BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

INTEGRATED EXECUTIVE SUMMARY OF HONG KONG, CHINA

Confidential

3 May 2022

INTEGRATED EXECUTIVE SUMMARY OF HONG KONG, CHINA'S WRITTEN SUBMISSIONS AND ORAL STATEMENTS

I. HONG KONG CHINA'S FIRST WRITTEN SUBMISSION

A. Introduction

1. This is a legal dispute concerning country of origin marking requirements arising principally under the Agreement on Rules of Origin ("ARO") and the Agreement on Technical Barriers to Trade ("TBT Agreement"). The measures at issue in this dispute involve a determination by the United States that goods indisputably manufactured or processed within the customs territory of Hong Kong, China originate within the People's Republic of China, a different World Trade Organization ("WTO") Member, and require these goods to be marked to indicate this origin.

2. 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. U.S. Customs and Border Protection ("USCBP") is responsible for implementing section 304 of the Tariff Act of 1930. Part 134 of USCBP's regulations, 19 C.F.R. Part 134, prescribes detailed rules concerning compliance with the origin marking requirement.[1] Through its regulations, USCBP has defined the term "country of origin" for the purpose of section 304 as "the country of manufacture, production, or growth of any article of foreign origin entering the United States".[2] 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'".[3] Thus, the "country of origin" for the purpose of the origin marking requirement is the country in which the imported article was manufactured, produced, or grown, or the country in which the article underwent a substantial transformation.

3. For the purpose of the origin marking requirement, USCBP has consistently treated Hong Kong, China as a "country of origin".[4] Such treatment of Hong Kong, China by USCBP for customs and origin marking purposes is consistent with the fact that Hong Kong, China is a separate customs territory and as such falls within the scope of "country" for the purposes of the WTO covered agreements and is thus a distinct country of origin from which goods may originate under the rules prescribed by the ARO (and for all purposes under the WTO covered agreements for which a determination of origin is required).

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[1] 19 C.F.R. Part 134 [redacted].

[2] 19 C.F.R. § 134.1(b) [redacted].

[3] 19 C.F.R. § 134.1(b) [redacted].

[4] See 19 C.F.R. § 134.1(a) [redacted]. See also, e.g. USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Childrens' Computer Games (26 January 1990) [redacted]; USCBP Ruling Letter HQ 560337 Re: Country of origin marking for products of Hong Kong imported on or after July 1, 1997 (27 June 1997) [redacted].

4. 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".[5] Abbreviations which "unmistakably indicate the name of a country" are acceptable, as are alternative spellings "which clearly indicate the English name of the country of origin".[6] 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.[7]

5. On 11 August 2020, USCBP published a Federal Register notice indicating that, after 25 September 2020, imported goods manufactured or produced in Hong Kong must be marked to indicate that their origin is "China".[8] By subsequent notice, USCBP extended the date for compliance with this requirement to 10 November 2020.[9] USCBP has rejected any use of the words "Hong Kong" in the required mark of origin after 9 November 2020 (including "Hong Kong, China"). Thus, the United States now requires a mark of origin ("China") that it previously rejected in the case of goods manufactured or produced in Hong Kong, China, while rejecting the use of a mark of origin ("Hong Kong") that it previously required as the exclusive mark of origin for such goods.

6. USCBP issued the August 11 Federal Register notice under the authority of Executive Order 13936, issued by former U.S. President Donald J. Trump on 14 July 2020.[10] 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.[11] 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".[12] Executive Order 13936 contains a finding that Hong Kong, China is not "sufficiently

[5] 19 C.F.R. § 134.45(a)(1) [redacted].

[6] 19 C.F.R § 134.45(b) [redacted].

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

[8] 85 Fed. Reg. 48551 (11 August 2020) ("August 11 Federal Register notice") [redacted].

[9] See USCBP, CSMS #43729326 – GUIDANCE: Additional 45-day Compliance Period for Executive Order 13936 – Hong Kong Normalization (21 August 2020) [redacted].

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

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

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

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.

7. Section 304 of the Tariff Act of 1930, Part 134 of the USCBP's regulations, the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice interacted with each other as described above to create the present circumstance in which the United States: (i) concludes, for the purpose of its origin marking requirement, that the People's Republic of China is the country of origin of goods manufactured or produced in the customs territory of Hong Kong, China; and (ii) requires goods imported from the customs territory of Hong Kong, China to be marked with this country of origin determination. Hong Kong, China will refer to this conclusion and requirement as, collectively, "the revised origin marking requirement".

B. The Revised Origin Marking Requirement Is Inconsistent with the ARO

8. Article 1.1 of the ARO defines "rules of origin" as "those laws, regulations and administrative determinations of general application applied by any Member to *determine the country of origin* of goods".[13] Article 1.2 elaborates upon this definition by stating that "rules of origin" include all rules of origin used in, *inter alia*, "origin marking requirements under Article IX of GATT 1994".

