**United States – Origin Marking Requirement**

**(DS597)**

# COMMENTS OF THE UNITED STATES ON THE RESPONSES OF HONG KONG, CHINA, TO THE QUESTIONS FROM THE PANEL TO THE PARTIES AFTER THE SECOND SUBSTANTIVE MEETING

**March 14, 2022**

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| *China – Rare Earths (AB)* | Appellate Body Reports, China – *Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014 |
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| *Russia – Traffic in Transit* | Panel Report, *Russian Federation – Measures Concerning Traffic in Transit*, WT/DS512/R, and Add.1, adopted 26 April 2019 |
| *Saudi Arabia – Protection of IPR* | Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R, circulated 16 June 2020 |
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| *US – Clove Cigarettes (AB)* | Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012 |
| *Brazil – Desiccated Coconut (AB)* | Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997 |

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## INTRODUCTION

1. The United States comments below on the complainant's responses to the second set of Panel Questions. The absence of a comment on any particular answer or argument by the complainant should not be construed as agreement with the complainant's arguments.

## CLAIMS UNDER ANNEX 1A AGREEMENTS

### AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT AGREEMENT)

**Question 68.**

**[to the United States – omitted]**

**Question 69.**

**To both parties: Please explain whether, for the purpose of Article 2.1 of the TBT Agreement, "*de jure* discrimination" is the same as an "origin-based distinction" and how each of these concepts relates to "legitimate regulatory distinctions" as developed by the Appellate Body or "origin neutral" factors/objectives as referred to by the United States.**

2. The United States provides comments on the responses of Hong Kong, China, to Questions 69 and 70 together.

**Question 70.**

**To Hong Kong, China: With reference to Hong Kong China's response to advance question No. 1 at the second meeting of the Panel, please clarify whether it is Hong Kong, China's position that any measure that on its face provides for a difference in treatment with respect to only one WTO member would lead to detrimental impact? If yes, would this lead to the conclusion that every measure that differentiates on the basis of origin constitutes *de jure* discrimination?**

3. The United States provides comments on the responses of Hong Kong, China, to Questions 69 and 70 together, without prejudice to the U.S. position that Hong Kong, China's claims under Article 2.1 of the TBT Agreement are unreviewable in light of the U.S. invocation of Article XXI(b).

4. The United States observes that the response by Hong Kong, China, to Question 69 highlights the major deficiency in its argument with respect to the TBT Agreement claims throughout this dispute – its refusal to substantively address the regulatory objective and the surrounding facts and circumstances with respect to the measure at issue.

5. Instead, Hong Kong, China, appears to suggest that an "origin-based distinction" in some instances itself establishes "detrimental impact" (such that there is no need for an evidentiary showing of such impact), and that is what it refers to as "*de jure*" discrimination. This position is untenable. The text of Article 2.1 requires "less favorable treatment" on account of origin, not

an origin-based distinction. The only alleged support that Hong Kong, China, offers for its conclusion is a quote of a single statement from the European Union's third party submission.[1] However, the European Union's submission does not itself explain the basis for this statement, nor does the United States understand the EU statement to support Hong Kong, China's approach. Indeed, Hong Kong, China, never engages with, for example, the subsequent statement by the European Union that "[w]hen policy objectives are akin to Article XXI objectives, a slightly different perspective is warranted because essential security interests are often pursued through origin-based measures."[2] Hong Kong, China's selective quoting from a third party submission is not a substitute for establishing the elements of a claim as set forth in the text. Its argument that it need not establish detrimental impact with respect to the measures at issue is not based on Article 2.1, and it has not in fact established any such impact.

6. In addition to the flaws in its arguments regarding whether there is a need to show detrimental impact, Hong Kong, China's view that there is no need to account for the regulatory purpose of a measure in cases of what it calls "*de jure*" discrimination is not based in the text of Article 2.1, but rather is based on its reading of certain past dispute settlement reports.[3] Notwithstanding that those reports do not stand for the proposition that Hong Kong, China, asserts,[4] the task of the Panel is to interpret the provisions at issue in accordance with the customary rules of treaty interpretation. As explained in prior submissions, this approach by Hong Kong, China – in which a panel evaluating a measure under the TBT Agreement must simply ignore regulatory purpose altogether – has no basis in the text of Article 2.1.[5]

7. If – despite the U.S. invocation of Article XXI(b) – the Panel addresses the merits of Hong Kong, China's Article 2.1 claim, the Panel should make an objective and holistic assessment of all the facts and circumstances at hand in examining whether the alleged discrimination relates to an origin-neutral purpose, and whether Hong Kong, China, has shown a detrimental impact. As the United States has explained, those facts and circumstances show that the purpose and overall concern of the marking requirement at issue is not origin-based discrimination; rather, the determination with respect to the autonomy of Hong Kong, China, stems from the global U.S. concern for fundamental freedoms, human rights, and integrity of democratic institutions.

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[1] Hong Kong, China's Responses to the Second Set of Questions, para. 2 (quoting European Union's third-party response to Panel question No. 9, para. 25).

[2] European Union Third Party Response to Panel Question 11, para. 37.

[3] In respect of the hypothetical measure raised in paragraph 11 of Hong Kong, China's response, based on the facts in *US – Clove Cigarettes*, this fact pattern is not instructive with respect to the circumstances of this dispute. The measure in that dispute related to a ban on imports, while the measure in this present dispute is an origin marking requirement. A ban would generally have an obvious impact on the conditions of competition because it deprives imports of any participation in the market. The same cannot be said of an origin marking requirement, in particular the terminology used for marking purposes.

[4] *See infra* para. 12. *See also* U.S. Second Written Submission, n. 226.

[5] *See* U.S. Second Written Submission, paras. 178-182; U.S. Response to Questions 14, 15, 74(a).

**Question 71.**

**To Hong Kong, China: With reference to the Appellate Body's statement in paragraph 182 of Appellate Body Report, *US – Clove Cigarettes*, please comment on the United States' argument in footnote 226 to paragraph 182 of its second written submission that this statement "does not mean that where there is *de jure* discrimination the panel need not undergo […] legitimate regulatory distinction analysis". Please also comment on Canada's statement in its response to Panel question No. 11 (at paragraph 39) that there "is no textual or conceptual reason that this type of *de jure* distinction should be assessed differently than a distinction giving rise to de facto discrimination where both may result in detrimental impact on the competitive opportunities for imports."**

8. The United States provides comments on the responses by Hong Kong, China, to Questions 71 and 72 together.

**Question 72.**

**To Hong Kong, China: If a Member imposes a measure that makes an origin-based distinction resulting in detrimental impact with respect to products of one Member and does so for legitimate policy reasons (e.g., the protection of consumer information), would it be possible to undertake a "legitimate regulatory distinctions" analysis under Article 2.1? If not – why not?**

9. The United States provides comments on the response by Hong Kong, China, to Questions 71 and 72 together.

10. As explained by the United States, the "less favorable treatment" analysis under Article 2.1 of the TBT Agreement is a holistic examination that includes an overall assessment of the facts and circumstances, including the regulatory objectives. A measure that facially makes distinctions based on origin and a measure that facially accords "less favorable treatment" are not the same. As explained in the U.S. response to Question 68, marking requirements and determination of the terminology generally reflect differences with respect to origin; that is generally the function of marks of origin. They are requirements and determinations that are necessarily different depending on where imports are coming from – that is a function of them being related to marks of origin, not because of discrimination.

11. Contrary to the assertion by Hong Kong, China,[6] the United States does not agree that an analysis under Article 2.1 can somehow avoid a consideration of the regulatory purpose or objective. In its response to Question 14, the United States specifically explained that "what Article 2.1 prohibits are measures that accord *less favorable treatment* to the concerned imported products as compared to other foreign like products *based on origin*."[7] That is, even if detrimental impact has been established, as the United States further explained in response to

[6] Hong Kong, China's Responses to the Second Set of Questions, para. 24.

[7] Responses of the United States to the First Set of Panel Questions, para. 56 (emphasis added).

Question 74(a), evaluating a measure and its impact, if any, must take into account not only the text of the measure, but also its regulatory objective and purpose. Therefore, to the extent that a measure has detrimental impact on a Member, a conclusion as to whether the measure provides less favorable treatment based on origin still needs to be informed by the regulatory purpose and objective. In contrast, what Hong Kong, China, claims in this dispute is that a *distinction* on the basis of origin (e.g., an origin marking requirement) by itself establishes detrimental impact and is by definition less favorable treatment. This position is not supported by the text of Article 2.1. And Hong Kong, China's, use of the term "*de jure*" discrimination (whatever that concept means in the context of a country of origin labeling dispute) in no way changes the type of analysis required under Article 2.1, including as to whether analysis of the regulatory objective (or legitimate regulatory distinction) is required.

12. The United States notes that the prior reports on which Hong Kong, China, seeks to rely (in lieu of the text of Article 2.1) in support of its argument that no regulatory analysis is required in cases of "*de jure*" discrimination did not address a measure that inherently makes distinctions on the basis of origin, such as a mark of origin requirement. Those reports also did not define or clarify what a *"de jure*" discrimination finding would look like in the context of Article 2.1 of the TBT Agreement, and especially in the context of measures relating to actions necessary to protect an "essential security interest." Moreover, those reports never mentioned that there is "no need for additional analysis" or even consideration of the regulatory objective under certain circumstances when it comes to the examination of a disputed measure.[8] While those reports described an analytical framework for instances of *de facto* discrimination, they do not state that a finding of *de jure* discrimination need not consider the regulatory purpose or objective. And because there were no measures demonstrating *de jure* discrimination at issue in those disputes, any statements regarding the analysis required for such a measure would have been merely dicta.

