential security interests" and not the enumerated subparagraphs. Under this interpretation, which is grammatically sound, consistent with the interpretative principle of *effet utile*, permits a harmonious reading of the English, French, and Spanish texts of Article XXI(b), and is consistent with the object and purpose of the GATT 1994, an invoking Member must make a *prima face* case that one or more of the circumstances enumerated in the subparagraphs objectively exists. Once this initial burden is satisfied, it is up to the invoking Member to determine whether an action is "necessary for the protection of its essential security interests", but it must make this determination in good faith. A panel may review whether the invoking

[137] European Union's response to Panel question No. 39, para. 120. See also Canada's response to Panel question No. 39, paras. 99-101 (agreeing that the 1949 Decision does not constitute a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention); Russia's response to Panel question No. 39 (same).

[138] See United States' response to Panel question No. 61, para. 254.

[139] See United States' response to Panel question No. 61, para. 252.

[140] See Hong Kong, China's response to Panel question No. 61, para. 232; European Union's response to Panel question No. 44, paras. 128-131; Russia's response to Panel question No. 44.

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

Member has acted consistently with this obligation, including by examining the nature of the Member's asserted essential security interests and whether there is a plausible relationship between those interests and the measures at issue. This interpretation has been adopted by two prior panels and endorsed by every third party who has commented on the issue.

177. The other interpretation before the Panel is the one advocated by the United States, which is that Article XXI(b) is entirely self-judging and thus the sole finding that the Panel is permitted to make is to recognize the United States' invocation of Article XXI(b). The U.S. interpretation of the English text denies meaning to the enumerated subparagraphs and conflicts with the equally authentic Spanish text of Article XXI(b), necessitating an even less coherent interpretation that purports to reconcile all three texts and leads to a conclusion that is entirely inconsistent with the object and purpose of the GATT 1994. This interpretation is unsupported by the jurisprudence and by every third party to have commented on the issue.

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

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

1. The GATT/ITO negotiating history confirms that the drafters did not intend for the security exception that became Article XXI(b) of the GATT 1994 to be entirely self-judging

179. The meaning of Article XXI(b) advocated by Hong Kong, China is clear and thus does not require confirmation under Article 32 of the Vienna Convention. Nor does Hong Kong, China's interpretation result in a meaning that is ambiguous or obscure, manifestly absurd or unreasonable.[142] Nevertheless, should the Panel consider it necessary to have recourse to supplementary means of interpretation, Hong Kong, China will briefly review the relevant sources of interpretation and explain why they only serve to confirm the interpretation that Article XXI(b) is not entirely self-judging.

180. The parties agree that the negotiating history of the International Trade Organization ("ITO") Charter may be considered part of the "preparatory work" to the GATT 1994.[143] The parties disagree as to what those ITO documents reveal with

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

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

respect to Article XXI(b). This disagreement has arisen as a result of the U.S. refusal to accept that these documents show that its own delegates considered and rejected an entirely self-judging interpretation of the exception that became Article XXI(b) of the GATT 1994. As Hong Kong, China has already addressed these documents in its responses to Panel questions, Hong Kong, China will only emphasize that the conclusion reached by the United States through its selective reading of these documents was decisively rejected by the panel in *Russia – Traffic in Transit*. Hong Kong, China recalls that following a careful review of the ITO negotiating history, the panel in that dispute found that:

> [T]he drafters considered that … the "balance" that was struck by the security exceptions was that Members would have "some latitude" to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b)[.]
>
> [I]n the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter.[144]

181. The panel concluded that "[t]he negotiating history therefore confirms the Panel's interpretation of Article XXI(b) of the GATT 1994 as requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself. In other words, *there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny*."[145]

182. Hong Kong, China agrees with this conclusion. Although the United States persists in its attempt to reframe the statements of its delegate to appear consistent with a self-judging interpretation, there can be no doubt that the United States viewed the subparagraphs as serving to limit the scope of the exception so as to avoid "permit[ting] anything under the sun" – something that would necessarily follow if the subparagraphs were self-judging. No third party supports the U.S. conclusion that the drafting history of Article XXI(b) confirms the interpretation that the subparagraphs are self-judging.[146]

183. The drafters' intent for the subparagraphs of the exception that became Article XXI(b) to be objectively reviewable is further confirmed by internal documents of the U.S. delegation at the time the exception was drafted. These documents were considered by the panel in *Russia – Traffic in Transit*. As Hong Kong, China has

[144] Panel Report, *Russia – Traffic in Transit*, para. 7.98.