9. It follows from these definitional elements that: (i) origin marking requirements involve laws, regulations and administrative determinations of general application applied by a Member to determine the country of origin of goods; and (ii) the requirement to mark a good with a particular country of origin is a "determination concerning the country of origin" of that good, i.e. that the origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the good. Any such determination must be made in accordance with the requirements of the ARO.

10. The first explanatory note to the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") explains that "[t]he terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO." The ARO is one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the WTO Agreement. Thus, where the ARO uses the term "country", including in the phrase "country of origin", that term includes Hong Kong, China as a separate customs territory Member of the WTO.

i. The Revised Origin Marking Requirement Is Inconsistent with Article 2(c) of the ARO

11. Under Article 2(c), a Member may not condition the conferral of a particular country of origin as indicated in a mark of origin upon conditions unrelated to

[13] Emphasis added.

manufacturing or processing. The revised origin marking requirement imposes a condition "not related to manufacturing or processing" as a prerequisite for the determination that an imported good is of Hong Kong, China origin. The conditions that the United States imposes for this purpose under the United States-Hong Kong Policy Act of 1992 are political conditions subjectively determined by the United States, not conditions related to manufacturing or processing. Executive Order 13936 relied upon section 202 of the United States-Hong Kong Policy Act of 1992 to suspend the ordinary operation of the origin marking requirement to goods produced in Hong Kong. Nothing in the August 11 Federal Register notice, or elsewhere in the relevant measures, relates to the manufacturing or processing of goods within the customs territory of Hong Kong, China.

12. These considerations further demonstrate that the "sufficient autonomy" condition is a rule of origin, i.e. it is a law or regulation of general application applied by the United States to determine the country of origin of certain goods. The "sufficient autonomy" condition set forth in the United States-Hong Kong Policy Act of 1992, while applying only to goods imported from Hong Kong, China, is of "general application" because it affects an unidentified number of economic operators and is not addressed to a specific company or transaction.[14] This condition "is applied … to determine the country of origin of goods" because it was the finding of an alleged absence of "sufficient autonomy" that required USCBP to determine, for origin marking purposes, that the country of origin of goods imported from Hong Kong, China is the People's Republic of China. The requirement of "sufficient autonomy" is a "condition not related to manufacturing or processing" that the United States has imposed as a prerequisite for "a qualifying good to be accorded the origin of a particular country", namely as a prerequisite for according the origin of Hong Kong, China to goods manufactured or processed in the customs territory of Hong Kong, China.

13. This imposition of a condition unrelated to manufacturing or processing as a prerequisite for a determination of the country of origin is inconsistent with Article 2(c) of the ARO. For the same reason, the requirement to mark goods manufactured or processed in Hong Kong, China as goods of "China" origin is inconsistent with Article 2(c) because it incorrectly indicates the country of origin of these articles when considerations relating exclusively to manufacturing or processing are taken into account.[redacted]

[14] Appellate Body Report, *EC – Poultry*, para. 113. See also Appellate Body Report, *US – Underwear*, p. 21; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.773; Panel Report, *EC – Selected Customs Matters*, para. 7.116.

[redacted]

ii. The Revised Origin Marking Requirement Is Inconsistent with Article 2(d) of the ARO

14. 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". Article 2(d) requires importing Members to apply the same rules of origin to goods imported from any Member. Under U.S. law, the United States applies a condition to goods imported from the customs territory of Hong Kong, China – the condition of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – to determine the country of origin of goods imported from that customs territory. The United States does not apply this same condition to goods imported from other Members. The United States therefore "discriminate[s] between other Members" in respect of the rules of origin that the United States applies to imports, in contravention of Article 2(d).

C. The Revised Origin Marking Requirement Is Inconsistent with Article 2.1 of the TBT Agreement

15. 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" within the meaning of Annex 1, paragraph 1, of the TBT Agreement. The requirement to mark an imported product with its country of origin is a "marking … requirement" that "appl[ies] to a product". The U.S. origin marking requirement as set forth in section 304 of the Tariff Act of 1930 and Part 134 of USCBP's regulations, as well as rulings and notices relating thereto, is therefore a "technical regulation" that falls within the scope of the TBT Agreement.

16. A party asserting a claim under Article 2.1 of the TBT Agreement must demonstrate that (i) the imported products in question are like the products of national origin or the products of other origins; and (ii) the treatment accorded to products imported from the complaining Member is less favourable than that accorded to like products of national origin or like products originating in other Members (and non-Members).[16]

17. The measures at issue draw a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members). The United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members). The United States has applied that condition to determine that goods imported from the customs territory of Hong Kong, China have an origin of the People's Republic of China, and consequently requires goods imported from Hong Kong, China to be marked as goods of "China". The United States has expressly rejected marking goods imported from Hong Kong, China as goods of "Hong Kong, China" origin, which is the full English name of the customs territory in

[16] See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, para. 202.

which the goods originate. Because this *de jure* difference in regulatory treatment is based on the origin of the goods rather than any characteristic(s) of the goods themselves, the presumption of likeness is established.[17]

18. There is often considerable brand and reputational value to be derived from marking a product as one having the origin of a particular Member. [redacted] By depriving these exporters and others like them of the ability to mark their products as products of Hong Kong, China origin, the origin marking requirement as applied by the United States 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). 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. Finally, 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 [redacted].