13. Furthermore, as the United States has explained, formally different treatment of like products from different sources does not mean there is "less favorable treatment",[9] and past reports reflect this understanding with respect to non-discrimination.[10] Therefore, under either the analytical approach explained by the United States or the "LRD analysis", it is not the case that the regulatory objective of a measure can be ignored.

14. Rather, under application of either approach, the measures at issue do not breach Article 2.1. The supposed detrimental impact that Hong Kong, China, alleges is that imports from Hong Kong, China, are subject to a requirement while other imports are not. To the extent that this

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[8] *See* U.S. Second Written Submission, n. 226.

[9] U.S. Responses to First Set of Panel Questions, paras. 66, 87; U.S. Responses to Second Set of Panel Questions, para. 15.

[10] As correctly noted in the *Korea – Beef (AB)* report, "A formal difference in treatment between imported and like domestic products is . . . neither necessary, nor sufficient, to show a violation of Article III:4". *Korea – Beef (AB)*, para. 137.

suffices to demonstrate a negative impact on the conditions of competition, even under Hong Kong, China's own interpretation of Article 2.1, that impact "stems exclusively" from a legitimate regulatory distinction.[11]

15. As the United States has discussed in prior submissions, the U.S. regulatory objective here is its global concern for human rights, fundamental freedoms, and democratic participation. With respect to Hong Kong, China, in light of China's escalating interference with its autonomy, one of the measures the United States has chosen to take is the suspension of differential treatment vis-à-vis the People's Republic of China under various U.S. laws, one of which includes marks of origin. The U.S. determination with respect to lack of autonomy in Hong Kong, China, clearly establishes why Hong Kong, China, is not entitled to treatment distinct from treatment of the People's Republic of China for purposes of marking.[12]

16. Because Hong Kong, China, has been determined to be no longer sufficiently autonomous from the People's Republic of China, products coming from Hong Kong, China, are now marked as originating from "China". This resulting regulatory distinction, which reflects the U.S. finding as to Hong Kong, China's autonomy by distinguishing between products from Hong Kong, China, and from other countries whose autonomy has not been so encroached by the People's Republic of China, corresponds with the regulatory objective articulated by the United States. Hong Kong, China, has not asserted (much less demonstrated) any other allegation of detrimental impact that does not "stem exclusively" from (or rationally relate to) this regulatory distinction.

**Question 73.**

**To Hong Kong, China: What is the basis for Hong Kong China's view, expressed during the second meeting of the Panel, that a level of justification would be available under the exceptions for *de jure* discriminations under, *inter alia*, Articles I and IX of the GATT 1994,**

[11] Hong Kong, China's assertion in paragraph 27 that the United States would or should have "suggested" that the detrimental impact "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products" is puzzling, given that the United States has presented significant explanation and evidence regarding the regulatory objectives at issue and why goods of Hong Kong, China, are marked as "China". Hong Kong, China, has refused to engage with the facts on the record regarding the measures at issue – rather, it attempts to analogize the circumstances with respect to China as equivalent to the relationship between Guinea and Guinea-Bissau, or the United States and Canada – and instead takes the position that no further analysis is required with respect to a *de jure* discriminatory measure. But even if it had acknowledged the relevance of regulatory purposes or distinctions for purposes of an Article 2.1 claim and engaged with the record evidence, this evidence does not support Hong Kong, China's claim.

[12] *See also* U.S. Responses to First Set of Panel Questions, para. 25 ("The United States uses its normal rules of origin in determining the applicable region, and then has chosen the name to be associated with the region of Hong Kong, China, based on its essential security interests, in light of China's decision to interfere in the governance, democratic institutions, and human rights and freedoms of Hong Kong, China."); U.S. Second Written Submission, para. 198.

**but not under the TBT Agreement? Please point out what in the text of the two provisions would warrant such a difference of approach between the TBT Agreement and the GATT 1994? In your response, please also comment on the statement by the Appellate Body in paragraphs 96 and 101 in Appellate Body Report, *US – Clove Cigarettes*.**

17. Hong Kong, China, is incorrect to suggest that there is a different "level of justification" with respect to claims of discrimination ("less favorable treatment") under the GATT 1994 and Article 2.1 of the TBT Agreement. The text of those provisions does not support such a distinction, as the United States has explained.

18. Hong Kong, China, attempts to rationalize its position on the basis of a discussion in a dispute settlement report regarding the applicability of Article XX to the TBT Agreement.[13] Based on the report, Hong Kong, China, then concludes that the fact the TBT Agreement does not contain a general exceptions clause means "'a level of justification' would be available under the GATT exceptions for *de jure* discrimination claims under Articles I and IX of the GATT 1994, but not for *de jure* discrimination claims under Article 2.1 of the TBT Agreement."[14] Indeed, Hong Kong, China, suggests that the "textual basis" for its different "level of justification" view is because the GATT 1994 contains a general exceptions clause while the TBT Agreement does not. This is a non-sensical argument.

19. The basis for consideration of regulatory objectives under Article 2.1 is provided by the text of the provision and its context, including the preambular language as well as Article 2.2, not whether a general exceptions clause exists within the Agreement.[15] Merely pointing out differences in the text of the agreements with respect to general exceptions does not establish that regulatory objectives would be irrelevant for claims under Article 2.1 in cases involving what Hong Kong, China, characterizes as "*de jure* discrimination" while they are relevant for claims under the GATT 1994.

20. And Hong Kong, China, makes no effort to address the absurd results of its interpretation regarding "justification" of measures under Article 2.1 as opposed to under nondiscrimination provisions of the GATT 1994. Hong Kong, China's interpretation would significantly constrain policy space for Members to maintain technical regulations under the TBT Agreement, even if the policy objective is one that the TBT Agreement explicitly recognizes as legitimate. That is, according to Hong Kong, China, while a Member may defend a breach of GATT III:4 under one of the Article XX subparagraphs, there can be no "justification" for the exact same regulation under an Article 2.1 claim if the regulation is what Hong Kong, China, characterizes as "*de jure*" discriminatory, regardless of the regulatory objective.

21. The idea that negotiators agreed in the TBT Agreement to limit regulatory policy space in this manner is baseless. Contrary to Hong Kong, China's position, the TBT Agreement

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[13] Hong Kong, China's Responses to the Second Set of Questions, para. 30 (discussing *US – Clove Cigarettes*).

[14] Hong Kong, China's Responses to the Second Set of Questions, para. 30.

[15] *See* U.S. Response to Panel Questions 14 and 16.

explicitly recognizes that Members will, and have the right to, take regulatory actions throughout its text. For example, the fourth recital in the preamble reflects the desire to "encourage the development" of conformity assessments and international standards; the sixth and seventh recitals recognize that Members are not prevented from taking certain measures – that is, "measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it [the Member] considers appropriate" and "measures necessary for the protection of its essential security interest". Article 2.2 explicitly refers to "legitimate objectives", which are again referenced in Article 2.4, while Article 2.7 requires Members to "give positive consideration" to accepting other Members' technical regulations as equivalent, "provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations".[16] What Hong Kong, China, characterizes as a "drafting choice" in the TBT Agreement in terms of constraining Members' right to regulate is not a drafting choice at all. Rather, it is a function of Hong Kong, China's interpretation of certain dispute settlement reports, not the text of the Agreement itself.

22. Moreover, the United States has invoked Article XXI in this dispute, and has not claimed the measures are justified under Article XX. Hong Kong, China, tries to avoid this additional hole in its argument by simply ignoring it; that is, without any basis, Hong Kong, China, has equated interpretive issues with respect to Article XX and Article XXI(b) throughout this dispute. This position is unsupportable. And under its "*de jure*" discrimination theory, regulatory objective need not be taken into account even if the objective is national security, yet this is recognized as a legitimate objective under the TBT Agreement.

**Question 74.**

**[to the United States – omitted]**

**Question 75.**

**[to the United States – omitted]**

**Question 76.**

**[to the United States – omitted]**

**Question 77.**

**To both parties: Do you consider that in assessing whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction", prior panels and the**

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[16] Similarly, Article 5.4 provides for Members to ensure that their central government bodies use guides or recommendations issued by international standardizing bodies exist or their completion is imminent "except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, inter alia, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems".

**Appellate Body, have incorporated into the analysis under Article 2.1 of the TBT Agreement concepts that are mostly associated with the test under Article XX of the GATT 1994? If so, what would be the rationale behind using concepts associated with Article XX for the purpose of an examination under Article 2.1 and what is the role of the sixth recital in that regard?**

23. As explained in the U.S. response to Question 77, the United States does not see the relevance of using concepts associated with Article XX in the context of this dispute. In its response, Hong Kong, China, repeats its erroneous argument that prior dispute settlement reports that perceived a parallel between the sixth preamble and Article 2.1 of the TBT Agreement, and Article XX and the national treatment obligations under the GATT, stand for the proposition that the legitimate regulatory distinction analysis is "only relevant in cases of alleged *de facto* discrimination."[17] This assertion is incorrect, as explained in the U.S. comments on Hong Kong, China's response to Question 72.[18] Under either the analytical approach explained by the United States or the "LRD analysis", the regulatory objective of a measure cannot be ignored.