[145] Panel Report, *Russia – Traffic in Transit*, para. 7.100 (emphasis added).

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

explained, these documents may be taken into account as supplementary means of interpretation under Article 32 of the Vienna Convention.[147] Such documents could also be reviewed by the Panel through the exercise of its discretion to rely on publicly available facts and evidence, as proposed by the European Union.[148] It is evident from these documents, as Hong Kong, China has previously shown, that the U.S. delegation carefully considered and explicitly rejected revisions to the draft language of the exception intended to render it self-judging in its entirety.[149]

2. The negotiating history of non-violation, nullification or impairment claims does not support the U.S. interpretation of Article XXI(b) as entirely self-judging

184. The United States makes a similar attempt to reframe the negotiating history to support its argument that the availability of non-violation, nullification or impairment ("NVNI") claims supports an interpretation of Article XXI(b) as entirely self-judging.[150] This negotiating history is irrelevant and, in any event, does not support the U.S. argument.

185. As Hong Kong, China explained at the first substantive meeting and in response to Panel Question 64, 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.[151] The availability of such claims thus has no bearing on the correct interpretation of Article XXI(b).[152]

[147] Hong Kong, China's response to Panel question No. 59(a), para. 209. See also European Union's response to Panel question No. 42, para. 124 ("[i]n the European Union's view, these documents would constitute the circumstances of the conclusion of the GATT 1947, or other supplementary means of interpretation").

[148] Hong Kong, China's response to Panel question No. 59(b), para. 216 (referring to Exhibit EU-5, para. 106). See also Canada's response to Panel question No. 42, para. 111 ("Canada agrees with the arguments put forth by the EU in this regard. Even if the material were not captured by Article 32 of the Vienna Convention, pursuant to Article 13.2 of the DSU the panel is empowered to seek information from any relevant source in making its findings").

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

[150] See United States' response to Panel question No. 64.

[151] Hong Kong, China's response to Panel question No. 64, para. 250.

[152] See also European Union's response to Panel question No. 55, para. 170 ("[n]on-violation complaints may be available even in cases where the measure at issue is objectively within the scope of the security exception, i.e. justified under it. This does not have any bearing on whether Article XXI(b) is self-judging or not, as violation complaints are also available and a panel should make an objective assessment of the matter before it, including of the applicability and conformity with Article XXI(b).").

186. Moreover, as several third parties have also observed,[153] the GATT/ITO drafting history cited by the United States does not establish that NVNI claims were intended as the sole means of recourse for Members affected by actions taken under Article XXI(b). On the contrary, the negotiating history merely confirms that NVNI claims are available for claims against measures found to satisfy the conditions of Article XXI(b), including the objective elements of the exception. In this regard, Hong Kong, China notes that in the Working Party Report submitted by the United States in Exhibit US-39, the Working Party explained that an action "*in time of war or other international emergency*", that is, an action falling within the scope of one of the enumerated subparagraphs, might be justified under the exception but nevertheless result in the nullification or impairment of benefits accruing to other Members, who would then have a right to bring NVNI claims.[154]

187. In sum, even if this negotiating history were somehow relevant, it does not support an interpretation of Article XXI(b) as entirely self-judging.[155]

D. Conclusion

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

189. If the Panel agrees with the panels in *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* that the subparagraphs are objectively reviewable, then there is no need for the Panel to proceed with an evaluation of whether the U.S. measures may be justified under Article XXI(b). In light of the U.S. failure to identify and invoke a particular subparagraph and submit arguments and evidence to demonstrate its objective applicability to the present case, no further analysis is necessary or possible.

VII. CONCLUSION

190. For reasons set out in this second written submission and in Hong Kong, China's previous submissions, Hong Kong, China respectfully requests that the Panel find that the United States has breached its obligations under the covered agreements, and recommend that the United States bring its measures into conformity with such covered agreements.

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[153] See Canada's response to Panel question No. 55, paras. 140-142; European Union's response to Panel question No. 55, para. 169; Russia's response to Panel question No. 55.

[154] United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan 9, 1948) (Exh. **US-39**), p. 2 (emphasis added).

[155] See United States' response to Panel question No. 64.