19. For these reasons, 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.

D. Claims Under the GATT 1994

20. 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 General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Hong Kong, China requests that the Panel address its claims under the GATT 1994 only in the event that the Panel finds, for whatever reason, that the measures at issue are not inconsistent with both the ARO and the TBT Agreement.

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

21. The measures at issue are inconsistent with Article IX:1 of the GATT 1994 for the same essential reasons that they are inconsistent with the Most-Favoured-Nation ("MFN") treatment obligation contained in Article 2.1 of the TBT Agreement. First,

[17] With regard to the requirement of likeness, it is well established that "when origin is the sole criterion distinguishing the products", it is "sufficient for a complainant to demonstrate that there can or will be domestic and imported products that are 'like'". Panel Report, *US – Poultry (China)*, paras. 7.424-7.429. The Appellate Body has observed that "measures allowing the application of a presumption of 'likeness' will typically be measures involving a *de jure* distinction between products of different origin." Appellate Body, *Argentina – Financial Services*, para. 6.36.

the requirement of likeness is satisfied 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. Second, the measures at issue accord less favourable treatment to goods of Hong Kong, China in respect of marking requirements because the United States does not determine the country of origin of goods imported from Hong Kong, China in the same manner that it determines the country of origin of like products imported from other Members, with the result that goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin. For these reasons, the measures at issue are inconsistent with Article IX:1 of the GATT 1994.

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

22. Origin marking requirements are clearly a "rule" or "formality" "in connection with importation". The requirement of likeness is satisfied 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.

23. For the reasons that Hong Kong, China explained in relation to Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994, it is an "advantage" for enterprises to be able to mark their goods with a single mark of origin using the English name of the actual country of origin. It is also an "advantage" for Members and their enterprises to be able to mark a product with its *correct* country of origin, i.e. the country of origin that results from the proper application of the rules of origin set forth in the ARO, including the requirement that any determination of origin must be based exclusively on considerations relating to where a good was manufactured or processed.

24. The United States has not extended these advantages "immediately and unconditionally" to like products originating in the customs territory of Hong Kong, China. In particular, the United States has denied Hong Kong, China enterprises the advantage of marking their products with the English name of the actual country of origin on the grounds that, in the view of the United States, Hong Kong, China lacks "sufficient autonomy" from the People's Republic of China. For these reasons, the measures at issue are inconsistent with Article I:1 of the GATT 1994.

II. HONG KONG CHINA'S OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

25. The only defence that the United States has put up is what we would call a "double maximalist" position, that is – Article XXI of the GATT 1994 is applicable to all of the multilateral agreements on trade in goods under the WTO Agreement (referred to as the "Annex 1A Agreements" below, which include the ARO and the TBT Agreement) and is self-judging in its entirety. This "double maximalist" defence is erroneous from a treaty interpretation perspective and is one that is doomed to fail.

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

the United States contends that Article XXI applies to all of the Annex 1A agreements merely by virtue of the fact that all of the Annex 1A agreements relate in some way to trade in goods.[18]

27. The essence of the United States' argument is that Article XXI of the GATT 1994 must apply to the other Annex 1A agreements because, in the United States' view, it would not make any sense for the security exception to apply to the "general agreement" on trade in goods but not to the more specific agreements on trade in goods.[19] What the United States' submission overlooks is the fact that each of the more specific agreements on trade in goods reflects a carefully negotiated balance of rights and obligations pertaining to the subject matter of each agreement. In some cases the Members chose to incorporate some or all of the GATT exceptions into that balance, and in other cases they did not. To conclude that the GATT exceptions apply to all of the Annex 1A agreements whether or not they incorporate those exceptions would upend the balance that the Members struck in the context of each agreement. The Panel must reject this proposition.

28. Evidently aware that its maximalist position has no interpretive support, the United States tries its hand at applying the interpretive principles that prior panel and Appellate Body reports[20] have used to determine whether a GATT exception applies to a different covered agreement, and argues on this basis that Article XXI of the GATT 1994 applies to the ARO and the TBT Agreement. The only two cases in which a GATT exception has been found to apply to other WTO legal instruments were cases involving Protocols of Accession, not another Annex 1A agreement. No similar textual linkages as found in the two cases involving the Protocols of Accession are present in this case. Given that the drafters of the Uruguay Round agreements knew how to, and indeed did incorporate one or both of the GATT exceptions when they considered it appropriate, as discussed above, it is difficult to envision the circumstance in which it would be appropriate to conclude as an interpretive matter that the drafters of an Annex 1A agreement incorporated one or both of the GATT exceptions merely by implication.