**Question 78.**

**To Hong Kong, China: Could you clarify the argument made in Hong Kong, China's response to Panel question No. 14, that the reference in the seventh recital of the preamble to the protection of essential security interest "foreshadows" certain specific provisions in the TBT Agreement, which do not include Article 2.1? Do you agree with the United States' understanding of this argument as being that the seventh recital "is only relevant for certain provisions" of the TBT Agreement (United States' second written submission, paragraph 185)?**

24. As explained in the U.S. Second Written Submission, the seventh recital serves as context for Article 2.1 (or any other provision of the TBT Agreement) in the same way it serves as context for Articles 2.2 and 10.8.3 of the TBT Agreement.[19] In its response, Hong Kong, China, appears to agree with this statement as it acknowledges that the "recital provisions provide context for all of the operative provisions in the Agreement." Yet in the next paragraph, Hong Kong, China, states that it "sees no basis for the Panel to read such considerations [(i.e., the seventh preamble)] into Article 2.1 in relation to measures that are *de jure* discriminatory."

25. The interpretation that preambular language can be selectively applied as context has no basis in the customary rules of treaty interpretation, and further shows the error of Hong Kong, China's position that analysis of a claim under Article 2.1 might require no consideration of regulatory objectives. Application of those rules, as provided by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), does not call for consideration of context in some circumstances and not others. Even if "*de jure*

[17] Hong Kong, China's Responses to the Second Set of Questions, para. 34.

[18] *See supra* para. 12.

[19] *See* U.S. Second Written Submission, paras. 185-189.

discrimination" were a meaningful term for purposes of Article 2.1 (and as the United States has explained it is not), under the customary rules of treaty interpretation, interpretation of Article 2.1 should still be informed by the context served by the preamble. Therefore, to assess whether there is "less favorable treatment" within the meaning of Article 2.1, the preambular language must be taken into account in interpreting those terms and in turn understanding how an analysis should be conducted under Article 2.1. This is not a function of "reading considerations into" Article 2.1; rather, it is the application of the customary rules of treaty interpretation. Conversely, Hong Kong, China, is reading consideration of regulatory objectives based in preambular language *out of* Article 2.1, apparently in an effort to avoid having to address the concerns at issue in this dispute.

**Question 79.**

**To both parties: In your view, is there a difference between "national security requirements" and "essential security interest" in the context of the TBT Agreement? In your response, please elaborate on your understanding of what each of these two concepts means.**

26. The United States observes that the response by Hong Kong, China, refers to the *Russia – Traffic in Transit* panel report's interpretation of "essential security interest". The United States provides relevant comments regarding that interpretation in comments on Hong Kong, China's responses to Questions 104, 106, 112, and 117 below.

**Question 80.**

**[to the United States – omitted]**

**Question 81.**

**[to the United States – omitted]**

**Question 82.**

**To Hong Kong, China: In paragraph 56 of its response to Panel question No. 16, Hong Kong, China submits that "the burden would be on the United States to *articulate* its essential security interests in the first instance" (emphasis original). In paragraph 113 of its second written submission, Hong Kong, China asserts that there remains significant disagreement among the parties and various third parties concerning, *inter alia*, the specificity with which the US essential security interests would need to be articulated in order for the Panel to take these interests into account.**

a. **What level of detail is required or will be sufficient for the articulation of a Member's essential security interests?**

b. **In paragraphs 108 and 109 of its second written submission, Hong Kong, China refers to the United States' statement in paragraph 71 of its response to Panel question No. 16, quoting paragraph 5 of the United States' opening statement at**

**the first meeting of the Panel, that the United States has articulated certain of its essential security interests in its submissions and oral statements to the Panel. Hong Kong, China submits that the United States has "broadly described" its essential security interests and that the United States only "claims" that it has articulated its essential security interests. Please elaborate. Please comment also on paragraphs 2 and 5 of the United States' second written submission.**

27. Hong Kong, China's response makes clear that its position that the United States has failed to articulate its essential security interests is based on its view that "essential security interests" are limited to "defense and military interests" or "maintenance of law and public order within the territory of the invoking Member". The United States explains in detail that this view is incorrect in its comments on the responses by Hong Kong, China, to Questions 104, 112, 115, 117, and 120 below.

28. Put simply, this narrow construction of "essential security interests" is not based on the text of Article XXI(b); indeed, Hong Kong, China, does not actually engage with the text of the provision itself. This narrow construction does not reflect the range of interests that Members appear to consider to relate to *their* respective essential security interests. The United States does not purport to define Hong Kong, China's appraisal of its own essential security interests, to the extent Hong Kong, China, even retains the capacity to do so in light of the imposition of the National Security Law, which implemented "major structural changes that significantly reduced the city's autonomy."[20] Perhaps the Chinese authorities would consider Hong Kong, China's essential security interests to be limited to circumstances within Hong Kong, China's territory, and not extend to circumstances in China or elsewhere.[21] But Article XXI(b) does not limit other Members from making a different consideration – such as where another Member's sovereignty is threatened.

29. With respect to Hong Kong, China's claim that any articulable interest relating to those under Article XXI(b) can never be a consideration when assessing a claim under the TBT Agreement because Article XXI(b) does not apply to the TBT Agreement,[22] as the United States has explained, this position is incorrect; application of the customary rules of treaty interpretation demonstrates that Article XXI(b) applies. And such an assertion blatantly disregards that the TBT Agreement explicitly recognizes in the seventh recital of the preamble that "no country should be prevented from taking measures for the protection of its essential security interest."

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[20] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6).

[21] However, the United States notes that Article 38 of the National Security Law appears to contemplate a certain degree of extraterritorial coverage for "offenses under the [National Security Law] committed . . . outside the Region by a person who is not a permanent resident of the Region." The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, G.N.(E) 72 of 2020, *available at* https://www.legco.gov.hk/yr19-20/chinese/panels/ca/papers/ajlscase20200707-gne72-ec.pdf (US-116).

[22] *See* Hong Kong, China's Responses to the Second Set of Questions, para. 45.

**GATT 1994**

**Question 83.**

**[to the United States – omitted]**

## THE EXCEPTION UNDER ARTICLE XXI OF THE GATT 1994

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

**Question 84.**

**To Hong Kong, China: At paragraph 133 of its second written submission, Hong Kong, China observes that if "the drafters of the GATT 1994 had meant for Article XXI(b) of the GATT 1947 to apply to *all* of the Annex 1A Agreements, they could have modified the language of Article XXI(b) to this effect when they incorporated the GATT 1947 into the GATT 1994. They did not". Could Hong Kong, China elaborate on why the premise underlying this position is correct, rather than an alternative view according to which the drafters did not do so because they shared the common understanding that the security exception in Article XXI was assumed to apply to the Annex 1A Agreements, unless expressly provided otherwise?**

30. Hong Kong, China's response reflects its erroneous position that the only way for a GATT exception to apply to other Annex 1A Trade in Goods agreement is by express incorporation. This is incorrect, as the United States has explained.[23]

31. Hong Kong, China, suggests that modifying the GATT 1947 in the GATT 1994 to provide that Article XXI applies to the other Annex 1A agreements "would have been a simple matter".[24] This assertion is just fiction, without any basis.[25] Indeed, incorporating the GATT

[23] U.S. Oral Opening Statement at the First Videoconference, paras. 59; U.S. Response to Panel Questions 23 and 28; U.S. Second Written Submission paras. 121-123.

[24] Hong Kong, China's Responses to the Second Set of Questions, para. 54.

[25] Along the lines of Hong Kong, China's sentiment that express incorporation "would have been a simple matter", express waiver of the essential security exception would equally "have been a simple matter", and this is contemplated by the conflicts provision in the general interpretative note to Annex 1A, in light of the single undertaking structure of the WTO Agreement. *See* U.S. First Written Submission, para. 275; U.S. Response to Panel Question 28. However, nothing in the text of the GATT 1994, the Agreement on Rules of Origin, or the TBT Agreement expressly waives or qualifies a Member's right to take action to protect its "essential security interests" in the context of the specific claims at issue.

1947 into the GATT 1994 was not a "simple matter", and editing the GATT 1947 itself was not necessarily even considered possible.[26]

32. Furthermore, using the GATT 1994 to modify the GATT 1947 as Hong Kong, China, suggests was not necessary in order for Article XXI(b) to apply to the claims at issue under the TBT Agreement and the *Agreement on Rules of Origin*. The drafters reflected their understanding that it applies in the text of those agreements and in the single undertaking structure of the WTO Agreement.

33. This conclusion does not follow from mere assumption, as Hong Kong, China, argues, but rather follows from the legal structure of the WTO Agreement. The WTO Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking as laid out in Article II.[27] Article II:2 provides "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members." Within Annex 1, Annex 1B and Annex 1C include the General Agreement on Trade in Services and the Agreement on Trade-Related Intellectual Property Rights, and each annex includes an essential security exception, with respect to trade in services and trade-related intellectual property rights, respectively. Annex 1A includes the multilateral agreements related to trade in goods, and includes an essential security provision in the first agreement in the annex, the GATT 1994. The general interpretative note to Annex 1A, which informs how the structure of the Annex is to be interpreted, provides that unless there is a direct conflict of provisions, the GATT 1994 provision applies.