29. In sum, there is no credible argument that Article XXI of the GATT 1994 applies to the ARO or the TBT Agreement. Hong Kong, China has demonstrated, and the United States has not disputed, that the measures at issue in this dispute are inconsistent with the ARO and the TBT Agreement. The Panel should therefore find that the challenged measures are inconsistent with the ARO and the TBT Agreement and exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994. This resolution of the matter would achieve a satisfactory resolution to the dispute and obviate the need for the Panel to interpret and apply Article XXI of the GATT 1994, other than as necessary to conclude that it does not apply to the ARO or the TBT Agreement.

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

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

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

30. Hong Kong, China will therefore not devote a significant amount of time in the first substantive meeting to rebutting the United States' erroneous contention that Article XXI(b) of the GATT 1994 is "self-judging" in its entirety. The fundamental problem with the United States' interpretation of Article XXI(b) remains what it has always been – the United States' failure to give meaning and effect to the subparagraphs of that provision. Like their counterparts in Article XX of the GATT 1994, the subparagraphs of Article XXI(b) define the specific circumstances in which the exception can be invoked. In other words, they serve to limit the subject matter applicability of Article XXI(b) to the three circumstances therein enumerated. The United States engages in syntactic contortions to try to place the subparagraphs within the portion of Article XXI(b) which is committed to the invoking Member's discretion, subject to the obligation of good faith. But if the applicability of the subparagraphs to a particular action for which justification is sought were committed to the invoking Member's discretion, then one may justifiably ask what purpose would those subparagraphs serve? The meaning and effect of Article XXI(b) would be exactly the same as if the subparagraphs did not exist, in contravention of the principle of effective treaty interpretation.

31. Properly interpreted, each of the subparagraphs of Article XXI(b) modifies the term "action" in the chapeau to this provision. The United States is forced to concede this point in the case of the third subparagraph, which, as a matter of English grammar, can only modify the term "action". The fact that each of the subparagraphs of Article XXI(b) modifies the term "action" is confirmed by the equally authentic Spanish text, which, due to the gender agreement of the word "relativas" with the word "medidas", leaves no possible doubt that each of the subparagraphs of Article XXI(b) modifies the term "action" in the English text. It is therefore apparent that each of the subparagraphs of Article XXI(b) forms a noun phrase with the term "action" in the chapeau, serving to define the three exclusive types of "actions" for which justification may be sought under this exception. Whether or not an "action" for which justification is sought is one of these three types is a question that is objectively reviewable by a panel in dispute settlement.

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

33. In its first written submission, the United States has not identified which of the three subparagraphs of Article XXI(b) it considers applicable to the GATT-inconsistent actions for which it seeks justification in this dispute, let alone established a *prima facie* case of the applicability of that subparagraph. Unless and until the United States demonstrates the objective applicability of one or more of the subparagraphs to the measures at issue, no purpose would be served by evaluating the conformity of those measures with the requirements of the chapeau. At this stage,

Hong Kong, China will merely observe that it does not perceive any relationship, let alone a minimally plausible relationship, between any "essential security interests" of the United States and a requirement to mark goods of Hong Kong, China origin incorrectly as goods that originate within the customs territory of a different WTO Member.

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

III. HONG KONG, CHINA'S RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

Excerpt from Hong Kong, China's Response to Panel Question No. 5.

35. … It is the prior country of origin determination that establishes the name of the country with which a good must be marked. Were that not the case, the ARO would not in any meaningful sense apply to rules of origin used in the application of origin marking requirements, contrary to the express text of Article 1.2. …

36. The United States has recognized that marks of origin necessarily involve a prior determination of the country of origin of a good. The U.S. International Trade Commission ("USITC") has explained in the context of origin marking requirements that "the origin determination is used *to establish the name of the country that must be marked on an imported article*".[21] As this explanation makes clear, the country applying the origin marking requirement must first determine the country of origin of the good, and that determination in turn "establish[es] the name of the country that must be marked" on the imported article. In other words, the requirement to mark an imported article with the name of a particular country is the result of a prior country of origin determination.

37. Consistent with this fact, the United States has previously notified its origin marking measures to the Committee on Rules of Origin, as required by Article 5.1 of the ARO. … For these reasons, and as explained further below, a requirement to mark an imported good with the name of a particular country necessarily involves a prior determination that that country is the country of origin as determined in accordance with the rules of the ARO. …

Excerpt from Hong Kong, China's Response to Panel Question No. 6.

38. It is self-evident that for the ARO to apply to origin marking requirements, as provided for in Article 1.2, there must be a *correspondence* between the country of

[21] 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).

origin of a good, properly determined in accordance with the rules of the ARO, and the specific country of origin mark that an importing Member requires that good to bear. As the USITC has correctly and succinctly explained, rules of origin are used in the application of origin marking requirements "to establish the name of the country that must be marked on an imported article".[22] It would not be meaningful to say that the ARO applies to origin marking requirements if, for example, the rules of the ARO require the conclusion that a good is of Canadian origin and yet it were nevertheless permissible for an importing Member to require that good to be marked as a product of the United Kingdom, a different Member. The ARO applies to marks of origin precisely so that a required mark of origin *correctly* indicates the customs territory of a Member from which a good originates. There is no other respect in which the ARO could meaningfully apply to marks of origin.

Excerpts from Hong Kong, China's Responses to Panel Questions Nos. 15 and 16

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

40. Setting aside the parties' agreement that no "second step" is required in cases of origin-based distinction, Hong Kong, China notes in relation to the Panel's question that the burden would be on the United States to *articulate* its essential security interests in the first instance. In no event would it be possible to take into account a Member's essential security interests if the Member does not articulate what those interests are. …

Excerpt from Hong Kong, China's Response to Panel Question No. 27

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

Excerpt from Hong Kong, China's Response to Panel Question No. 44

[22] 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].

42. As the panel in the *Russia – Traffic in Transit* dispute correctly found, although the invoking Member retains the discretion to determine the necessity of the measure at issue and to define for itself what it considers to be its essential security interests,[23] this does not mean, that the invoking Member is free to label any interest an "essential security interest".[24] Nor does it mean that the invoking Member is free to assert that any measure, however remote from the proffered essential security interest, is a measure protective of that interest.[25] These limitations reflect the fact that the entirety of the adjectival clause is subject to the overarching obligation of good faith. Thus, the legal effect of the phrase "which it considers" does not require complete and total deference to the respondent's assertion that an action is necessary for the protection of its essential security interests. Rather, the invoking Member's asserted essential security interests and the relationship between those interests and the measures at issue are subject to review by a panel for the limited purpose of evaluating whether the Member has acted in good faith.

IV. HONG KONG CHINA'S SECOND WRITTEN SUBMISSION

A. 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

43. 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".

44. 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

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

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

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

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).

45. 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. Moreover, questions of terminology come *after* the importing Member has determined the country of origin based on the application of rules of origin. Contrary to what the United States suggests in its answers to the Panel's questions, the present dispute is not a dispute about terminology. 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.

46. Nor is the present dispute a dispute about the boundaries of the customs territory in which particular goods were manufactured or processed. The United States acknowledges that the revised origin marking requirement applies to goods "produced in the geographic region of Hong Kong, China".[26] The United States further acknowledges that the geographical boundaries of the separate customs territory of Hong Kong, China are not in dispute,[27] 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.[28] 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] United States' response to Panel question Nos. 6 and 7, para. 25.

[27] 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).

[28] 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.").

B. 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

47. 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".[29] 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. "goods produced in Hong Kong") in fact have an origin of the People's Republic of China.

48. 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 implies. 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.

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

49. 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".

50. 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

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

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.

51. 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. 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.

52. 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"[30] – 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.

53. 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".[31]

[30] 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).

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

54. 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 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.[32]

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

55. Regardless of how one characterizes 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)), 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".[33] 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".[34] The Hong Kong Trade Development Council ("HKTDC") submitted a request to USCBP seeking the conferral of Hong Kong, China origin for goods manufactured or processed in Hong Kong, China. 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.

[32] 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"). 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.

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

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

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

56. 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".[35] 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.

F. The Revised Origin Marking Requirement Is Inconsistent with Article 2.1 of the TBT Agreement

57. 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".[36] The United States argues that because these underlying concerns are "origin-neutral", the measures do not reflect origin-based discrimination.[37]

58. 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.[38]

59. 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

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

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

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

[38] *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").

the measures at issue reflect *de jure* origin-based distinctions, that may not be the end of the Panel's analysis.[39] 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" ("LRD") test developed by the Appellate Body.[40]

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

61. 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.[41] 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 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.

62. 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.[42]

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

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

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

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

63. 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. 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.

G. The Revised Origin Marking Requirement Is Inconsistent with Articles IX:1 and I:1 of the GATT 1994

64. 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, because the United States has 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.

H. Article XXI(b) of the GATT 1994 Does Not Apply to the ARO or the TBT Agreement

65. 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.

66. 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

> [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.

the GATT 1994 is available as a potential justification under all of the Annex 1A agreements. This proposition overlooks both the text of Article XXI(b) itself and the context provided by the other Annex 1A agreements.

67. 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. 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 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".[43]

68. There are multiple problems with the United States' argument. 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.

I. Article XXI(b) of the GATT 1994 Is Not Entirely Self-Judging

i. 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

69. 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.[44] 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.

[43] 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.

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

70. 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".[45] 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,[46] 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".[47] The subparagraphs must have *objective* meaning among the Members. 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.[48]

71. 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.[49] 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.

72. 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. None of the other provisions cited by the United States supports an

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

[46] 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.

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

[48] 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.

[49] 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.").

interpretation of Article XXI(b) as entirely self-judging, with the subparagraphs serving only to "guide a Member's exercise of its rights".[50]

73. 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 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. 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.[51]

74. 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.[52] 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.[53]

75. 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.[54]

76. 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

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

[51] 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.

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

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

[54] 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.

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).

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

77. 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.[55] 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.