**Question 85.**

**To Hong Kong, China: Hong Kong, China submits that "the *silence* of the other Annex 1A agreements on this issue must be interpreted to mean that the GATT exceptions are *not* available under those agreements" (paragraph 134 of its second written submission). Please indicate whether silence could also mean that there was a common agreement that Article XXI applies to Annex 1A Agreements, if not, why not?**

34. In its answer, Hong Kong, China, appears to recognize that – as the United States has explained – silence is not dispositive as a matter of interpretation. Despite this, Hong Kong,

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[26] *See* A. Porges, The Legal Affairs Division and Law, in A History of Law and Lawyers in the GATT/WTO, G. Marceau, ed. (Cambridge University Press, 2015), n.25 (US-161) ("During the spring 1992 LDG [Legal Drafting Group] process, there was universal support for including GATT rules as the central pillar of the MTO package. A group of delegates met and tried to edit the GATT to eliminate obsolete provisions, but could not agree on which provisions were obsolete and quickly realised that editing the GATT was impossible in the time available. The solution found in September-November 1993 was the 'GATT 1994' text in Annex 1A of the WTO Agreement, which incorporates a snapshot of the GATT text by reference (minus provisions on provisional application, and minus the US Section 22 waiver, which was being tariffed".).

[27] Article II, Agreement Establishing the World Trade Organization.

China, then goes on to argue that mere silence in an Annex 1A agreement means that the application of Article XXI(b) is prohibited.[28] In particular, Hong Kong, China again restates its argument – which the United States has already rebutted in prior submissions regarding so-called "necessary implication."[29]

35. The additional argumentation that Hong Kong, China, provides in its response does not address the substance of the U.S. rebuttal. Hong Kong, China, again fails to apply the customary rules of treaty interpretation in maintaining its position that Article XXI(b) does not apply to any non-GATT 1994 agreement unless it is expressly incorporated. Hong Kong, China, ignores the analysis of the text and context that demonstrates that Article XXI(b) applies, and instead seeks to rely on inapposite past dispute settlement reports and U.S. concerns regarding the Appellate Body. This approach does nothing to advance Hong Kong, China's position regarding the availability of recourse to Article XXI(b).

36. First, contrary to the assertion by Hong Kong, China, the United States does not consider that the *Agreement on Rules of Origin* and the TBT Agreement are silent as to whether Article XXI(b) applies simply because they do not include a provision on express incorporation. Rather, there are multiple textual links in each agreement demonstrating that Article XXI(b) applies, as well as textual overlap in the provisions at issue in this dispute. As the United States has explained, the text of Article XXI(b), the various textual linkages to the GATT 1994, and the overlap of specific claims establish, in the context of the single undertaking and in light of the object and purpose of the *Agreement on Rules of Origin* and TBT Agreement, that Article XXI(b) applies to the claims in this dispute.[30] The lack of language in the *Agreement on Rules of Origin* and TBT Agreement that Article XXI(b) would not apply confirms this interpretation – that negotiators understood that Article XXI of the GATT 1994, the first Annex 1A agreement, would apply to those other Annex 1A agreements on trade in goods. The understanding that Article XXI(b) applies to the claims at issue is reflected in the text of the WTO agreements, and as such there was no need for subsequent agreement under Article 31 of the VCLT as Hong Kong, China, suggests.

37. Hong Kong, China, does not address this analysis of the text and context at all in its response. Instead, rather than applying the customary rules of treaty interpretation as to whether Article XXI(b) applies, Hong Kong, China, attempts to apply the analysis of past dispute reports to make its points about the supposed silence on this issue in the agreements at issue in this present dispute, specifically, the *US – Carbon Steel (AB)* report.[31] However, the reference by Hong Kong, China, to the report in *US – Carbon Steel (AB)* does not address the interpretative question in dispute – whether Article XXI applies to the specific claims at issue. Hong Kong, China's reliance on that report's discussion of internal cross-references within the SCM

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[28] Hong Kong, China's Responses to the Second Set of Questions, para. 56.

[29] U.S. Oral Opening Statement at the First Videoconference, paras. 59; U.S. Response to Panel Questions 23 and 28; U.S. Second Written Submission paras. 121-123.

[30] *See e.g.,* U.S. Second Written Submission, paras. 109-152.

[31] *See* Hong Kong, China's Responses to the Second Set of Questions, paras. 58-59.

Agreement is also misplaced, as there is no issue of such internal cross-references within any of the agreements at issue in this dispute.

38. And with respect to the SCM Agreement, the United States recalls that, as discussed in its response to Question 90, the *Brazil – Desiccated Coconut (AB)* report found that the reference to "this Agreement" in Article 32.3 means "this Agreement and Article VI of the GATT 1994", based on a reading of Articles 32.3 with Articles 10 and 32.1 of the SCM Agreement, and in turn found that the applicability of Article VI of the GATT 1994 to the dispute also determines the applicability of Articles I and II of the GATT 1994.[32] Thus, Hong Kong, China's view that express internal cross-references obviate the need for structural analysis is incorrect.

39. Second, Hong Kong, China, is also incorrect to argue that the United States is asking the Panel to "read into" the *Agreement on Rules of Origin* and the TBT Agreement a Member's right to take action to protect its essential security interests, while expressing concerns regarding impermissible gap-filling by the Appellate Body. Hong Kong, China, appears to misunderstand both the U.S. concerns regarding gap-filling and the U.S. arguments in this dispute. As the United States has explained, in a number of past instances the Appellate Body has failed to properly apply the customary rules of treaty interpretation and has in turn added to Members' obligations and diminished their rights. What the United States is asking the Panel to do in this dispute is to properly apply the customary rules of treaty interpretation, including interpreting the ordinary meaning of the text, in its context and in light of the object and purpose of the treaty, and not to diminish a Member's right to take action to protect its essential security interests. Consideration of structure as context is part of the proper application of the rules – a principle which Hong Kong, China, no longer appears to dispute. An interpretation that Article XXI(b) applies to the claims at issue reflects the rules of treaty interpretation, does not read text into or fill gaps in the agreements, and preserves Members' sovereign rights to take action to protect their essential security interests.[33]

**Question 86.**

**To Hong Kong, China: In paragraph 141 of its second written submission, Hong Kong, China argues that "the United States ignores the fact that each of the Annex 1A agreements is a**

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[32] U.S. Response to Second Set of Panel Questions, para. 81.

[33] Indeed, it is Hong Kong, China, that has read "words and obligations that simply do not exist" when it comes to the interpretation of Article XXI as well as its claims under the *Agreement on Rules of Origin* and the TBT Agreement. With respect to Article XXI, for example, Hong Kong, China, seeks to reorder the words of Article XXI(b) as written, or read into Article XXI(b) the clause "and which relates to" in the beginning of subparagraphs (i) and (ii), and "and which is taken in time of" in the beginning of subparagraph (iii). *See* U.S. Responses to Questions from the Panel, para. 260; U.S. Second Written Submission, para. 27. Hong Kong, China, also inserts into the text, and impose the requirements, of the chapeau of Article XX. *See* U.S. Second Written Submission, para. 29. With respect to the *Agreement on Rules of Origin*, Hong Kong, China, reads the scope of the Agreement as covering the instruments that rules of origin are used to administer and reads its disciplines as requiring specific outcomes. *See* U.S. Second Written Submission, paras. 159-171. With respect to the TBT Agreement, Hong Kong, China, reads into the Agreement the term "*de jure*" discrimination when the standard should be "less favorable treatment." *See* U.S. Second Written Submission, paras. 176-182.

**distinct agreement, representing its own balance of rights and obligations in respect of the subject matter of that agreement". Could Hong Kong, China please:**

a. **clarify how this position can be reconciled with the indication in Article II:2 of the Marrakesh Agreement that the "agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members"?**

b. **elaborate on why Hong Kong, China considers that each Annex 1A Agreement "represents its own balance of rights and obligations in respect of the subject matter of that agreement", when the Uruguay Round negotiations were guided by the principle that the conduct and the implementation of the outcome of the negotiations, that is the eventual WTO Agreements, would be accepted and implemented as a single package of rights and obligations (Uruguay Round Ministerial Declaration) and that any "early harvest" would be agreed on a provisional basis only, together with the later understanding that nothing would be agreed until everything is agreed and that Members would agree to all Multilateral Trade Agreement without any reservations.**

40. The United States provides comments on the responses of Hong Kong, China, to subparts (a) and (b) of Question 86 together.

41. The response by Hong Kong, China, to Question 86(a) does nothing to reconcile its position with the single undertaking structure of the WTO Agreement, as reflected in Article II. Hong Kong, China, purports to recognize that the "specific relationship" among the agreements and their provisions must take into account this single undertaking structure as context.[34] But then Hong Kong, China, simply ignores this structure and repeats its unsupportable arguments about the applicability of Article XXI. Indeed, within a few sentences of recognizing the overall structure, it rehashes its stale arguments that each of these agreements are "distinct" and essentially must be interpreted in a vacuum reflecting their "own balance of rights and obligations."

42. Hong Kong, China, seeks to reduce the WTO Agreement to simply an overarching agreement "plus a series of distinct agreements." This is erroneous. These agreements are not wholly "distinct", as the WTO Agreement sets forth a single package of rights and obligations. As a legal matter, these rights and obligations are annexes to, and an integral part of, the WTO Agreement.[35] And within those annexes, these agreements are accordingly placed in annexes:

[34] Hong Kong, China's Responses to the Second Set of Questions, para. 65.

[35] Marrakesh Agreement, Article II:2.

Annex 1 includes the multilateral agreements on trade in goods (Annex 1A), the *General Agreement on Trade in Services* (Annex 1B), and the *Agreement on Trade-Related Intellectual Property Rights* (Annex 1C); Annex 2 includes the DSU; Annex 3 includes the trade policy review mechanism; and Annex 4 includes the plurilateral agreements. Hong Kong, China, ignores the legal significance of Article II,[36] as reflected in this legal structure.

43. Rather than conducting a text-based rebuttal of the U.S. application of the customary rules of treaty interpretation with respect to the interpretative question at issue, which accounts for the single undertaking structure as context, the response by Hong Kong, China, relies on prior reports addressing the applicability of Article XX.[37] As the United States noted in its response to Question 20, the "subject" of the interpretative exercise for purposes of this dispute is the specific claimed breaches, specifically Articles 2(c) and 2(d) of the *Agreement on Rules of Origin*, Article 2.1 of the TBT Agreement, and Articles I and IX of the GATT 1994. And the issue is whether Article XXI(b) applies to these specific provisions.[38] That is an interpretive inquiry that the Panel must conduct on a case-by-case basis. None of those prior reports cited by Hong Kong, China, answers the present interpretative inquiry, and analyzing prior reports is not a substitute for applying the customary rules of treaty interpretation.

44. In addition, Hong Kong, China, fails to address the differences between Article XX and Article XXI for purposes of the analysis in this dispute. As the United States has explained, Article XX is different from Article XXI in key respects, and the Panel's analysis should account for those differences.[39] With respect to the analysis of structure as context, the security exceptions in each of Annexes 1B (GATS) and 1C (TRIPS) mirror the security exception in Annex 1A (GATT). That is, when Uruguay Round negotiators included new areas or updated disciplines under the single undertaking, such as services or intellectual property rights – or rules of origin or technical barriers to trade – they extended the security exception to those commitments, and maintained the same self-judging approach. In contrast, the "general exceptions" provision of Annex 1B (GATS Article XIV) includes a number of textual differences compared to the general exceptions of Annex 1A (that is, Article XX of the GATT

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[36] Marrakesh Agreement, Article II:2 ("The agreements and associated legal instruments included in Annexes 1,2, and 3, (hereinafter referred to as "Multilateral Trade Agreements") are ***integral parts of this Agreement***, binding on all Members". (emphasis added)).

[37] Hong Kong, China, also seeks to rely on its characterization of the U.S. argument in a dispute regarding the applicability of Article XX to the Customs Valuation Agreement. As discussed in the U.S. comments on Hong Kong, China's response to Question 92, this reliance is misplaced and is based on an incorrect understanding of the U.S. position in both that dispute and the present one.

[38] To be clear, the United States is not seeking a finding in this dispute that Article XXI(b) applies to "all of the WTO agreements" (which, of course, include not only the agreements at issue in this dispute, but also other agreements in Annex 1, as well as the agreements in Annexes 2, 3, and 4). Hong Kong, China, mischaracterizes the U.S. arguments in this regard, and its ensuing conclusion that such an exception would need to be reflected in the Marrakesh Agreement is baseless.

[39] U.S. Response to Panel Question 21.

1994), and Annex 1C (TRIPS) does not include a "general exceptions" provision. The textual differences between Articles XX and XXI themselves, as well as the differences in the structure of the WTO Agreement with respect to these exceptions, are relevant context for the Panel's analysis of the applicability of Article XXI(b) to the claims at issue in this dispute. Hong Kong, China's analysis fails to account for those differences and should be rejected.

45. In maintaining that each of the WTO agreements must be interpreted in a vacuum, Hong Kong, China, appears to consider the negotiating modalities of the Uruguay Round to be divorced from the results of the Round. This position is not supported by the text of the WTO Agreement itself, as reflected in, among other provisions, Article II. The commitment to a single package of rights and obligations is a legal one, not merely an expired negotiating framework. Moreover, it is simply not the case as a practical matter that negotiators approached each of the various agreements independently – a trade-off in one area (e.g., agriculture) might lead to flexibilities in another area (e.g., intellectual property). The WTO Agreement *as a whole* establishes a balance of rights and obligations, which Hong Kong, China, first acknowledges[40] but then ignores in insisting that WTO Members relinquished the right to take actions to protect their essential security interests.

**Question 87.**

**[to the United States – omitted]**

**Question 88.**

**To Hong Kong, China: Please comment on the United States' statement in paragraph 116 of its second written submission that "[s]ome commentary has even noted that the 'systemic structure of a treaty is … of *equal importance* to the ordinary linguistic meaning of the words used …".**

46. As mentioned in the U.S. comment on Hong Kong, China's response to Question 86, Hong Kong, China, treats what is part of application of the customary rules of treaty interpretation (i.e., the structure of the WTO Agreement) as a mere reflection of the "fact" that it is simply "an overarching agreement . . . plus a series of distinct agreement relating to particular subjects." Hong Kong, China's position is not based in those rules and is unsupported by the text of the WTO Agreement and the agreements at issue, and should be rejected.

47. The specific interpretative question in this dispute is, in light of the single undertaking structure, whether Article XXI(b) of the GATT 1994 applies to the specific claims at issue in the *Agreement on Rules of Origin* and the TBT Agreement. Hong Kong, China, is wrong to suggest that taking into consideration the structure of a treaty as context of treaty interpretation is

[40] Hong Kong, China's Responses to the Second Set of Questions, para. 63.

analysis that the United States "invented for purposes of this dispute"[41] such that the Panel should not undertake such an analysis. As explained in prior submissions, treating the structure of treaty as context is part of customary rules of treaty interpretation, and prior WTO dispute reports (as well as other international dispute settlement bodies) have taken such an approach. In this dispute, the United States has established that the Article XXI(b) exception applies to the claims at issue based on the texts of those agreements, in their context (including the structure of the WTO Agreement as a whole) and in light of the object and purpose of those agreements.

48. Hong Kong, China's approach to applying the treaty structure as interpretative context in its response does not apply the structure at all. While it claims to acknowledge the significance of the single undertaking structure provided under Article II:2,[42] Hong Kong, China, does not take the structure into consideration at all in considering whether the exceptions apply to the specific claims at issue. Essentially, its application of the treaty structure as context is a restatement of its express incorporation or "necessary implication" approach.

49. While failing to actually apply the single undertaking structure as context, Hong Kong, China, uses circular reasoning in answering the interpretative issue at hand, which is whether Article XXI applies in light of the single undertaking structure context of the treaty. Specifically, the treaty structure described by Hong Kong, China, is simply a recitation of whether or not the agreements contain exception provisions, not a reflection of the structure as context.[43] Based on this reductive characterization of the structure, Hong Kong, China, immediately concludes that because there is no express incorporation, the exceptions do not apply. This circular analysis in no way accounts for the "systemic structure" of the WTO Agreement, as reflected in Article II.

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[41] Hong Kong, China's suggestion that the U.S. position in this dispute is inconsistent with its position in other disputes in this regard is incorrect and irrelevant. There is no basis within the customary rules of treaty interpretation for rejecting an argument simply because a party has not made the identical argument in prior disputes. That aside, as noted, the reports (*China – Rare Earths*) to which Hong Kong, China, cites for this proposition presented different facts and legal issues. Specifically, the interpretative issue in *China – Rare Earths* related to the applicability of Article XX to China's accession protocol. The arguments presented by the United States with respect to that issue were consistent with the customary rules of treaty interpretation. The analysis of the applicability of Article XX is not equivalent to the analysis of the applicability of Article XXI(b), as explained in the U.S. comments on Hong Kong, China's responses to Question 91. The arguments presented here with respect to Article XXI are consistent with the arguments made in the *United States – Steel and Aluminum* disputes; as the United States has explained, the structure of the WTO Agreement would support a conclusion that Article XXI(b) applies to the Annex 1A agreements (although that is not an issue that the Panel needs to decide in this dispute), and in both disputes the United States has provided textual links in the non-GATT agreement at issue demonstrating that Article XXI(b) applies.

[42] Hong Kong, China's Responses to the Second Set of Questions, para. 63.

[43] Hong Kong, China's Responses to the Second Set of Questions, para. 72 (summarizing the structure as essentially that "ten other agreement in [Annex 1A] do not incorporate the exception in question, either expressly or by necessary implication.").

50. Hong Kong, China's understanding of a Member's rights under Article XXI(b) is not only flawed, but also alarming. According to Hong Kong, China, the structure of the WTO Agreement reflects that a WTO Member has *no right* to take actions that it considers necessary to protect its essential security interests – in *any* circumstances – under at least "ten other [WTO] agreements."[44]

51. The dangerous consequences of this position are laid bare by the current circumstances facing Ukraine and the Ukrainian people in the wake of the unjustified invasion by the Russian Federation. Ukraine has informed the WTO Membership that it has "decided to impose a complete economic embargo and no longer apply the WTO agreements in its relations with the Russian Federation. Ukraine considers that these steps are consistent with its national security rights under, *inter alia*, Article XXI of the GATT 1994, Article XIV*bis* of the GATS, and Article 73 of the TRIPS Agreement".[45] In response, the Russian Federation has claimed that "[t]he So-called Security Exceptions relied upon are relevant in the context of a limited number of WTO agreements, namely Article XXI of the GATT is relevant to the matters covered by the GATT, Article XIVbis of the GATS only applies to the matters covered by the GATS, while Article 73*bis* of the TRIPS Agreement in the context of matters covered by the TRIPS Agreement."[46] Russia's position is, in effect, the position that Hong Kong, China, asks the Panel to adopt.

52. The United States considers, consistent with its views expressed in this dispute, that Ukraine is well within its rights to suspend application of the WTO agreements in Annex 1A other than the GATT 1994 to the Russian Federation. The current situation makes clear the absurdity, and the dangerousness, of the argument that drafters of the Uruguay Round simply chose to relinquish their respective rights to take essential security actions under those agreements (for example, because they did not expressly incorporate Article XXI(b) into certain agreements).