78. 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.[56] As Hong Kong, China has already addressed those ITO 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*. 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.[57]

79. 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. 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.[58]

80. 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 claims supports an interpretation of Article XXI(b) as entirely self-

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

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

[57] 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.

[58] 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).

judging.[59] This negotiating history is irrelevant and, in any event, does not support the U.S. argument.

81. 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.

V. HONG KONG CHINA'S OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

82. Properly interpreted, a Member's invocation of Article XXI(b) must begin with a *prima facie* demonstration that one or more of the subparagraphs of that provision is objectively applicable to the measures for which justification is sought. The United States has not even attempted to discharge that burden of proof by presenting evidence and legal argument in support of the objective applicability of any one of the Article XXI(b) subparagraphs. Nor has the United States attempted to demonstrate in accordance with the requirement of the chapeau of Article XXI(b) that the measures bear a plausible relationship to any essential security interests of the United States, such that the invocation of Article XXI(b) would have been made in good faith.

83. Having disposed of the United States' attempt to justify the revised origin marking requirement under Article XXI(b) of the GATT 1994, Hong Kong, China will turn to the United States' responses to Hong Kong, China's claims on the merits under the ARO, the TBT Agreement, and the GATT 1994, respectively.

84. The United States' apparent acknowledgement that the goods covered by the revised origin marking requirement originate in Hong Kong, China when ARO-compliant rules are applied is tantamount to a concession that the United States is acting inconsistently with the ARO. The United States appears to acknowledge that the goods subject to the revised origin marking requirement are goods of Hong Kong, China origin when the United States' "normal rules of origin" – that is, the United States ARO-compliant rules of origin – are applied.[60] The United States nevertheless requires these goods to be marked as having the origin of a different WTO Member, the People's Republic of China.

85. As for the TBT Agreement, in relation to Hong Kong, China's claim under Article 2.1 of the TBT Agreement, the United States focuses its second written submission on its assertion that Hong Kong, China has "walk[ed] away from its own theory of the case" simply because Hong Kong, China has stated that the challenged measures are *de jure* discriminatory.[61] To be clear, Hong Kong, China's argument has been from the very beginning, and remains, that the measures at issue are *de jure* discriminatory. Further,

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

[60] United States' second written submission, para. 165.

[61] United States' second written submission, para. 177.

Hong Kong, China has also provided evidence of the detrimental impact of the origin-based distinction in the revised origin marking requirement in fact to facilitate the Panel's objective assessment in the present dispute.

86. Turning to Hong Kong, China's claims under the GATT 1994, it is apparent from the United States' second written submission that it has no meaningful response to Hong Kong, China's claims under Article IX:1 and Article I:1. The United States' attempt to rebut these claims is based on an obvious mischaracterization of the relevant legal standard under these provisions. The essence of the United States' response to Hong Kong, China's claim under Article IX:1 is that Article IX:1 does not prescribe any rules about how a Member determines the country of origin for origin marking purposes, or what terminology it permits or requires to indicate the country of origin.[62] This response shows a lack of accurate appreciation of the nature of Article IX:1. Article IX:1 is an *anti-discrimination* provision, not a provision that prescribes specific substantive rules governing how Members implement origin marking requirements. The United States engages in the same tactic with respect to Hong Kong, China's claim under Article I:1 of the GATT 1994. The question under Article I:1 is not, as the United States suggests, whether this provision prescribes specific substantive rules about how Members implement origin marking requirements.

VI. HONG KONG CHINA'S CLOSING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

The United States' Allegedly "Origin-Neutral" Regulatory Objectives

87. Hong Kong, China's view, shared by all of the third parties, is that the U.S. position on the applicability of Article XXI(b) to the TBT Agreement is baseless. In the context of Hong Kong, China's claim under Article 2.1, the repeated U.S. references to its "self-judging essential security interests" are therefore a non-sequitur. Where this leaves the United States is with its theory that measures that are *de jure* discriminatory are not in violation of Article 2.1 if a Member can identify an origin-neutral concern operating somewhere in the background.

88. The alleged origin-neutral concerns that the United States has claimed in this case are its professed global concerns about democratic norms and fundamental freedoms. The measure that Hong Kong, China is challenging is a technical regulation that precludes Hong Kong, China goods from being marked with the name "Hong Kong, China". Hong Kong, China cannot conceive of any relationship between this technical regulation and the United States' professed global concerns about democratic norms and fundamental freedoms, and the United States appears determined not to explain what this relationship might be. But what the United States is asking the Panel to accept is quite clear – namely, that its professed origin-neutral concerns about democratic norms and fundamental freedoms could be used to demonstrate that any origin-based discrimination is in fact "origin-neutral" and not inconsistent with Article 2.1. This is true even if the measures are discriminatory on their face, as is the case here, and even if the measures have no relationship to the United States' professed "global concerns", as is also the case here. Hong Kong, China trusts that it is evident to the Panel that accepting the U.S. "origin-neutral"

[62] See, e.g., United States' second written submission, paras. 194-195.

theory would obliterate the straightforward prohibition on origin-based discrimination contained in Article 2.1 of the TBT Agreement.