53. Taking action to protect its essential security interests is an inherent right and function of a sovereign government. Hong Kong, China's interpretation diminishes that right. It ignores the reality of both the terrible circumstances that might prompt a Member to act and the scope of such action. It also undermines the credibility of the multilateral trading system by suggesting that it is an appropriate forum for seeking to limit a Member's right to take action to protect its essential security interests – even in circumstances when it is suffering an unjustifiable military invasion by another Member. Such an interpretation should not be adopted by the Panel.

**Question 89.**

**[to the United States – omitted]**

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[44] Hong Kong, China's Responses to the Second Set of Questions, para. 72.

[45] Ukraine Letter to the Chairman of the WTO General Council, March 2, 2022 (US-235).

[46] Russia Federation Letter to the Chairman of the WTO General Council, March 7, 2022 (US-236).

**Question 90.**

**[to the United States – omitted]**

**Question 91.**

**To Hong Kong, China: Please comment on the United States' statement in paragraph 120 of its second written submission, that "Hong Kong, China errs in suggesting that the analysis of applicability of the essential security exception under Article XXI must be identical to that of the applicability of Article XX".**

54. In its response, Hong Kong, China, erroneously equates an analysis of Article XX with an analysis of Article XXI. In so doing, Hong Kong, China, again fails to recognize the interpretative issue in this dispute (whether Article XXI applies to the specific claims at issue), as well as textual differences between the exceptions.[47]

55. Hong Kong, China, professes confusion regarding the U.S. position. However, the U.S. position has been clearly stated, and Hong Kong, China's professed confusion is just another of its attempts to avoid the key issues. The United States has not suggested that the reasoning as to why Article XXI(b) applies to the claims at issue is applicable to Article XX. To the contrary, as the United States has explained, Articles XX and XXI are substantively and operationally different, and as such, analysis of the applicability of Article XX to the other Annex 1A agreements cannot be simply transposed to an analysis of whether Article XXI applies to specific provisions.[48]

56. Despite this, Hong Kong, China attempts to defend its Article XXI applicability position by equating an analysis of the applicability of Article XX with Article XXI(b). The provisions, however, are different. For example, Hong Kong, China, asserts that in Article XXI(b), the operative language regarding the relationship between the measure taken and the Member's objective appears in the subparagraphs, as in Article XX. This is incorrect. The operative language in Article XXI(b) regarding the measure taken ("any action") and the Member's objective ("necessary to protect its essential security interests") is in the chapeau: "which it considers".[49] Thus, Hong Kong, China's argument is based not on the text, but rather Hong Kong, China, seeks to reorder the language of Article XXI(b) such that the language of the subparagraphs would be inserted after "action" in the chapeau.[50] As the United States has explained, however, there is no basis in the customary rules of treaty interpretation for such an exercise, and Hong Kong, China's proposed rewrite undermines its assertion that Article XXI is no different than Article XX, just as it undermines its position regarding the self-judging nature

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[47] *See e.g.,* Written Panel Questions to the Parties, Questions 21, 24, and 27.

[48] *See* U.S. Response to First Set of Panel Questions, paras. 110-115.

[49] U.S. Responses to First Set of Panel Questions, paras. 112-113.

[50] U.S. Second Written Submission, para. 23.

of Article XXI. In both instances, Hong Kong, China, simply ignores the pivotal language "which it considers" – which is a reflection of a Member's fundamental right to take action it considers necessary to protect its essential security interests, and to determine in what circumstances such action is necessary.

57. Hong Kong, China, also ignores the nature of the essential security exception in mischaracterizing the U.S. interpretation of the structure of the WTO Agreement as an argument that the "security exceptions are ubiquitous, whereas the general exceptions are not" as it relates to the GATS and TRIPS.[51] As explained in the U.S. First Written Submission, the security exceptions in each of Annexes 1B (GATS) and 1C (TRIPS) mirror the security exception in Annex 1A (GATT) – including, importantly, with respect to the language "any action which it considers necessary". That is, when Uruguay Round negotiators included new areas or updated disciplines under the single undertaking, such as services or intellectual property rights – or rules of origin or technical barriers to trade – they extended the security exception to those commitments, and maintained the same self-judging approach.

58. In contrast, the "general exceptions" provision of Annex 1B (GATS Article XIV) includes a number of textual differences compared to the general exceptions of Annex 1A (that is, Article XX of the GATT 1994). For example, Article XIV of the GATS includes specific language on exceptions to the GATS provisions on MFN and national treatment, and does not include language similar to that found in Article XX(c), (e), (f), (g), (h), (i), or (j). Annex 1C (TRIPS) does not include a "general exceptions" provision.

59. Hong Kong, China, does not address these substantive differences of how the GATS, TRIPS, and the GATT 1994 each address general exceptions. Instead, Hong Kong, China, attempts to equate differences among Article XIV*bis* of the GATS, Article XXI(b) of the GATT 1994, and Article 73 of the TRIPS Agreement with the differences between general exceptions, or with the treatment for certain measures necessary to secure compliance with laws and regulations. However, the security exceptions among these agreements are closely similar, if not identical. In respect of Article XIV*bis* of the GATS, not surprisingly given that the GATS applies to services, the language "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials" in Article XXI(b) – which refers to goods – is replaced with "relating to the supply of services". With respect to Article 73 of the TRIPS Agreement, the security exception language is identical to Article XXI(b). Hong Kong, China's attempt to disregard the similarity, if not identity, between the essential security exceptions in the Annex 1A agreements and conflate it with substantive differences among these agreements with respect to the general exceptions is erroneous.[52]

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[51] Hong Kong, China's Responses to the Second Set of Questions, para. 80.

[52] For example, Article 3.2 of the TRIPS Agreement is different in a number of respects from both Article XX(d) of the GATT 1994 and Article XIV(c) of the GATS, in particular in that it limits recourse to exceptions permitted under Article 3.1 in relation to judicial and administrative procedures, such as procedures requiring the designation of an address for service of process or the appointment of an agent within the jurisdiction of the Member. *See* Paris

60. Furthermore, Hong Kong, China, fails to acknowledge that the United States has also shown the various text-based linkages that establish that Article XXI applies to the ***specific claims at issue*** under the agreements at issue.[53] Hong Kong, China's claim that the U.S. interpretation in that regard would apply with respect to Article XX is not only incorrect in light of the differences between Article XX and Article XXI(b) that the United States has identified throughout this dispute, but it also ignores the specific interpretive issue at hand.

**Question 92.**

**To Hong Kong, China: Please comment on the United States' position, in paragraph 137 of its second written submission, that "the relationship between and among the disputed provisions is part of the structural consideration, and in turn part of the context for purposes of treaty interpretation".**

61. Hong Kong, China, erroneously asserts that the United States provides no interpretive basis for the overlapping nature of the claims and has not established how claims actually overlap.[54] To the contrary, the United States has explained that the overlapping nature of the claims at issue is relevant context in applying the customary rules of treaty interpretation, and demonstrated how those claims overlap as both a legal and a factual matter.[55]

62. As discussed above, the understanding of the WTO Agreement's structure by Hong Kong, China, as it relates to exceptions, is self-serving and does not actually reflect the single undertaking structure when it comes to the interpretative issue at hand. Furthermore, because Hong Kong, China, conflates treaty structure with treaty text, it fails to recognize the relationship between the structure and the overlapping claims at issue. As explained in the U.S. response to Question 27, the overlap between the claims at issue is relevant in the interpretative analysis in light of the single undertaking as context, as well as the specific linkages between the *Agreement on Rules of Origin* and the TBT Agreement, respectively, and the GATT – including the linkages between the claims at issue in this dispute.

63. Instead of addressing the specific overlap of the claims at issue, Hong Kong, China, attempts to address how all of the Annex 1A agreements overlap to an extent in that they address trade in goods.[56] This is not the U.S. argument,[57] and not the interpretative issue for purposes of

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Convention, Article 2(3). This is not analogous to the situation with Articles XXI of the GATT 1994, Article XIV*bis* of the GATS, and Article 73 of the TRIPS Agreement.

[53] *See* U.S. First Written Submission, paras. 282-288, 298-309.

[54] *See* Hong Kong, China's Responses to the Second Set of Questions, para. 86.

[55] U.S. Opening Statement at the First Videoconference, paras. 41-47; U.S. Responses to the First Set of Panel Questions, paras. 102-105; U.S. Second Written Submission, paras. 137-143.

[56] Responses of Hong Kong, China, to Questions from the Panel, para. 90.

[57] *See generally* U.S. Second Written Submission, paras. 114-120, 137-143.

this dispute.[58] The United States has shown that the textual links of both the *Agreement on Rules of Origin* and the TBT Agreement to the GATT 1994, in their context – especially the structure of the WTO Agreement – and in light of the object and purpose of the WTO Agreement as a whole and of each respective agreement establish that Article XXI(b) applies to the claims at issue. The claims in the present case are brought under non-discrimination provisions under the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement, with respect to origin marking, which is specifically disciplined under the GATT 1994. The overlap between the claims is established by the nature of the claims themselves – that is, for all of its claims, Hong Kong, China, is claiming that it is subject to a requirement (consideration of autonomy, and in turn marking as "China") that other Members are not, in a way that it is impermissibly discriminatory. And the relationship between and among the disputed provisions is part of the structural consideration, and in turn part of the context for purposes of treaty interpretation.