The United States' Failed Invocation of Article XXI(b) of the GATT 1994

89. Beginning with the subparagraphs of Article XXI(b), i.e. the types of GATT-inconsistent "actions" for which a responding Member may seek justification, Hong Kong, China does not consider that the United States has even attempted to demonstrate the objective applicability of any of these subparagraphs. While the United States has made vague references to Article XXI(b)(iii) and may have implied that the challenged measures constitute an "action … taken in time of … [an] other emergency in international relations", the United States has made no effort to identify that any such "emergency in international relations" exists, as that term is properly understood.

90. Even if the United States had demonstrated the objective applicability of Article XXI(b)(iii), which it has not, the same basic problem would arise were the United States to attempt to demonstrate that it has invoked this exception in good faith. As the panel in *Russia – Traffic in Transit* correctly held, the obligation of good faith requires the "invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".[63] While sticking to its position that what constitutes an "essential security interest" is exclusively for the invoking Member to determine, the United States nevertheless suggests that any situation in the world that may implicate the United States' alleged global concern of "fundamental freedoms, human rights, and democratic norms" necessarily implicates the "essential security interests" of the United States.

91. The problem for the United States is that not every foreign policy or political concern, no matter how sincerely held, necessarily implicates a Member's essential security interests as this term is properly understood. Even if one were to take at face value the United States' asserted interest in promoting "fundamental freedoms, human rights, and democratic norms" around the world, the United States has failed to demonstrate how the alleged situation with regard to "fundamental freedoms, human rights, and democratic norms" in other parts of the world relates to the protection of the United States' territory and its population from external threats, or the maintenance of law and public order internally. Article XXI of the GATT 1994 is entitled "Security Exceptions", not "Foreign Policy" or "Political" exceptions. The United States itself has stated in these proceedings on more than one occasion, that "support for democratization is a fundamental principle of *overall U.S. foreign policy*". Irrespective of the veracity of this position, such purported foreign policy interest could not possibly be described as an "essential security interest" under Article XXI.

92. Finally, and where the wheels ultimately come off the bus for the United States' attempted invocation of Article XXI(b), the United States has completely failed to demonstrate that there is any nexus whatsoever between the GATT-

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

inconsistent action for which it seeks justification and any "essential security interests" of the United States, *even accepting* for this purpose that the promotion of "fundamental freedoms, human rights, and democratic norms" in other parts of the world is such an "interest". The measures at issue in this dispute relate exclusively to a country of origin labelling requirement. The United States has not even attempted to explain how the discriminatory treatment of Hong Kong, China goods in respect of this origin labelling requirement – in particular, the refusal to allow these goods to be marked with the full English name of the customs territory in which they were manufactured or produced, the treatment that the United States accords to the goods of all other Members – has anything to do with protecting any "essential security interests" of the United States, whatever those "interests" might be. There is no plausible connection between requiring the origin of goods to be mislabelled and the protection of any "essential security interests" of the United States. More importantly, the United States has not offered any explanation of what this connection might be – in fact, in the U.S. closing statement at the second substantive meeting, the United States has made clear that it has no intention of demonstrating this connection. This is presumably because there is none.

93. In conclusion, the matter before the Panel is a legal dispute narrowly focused on whether the United States' discriminatory treatment of Hong Kong, China goods in respect of the United States' country of origin labelling requirement is consistent with the identified provisions of the covered agreements. It is not about the veracity of the United States' views concerning the relationship between Hong Kong, China and the People's Republic of China. While the United States has attempted to justify these violations under Article XXI(b) of the GATT 1994 – effectively conceding those violations – that exception does not apply to the ARO and TBT Agreement and, in any event, the United States has failed to discharge its burden of proof under that exception.

VII. HONG KONG, CHINA'S RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Excerpt from Hong Kong, China's Response to Panel Question 72

94. … Hong Kong, China agrees with the Appellate Body that an LRD analysis only makes sense in cases of alleged *de facto* discrimination, where the discrimination against imported products "will not be *immediately discernible from the text of a measure*".[64] Furthermore, as Hong Kong, China explained in its response to the prior question, the United States appears to agree that where a measure "*on its face*, treat[s] imported products less favorably than other like foreign products", no further analysis is required.[65]

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

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

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

the origin-based less favourable treatment is evident on the face of the measure, the violation of Article 2.1 is incontrovertible. … It is difficult to hypothesize many circumstances in which a technical regulation would need to draw origin-based distinctions to achieve a legitimate regulatory objective that could not otherwise be achieved on an origin-neutral basis – i.e. by focusing on product characteristics or their related processes and production methods, rather than the origin of the products.

96. Finally, Hong Kong, China would once again emphasize that the United States has *never* suggested that the detrimental impact on Hong Kong, China products "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[66] If the United States had ever suggested that the detrimental impact here was based exclusively on a legitimate regulatory distinction (and if the Panel disagreed with both parties and the Appellate Body and found an LRD analysis appropriate in a case of *de jure* discrimination), then Hong Kong, China would agree with the Appellate Body that the Panel would need to "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."[67]

Excerpt from Hong Kong China's Response to Panel Question 82

97. The problem, to be clear, is that while the United States has suggested that the alleged global concerns of "the values of fundamental freedoms and human rights" *are* its essential security interests under Article XXI(b), the United States has made *no* attempt to explain how protecting "the values of fundamental freedoms and human rights" *in Hong Kong, China* as alleged has anything to do with the protection of the United States from external threats or the maintenance of law and public order *internally*. This is why Hong Kong, China maintains that the United States has not sufficiently articulated its essential security interests – because what the United States has in fact articulated cannot conceivably fall within the undisputed understanding of what constitutes an "essential security interest" under Article XXI(b).

Excerpts from Hong Kong China's Response to Panel Questions 113 and 114

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

99. … The said nexus requirement extends both to the *temporal* connection, as highlighted by the European Union, and to the *subject matter* connection between the GATT-inconsistent action and the demonstrated "emergency in international

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

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

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

VIII. HONG KONG, CHINA'S COMMENTS ON THE U.S. RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Excerpt from Hong Kong, China's Introductory Comments

100. … In no event would the Panel need to evaluate or pass judgment on the merits of the United States' "sufficient autonomy" determination. The United States' consistent focus in its responses to the Panel's questions on the legitimacy of its "sufficient autonomy" determination is, therefore, a complete red herring. The United States repeatedly highlights this issue, despite its irrelevance, because it has no credible response to Hong Kong, China's legal claims of violation under the relevant WTO covered agreements in this dispute.

Excerpt from Hong Kong, China's Comment on U.S. Response to Panel Question 68

101. … The United States appears to believe, without any legal basis, that it has a blank check to impose *de jure* discriminatory measures with respect to products imported from Members around the world, so long as those measures are ostensibly related to the United States' overarching "origin neutral" global concerns.

102. The fallacy of the U.S. theory is obvious. If this theory applies to technical regulations adopted by all Members (and it must), and the presence of any relevant "origin-neutral governmental objective" renders all origin-based less favourable treatment non-discriminatory, it would be hard to imagine that *any* discriminatory measure could not be excused pursuant to this standard. When Members treat products from a particular Member less favourably, they tend to have a reason for doing so. If extrapolated out far enough, it seems to Hong Kong, China that those reasons could always be linked to a high-level "origin neutral governmental objective". But there is *nothing* in Article 2.1 of the TBT Agreement that suggests that the reason for the less favourable treatment is relevant, much less the high-level government objective behind the reason. The United States is reading gaping exceptions into an agreement where no such exceptions exist, and adopting the United States' amorphous "origin neutral" theory would have obvious and far-reaching implications for the rules-based multilateral trading system beyond the current dispute.

Excerpt from Hong Kong, China's Comment on U.S. Response to Panel Question 103

103. … As Hong Kong, China explained in response to Panel question No. 104, a situation alleged to constitute an "emergency in international relations", even if taking place in another part of the world, must nevertheless implicate defence or military interests, or maintenance of law and public order interests, *of the invoking Member*. Those interests must, in all events, concern the "essential security interests" of the

invoking Member, i.e. "those interests relating to the quintessential functions of the state, namely the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[68] Events taking place in other parts of the world could constitute an "emergency in international relations" under this interpretation, provided that this condition is satisfied.

104. As discussed further in Hong Kong, China's comment on the United States' response to Panel question No. 116, the United States has provided no explanation of how events taking place in Hong Kong, China implicate any defence or military interests, or maintenance of law and public order interests, *of the United States*, even if one were to credit in full the United States' characterization of those events. At most, what the United States has described is a political or foreign policy concern relating to those events. The United States has failed to demonstrate how this concern, even if sincerely held, constitutes an "emergency in international relations" for the United States.

Excerpt from Hong Kong, China's Comment on U.S. Response to Panel Question 114

105. … Even if, purely on an *arguendo* basis, one were to assume that "the situation with respect to Hong Kong" constitutes an "emergency in international relations" in relation to the United States, contrary to a proper understanding of that phrase, the United States has failed to explain how prohibiting Hong Kong, China exporters from marking their products with the "full English name" of the customs territory in which the products were manufactured or produced – the treatment that the United States accords to the products of all other Members – does anything to protect the United States from the alleged "threat" arising from this "national emergency". That is, the United States has failed to explain how violating Articles IX:1 and I:1 of the GATT 1994 – the GATT-inconsistent action for which justification is sought – does anything to protect the United States from any "threat" to the United States arising from this putative "emergency in international relations". Thus, the United States has failed to demonstrate the required nexus between the action for which justification is sought and the alleged "emergency in international relations", even if one were to assume that "the situation with respect to Hong Kong" is such an "emergency", contrary to a proper interpretation of this phrase.

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