64. Hong Kong, China, also attempts to dismiss the relevance of the overlap between the claims at issue by erroneously stating that there is no overlap between the *Agreement on Rules of Origin* and the TBT Agreement on one hand, and the GATT 1994 on the other. While admitting that the nature of the obligations is similar, Hong Kong, China, claims that the "[c]laims under these provisions are not and cannot be the same" because the subject matter is different. To recall, Hong Kong, China, acknowledged that the claims at issue are "essentially the same" claims in its First Written Submission.[59] Hong Kong, China's subsequent disavowal of that characterization does not change the fact that the claims do overlap as both a legal and factual matter. As the United States addressed in prior submissions, the "essentially the same" nature of these claims is reflected in the overlap in the terms and scope of the legal provisions at issue.[60] And in this dispute, the "subject matter" of each claim is a marking requirement, and the U.S. consideration of autonomy.

65. Put simply, Hong Kong, China's response to Question 92 is a continuation of its effort to recast the question of whether Article XXI(b) applies to the specific claims at issue in this dispute, with respect to the marking requirement at issue in this dispute, as a broader question as to whether any exception in the GATT 1994 must apply to every agreement in Annex 1A, or even whether any general exception must apply to every agreement in Annex 1. This is not the interpretative question at issue, and Hong Kong, China's arguments to the contrary ignore both textual differences between the various exceptions and the specific nature of the legal claims at issue in this dispute.

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[58] Hong Kong, China's claims that the U.S. views regarding applicability of Article XX of the GATT 1994 to the Customs Valuation Agreement in the *Thailand – Cigarettes (Article 21.5)* dispute are contradictory to its position regarding the applicability of Article XXI(b) to the claims at issue in this dispute fail to acknowledge the differences between Articles XX and XXI, as discussed, and are incorrect as a factual matter. The United States has not taken the position in this dispute that, as a general matter, general exceptions necessarily apply to special rules.

[59] First Written Submission of Hong Kong, China, para. 66.

[60] U.S. Response to the First Set of Panel Questions, paras. 102-105; U.S. Second Written Submission, paras. 137-143

**Question 93.**

**To both parties: Where there is a claim of inconsistency with respect to an obligation in the GATT 1994 that is virtually the same as that in another Annex 1A Agreement (e.g., MFN obligations such as here under Article IX:1 and Article I:1), could it be assumed that the justification provided for in the exceptions of the GATT 1994 should be the same under the other Annex 1A Agreement, unless otherwise provided in the specific Annex 1A Agreement? If not, why not?**

66. In its response, Hong Kong, China, repeats its assertion that the lack of express incorporation language in one agreement means that Articles XX and Article XXI cannot apply to that agreement. The United States has explained that lack of express incorporation is not dispositive of the interpretative question at hand, that is, whether Article XXI applies to the specific claims at issue. The starting point for such analysis is the text of those claimed provisions, in its context and in light of the object and purpose. Hong Kong, China's response to Question 93 mentions nothing about the structure of the single undertaking as context, and instead suggests that express incorporation or lack thereof by itself resolves the question of applicability. This is not correct under the customary rules of treaty interpretation.

67. Hong Kong, China, further takes issue with the Panel's characterization of claims as "virtually the same". As explained in the comment to Hong Kong, China's response to Question 92, Hong Kong, China's new approach to the "sameness" of its claims ignores the text of the provisions at issue – provisions regarding non-discrimination, or "less favorable treatment" – with respect to the measure at issue – a marking requirement, or more specifically the consideration of autonomy (which Hong Kong, China, claims is "how" the United States determines origin for marking purposes). Hong Kong, China, makes no effort to respond to the question that the United States understood the Panel to be asking, that is whether whatever justification might be available under the GATT 1994 would also be available for a provision in another Annex 1A agreement with the same substance. Instead, Hong Kong, China, suggests that this question simply cannot arise in light of what it construes as "the different balances of rights, obligations, exceptions, and flexibilities that each such agreement establishes in respect of its subject matter".

68. Hong Kong, China, is incorrect to assert that the "balance" of each Annex 1A agreement is established in a vacuum,[61] as the United States discusses in its comments on Hong Kong, China's response to Question 73, as well as in the U.S. response to Question 93. Furthermore, the interpretation by Hong Kong, China, that each Annex 1A agreement represents its "own balance of rights and obligations" would result in differing levels of justification with respect to the same substantive obligation (e.g., nondiscrimination) with respect to the same measure under different agreements. In the current circumstances, Hong Kong, China, believes recourse to the essential security exception under the GATT 1994 should not be available under the *Agreement on Rules of Origin* or the TBT Agreement. In other words, Hong Kong, China, considers that

[61] U.S. Opening Statement at the Second Videoconference, para. 37; U.S. Responses to the Second Set of Panel Questions, para. 75.

those agreements may preclude a Member from taking an action that it considers necessary to protect its essential security interests. This interpretation is not supported by the text or context of the treaty provisions at issue. And it ignores the fact that certain circumstances may necessitate that a Member take a wide range of measures to protect its essential security interests.

### INTERPRETATION AND APPLICATION OF ARTICLE XXI(B) OF THE GATT 1994

**Question 94.**

**To both parties: The claimed self-judging nature of Article XXI(b) is derived from the words "which it considers. This suggests therefore, that whether Article XXI(b) is self-judging in full or in part depends on what the words "which it considers" relate to in the text of this provision. Do you agree? If not, why not?**

69. Hong Kong, China, states that it agrees that "which it considers" reserves the determination of whether an action is "necessary" to the judgment of the Member taking the action. At the same time, Hong Kong, China, submits that the Member's assessment of the necessity of an action is subject to review by a panel for compliance with an obligation of good faith.

70. This position is contradictory, and fails to reflect the text of Article XXI(b). As the United States has explained, the terms "which it considers" begin a relative clause that ends at the end of each subparagraph,[62] and the ordinary meaning of the term "considers" indicates that the action taken reflects the beliefs of the WTO Member.[63] There is no basis in the text for concluding that "which it considers" means something other than its ordinary meaning, or for reading an obligation of good faith into Article XXI(b).[64] Under the interpretation by Hong Kong, China, what matters for purposes of Article XXI(b) is not whether a Member considers an action necessary for the protection of its essential security interests, but whether a panel considers that a Member acted in good faith in evaluating "its" essential security interests and acting to protect them. This is not what the text of Article XXI(b) provides.

**Question 95.**

**To both parties: For purposes of deciding whether subparagraph (iii) of Article XXI(b) is covered by the discretion granted to the Member through the words "which it considers", does it matter whether the word "action" relates to all three subparagraphs?**

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[62] U.S. First Written Submission, paras. 34-43, 180-186; U.S. Second Written Submission, paras. 18-28; U.S. Response to Panel Questions 94 and 95.

[63] U.S. First Written Submission, paras. 37-38, 182-84.

[64] U.S. Second Written Submission, paras. 28-31; U.S. Opening Statement at the Second Videoconference, paras. 15-17; U.S. Response to Questions 118 and 119.

71. The United States provides comments on Hong Kong, China's responses to Questions 95 and 99 together below.

**Question 96.**

**[to the United States – omitted]**

**Question 97.**

**[to the United States – omitted]**

**Question 98.**

**[to the United States – omitted]**

**Question 99.**

**To Hong Kong, China: Please comment on the United States' view at paragraph 14 of its opening statement at the second meeting of the Panel that "there are no words before any of the subparagraphs – such as 'and which' or 'provided that' – to indicate a break in the single relative clause or to introduce a separate condition with respect to the subparagraphs."**

72. The United States provides comments on Hong Kong, China's responses to Questions 95 and 99 together.

73. Hong Kong, China, fails to respond to the fact that, as the United States pointed out, in Article XXI(b) there is no break in the relative clause beginning with "which it considers".[65] Instead, Hong Kong, China, continues to insist that "[s]ubparagraph (iii) forms a noun phrase with the term 'action' ('action … taken in time of war or other emergency …') and this noun phrase *precedes* the language ("which it considers")."[66] According to Hong Kong, China, this means that none of the subparagraphs are qualified by the language "which it considers".

74. This is plainly incorrect. In the text of Article XXI(b), "taken in time of war or other emergency" does *not* precede the language "which it considers". Nor does the language of subparagraphs (i) and (ii) precede the language "which it considers". There is no basis for interpreting subparagraph (iii) in a way that is clearly not written, and then extrapolating that interpretation to interpret the remaining subparagraphs as they are not written. Hong Kong, China, provides no basis in the customary rules of treaty interpretation (or in grammatical rules)

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[65] *See* U.S. Second Written Submission, paras. 27, 43-47 (discussing reconciliation of the authentic texts).

[66] Hong Kong, China's Responses to the Second Set of Questions, para. 99; *see also* Responses of Hong Kong, China, to Questions from the Panel, n.103.

for its assertion that the words of Article XXI(b) should be reordered to provide that the relative clause does not modify the terms that follow "which it considers".

75. In contrast, the United States has explained that, under the interpretation that reconciles the three authentic texts under Article 33 of the VCLT, the terms of Article XXI(b)(iii) form a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" modifies the entirety of the main text and the subparagraph endings.[67] In particular, the United States has explained that this is the case regardless of whether all of the subparagraphs relate to "action".[68] Hong Kong, China's interpretation to the contrary is unsupported by grammar rules and directly contrary to the text of Article XXI(b) as written, and should therefore be rejected.

**Question 100.**

**To both parties: The final text of Article XXI(b) at the end of the Geneva session of negotiations in the summer of 1947 was adopted in the GATT (the provisional application of which was decided by protocol on 30 October 1947) and served as draft Article 94 in the final round of negotiations for the Havana Charter. The final text of what became Article 99 of the Havana Charter as adopted in March 1948, contains further modifications to the text of Article XXI(b), including the following modification at the end of the *chapeau*: "…, *where such action*". Please comment on the relevance, if any, of this further modification, to the interpretation of Article XXI(b).**

76. In its response Hong Kong, China, equates the language of Article 99 of the Havana Charter – which is on its face different than Article XXI(b) – with Article XXI(b). The United States discussed these differences in its own response to this question, and explained that Uruguay Round negotiators did not reflect those differences in the text of Article XXI(b).[69] Again, in an effort to sever the relative clause beginning with "which it considers" in Article XXI(b), Hong Kong, China, seeks to read language into the provision that is not there (", where such action"). Such an approach is inconsistent with the customary rules of treaty interpretation, and should be rejected.

**Question 101.**

**To both parties: In interpreting a provision under the customary rules of interpretation, under what circumstances can a panel take into account information that does not qualify as relevant under Articles 31 and 32 of the Vienna Convention (e.g. the statements that the United States refers to in paragraphs 189 to 214 or the internal documents discussed in paragraphs 136 to 161 of its first written submission)?**

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[67] U.S. First Written Submission, paras. 168-186; U.S. Second Written Submission, paras. 34-35, 43-48; U.S. Response to Question 96.

[68] U.S. Response to Question 95.

[69] *See also* U.S. Second Written Submission, para. 27.

77. The United States refers the Panel to its own response to Question 101.

**Question 102.**

**To both parties: Please comment on the definition of "war" offered by the panel in *Russia – Traffic in Transit* in paragraph 7.72 of its report (war refers to armed conflict, which "may occur between states (international armed conflict) or between governmental forces and private armed groups, or between such groups within the same state (non-international armed conflict)").**

78. Contrary to Hong Kong, China's suggestion, the United States is not asking the Panel to use "interrogative powers" with respect to its invocation of Article XXI(b). The United States does not ask the Panel – or anyone else – to make its case for it. To be clear, because Article XXI(b) is self-judging by its terms, a Member invoking that provision has no further case to make.

79. Even though Article XXI(b) is self-judging and a panel should not review a Member's essential security decisions, the United States in fact has provided ample evidence on this issue. Thus, Hong Kong, China, is incorrect to assert that the United States has provided no evidence or argument to support its invocation of Article XXI(b).

- From its First Written Submission,[70] the United States has explained that, in Executive Order 13936, citing the Secretary of State's 2020 Hong Kong Policy Act Report as well as the National Security Legislation imposed by China on Hong Kong, China, the President determined that Hong Kong, China, "is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" for purposes of a number of U.S. laws, including the marking statute.

- From its First Written Submission, the United States has explained that the Executive Order further determined "that the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States" and declared a national emergency with respect to that threat.

- The United States also provided significant evidence regarding the circumstances and concerns with freedoms and human rights in Hong Kong, China, in its First Written Submission, as well as in subsequent submissions.[71]

[70] U.S. First Written Submission, paras. 7-8, 16-23.

[71] U.S. First Written Submission, paras. 9-10; see also U.S. Exhibits 6, 6A, 112, 116-137.

80. In short, Hong Kong, China, simply has chosen to ignore this evidence and explanation.

**Question 103.**

**To both parties: Please comment on the definition "emergency in international relations" offered by the panel in *Russia – Traffic in Transit* in paragraph 7.76 of its report (refers "generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or *surrounding* a state").**

81. The United States refers the Panel to its own response to Question 103, as well as the Introduction to Questions 102 through 126.

**Question 104.**

**To both parties: Please comment on whether the situations described in paragraph 18 of Canada's third-party statement and in paragraph 160 of the European Union's third-party response to Panel question No. 51 could generally be considered to constitute or contribute to an *emergency* in international relations in the sense of Article XXI(b) of the GATT 1994.**

82. Hong Kong, China's assertion that Article XXI(b) limits a Member from taking action to protect its essential security interests to circumstances that "directly implicate defence or military interests, or maintenance of law and public order interests, within the territory of the invoking Member" has no basis in the text of Article XXI(b). As the United States has explained, the ordinary meaning of the term "emergency in international relations" is not limited to circumstances involving "defense and military interests" or "maintenance of law and public order", nor does anything in the text of Article XXI(b) impose a territorial limitation on the essential security interests that a Member may seek to protect.[72]

83. Likewise, nothing in the text of Article XXI(b)(iii) limits an "emergency in international relations" to a specific territorial area, that is, one "engulfing or surrounding a state".[73] This erroneous position of Hong Kong, China, is similar to the *Russia – Traffic in Transit* panel's view of "essential security interests" as referring to "the protection of *its territory* and its population from external threats".[74] Indeed, Hong Kong, China, fails to analyze the text of Article XXI(b) itself in arguing that the term "emergency in international relations" is so limited, and relies solely on the analysis of that report – an analysis that, as the United States has explained, itself fails to reflect application of the customary rules of treaty interpretation.[75]

[72] U.S. First Written Submission, paras. 232-244; U.S. Response to Question 103.

[73] *See also* Third Party Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 18.

[74] *Russia – Traffic in Transit*, para. 7.130 (emphasis added).

[75] U.S. First Written Submission, paras. 232-244; Introduction to U.S. Responses to Panel Questions 102 through 126.

84. It appears that Hong Kong, China, considers that a WTO Member may not validly consider events anywhere outside its territory to be an emergency in international relations or part of its essential security interests. While this position might reflect Hong Kong, China's appraisal of its own security interests, to the extent Hong Kong, China, even retains the capacity to do so, it is not the place of Hong Kong, China, or Chinese authorities, to make that determination for other Members who may choose to take action in response to terrible situations well beyond their borders in light of their own appraisal of their essential security interests in those circumstances. Hong Kong, China's position has no basis in the text of Article XXI(b) and should be rejected by this Panel.

**Question 105.**

**To both parties: Which aspects of a situation would render it one where "international relations" are implicated in the sense of Article XXI(b)(iii)?**

85. Hong Kong, China, provides no textual support for its arguments regarding the meaning of "international relations" in its response. Instead, it relies solely on language from the *Russia – Traffic in Transit (Panel)* report. This report is not itself WTO agreement language, and the analysis in the report does not reflect the customary rules of treaty interpretation, as the United States has explained. The United States refers the Panel to its response to Question 105 for a discussion of the ordinary meaning of the term "international relations", in accordance with the customary rules of interpretation.[76] The ordinary meaning of that term does not support the interpretation that an "emergency in international relations" is limited to situations implicating defense or military interests, or maintenance of law and order interests.

**Question 106.**

**To both parties: The French and Spanish text of Article XXI(b)(iii) refer to "en cas de grave tension internationale" and "en caso de grave tensión internacional", respectively, where the English text refers to "or other emergency in international relations". Please comment on whether the French and Spanish text provide additional meaning on the type of emergency that needs to exist, for instance, one where there is "heightened tension" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.76).**

86. As the United States explained in its response to Question 106, the French and Spanish texts confirm that the term "emergency in international relations" must be understood broadly. Hong Kong, China's own response fails to support its conclusion that "emergency in international relations" must be understood to refer only to "situations of 'heightened tension or crisis' or situations 'of general instability engulfing or surrounding a state'". Nothing in the English, French, or Spanish text imposes any kind of territorial limitation ("surrounding a state"), and Hong Kong, China's own proffered definitions do not indicate to the contrary. And nothing in the English, French, or Spanish texts suggests that an "emergency in international relations" is

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[76] *See also* U.S. First Written Submission, paras. 234-244.

limited to situations "similar to" war.[77] Rather, the English, French, and Spanish texts reserve judgment as to what constitutes an "emergency in international relations" to a Member taking action it considers necessary to protect its essential security interests.[78]

**Question 107.**

**To both parties: Please comment on the European Union's statement in paragraph 158 of its response to Panel question No. 51 that "[i]n determining whether a particular situation constitutes an 'other emergency in international relations', a panel would need to assess in particular the gravity of the situation".**

87. The United States refers the Panel to its responses to Questions 106 and 107.

**Question 108.**

**To both parties: What criteria do you consider appropriate for the Member invoking Article XXI(b)(iii) to take into account when determining whether the gravity of the situation is such that it would constitute an "other emergency in international relations"?**

88. The United States provides comments on Hong Kong, China's responses to Questions 108 and 109 together.

**Question 109.**

**To both parties: Do you consider that there can be situations of concern in international relations that would not be characterized as an "emergency in international relations" in the sense of Article XXI(b)(iii)? In your response, please provide examples.**

89. The United States provides comments on Hong Kong, China's responses to Questions 108 and 109 together.

90. As the United States has explained, by its terms Article XXI(b)(iii) reserves the assessment of whether circumstances constitute an "emergency in international relations" to the Member taking action to protect its essential security interests in those circumstances. That assessment is not subject to second-guessing by a Panel.

91. Hong Kong, China, seeks to replace the assessment of a Member as to whether a situation is an "emergency in international relations" such that it must act to protect its essential security interests, with the judgment of a panel as to the existence of those circumstances. Hong Kong, China, also asserts, without providing any textual support, that conflicts that "may be considered

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[77] *See also* U.S. Response to Panel Question 103.

[78] U.S. First Written Submission, paras. 38, 181-186; U.S. Response to Panel Question 96.

urgent or serious in a political or diplomatic sense" cannot constitute an "emergency in international relations" within the meaning of Article XXI(b)(iii).[79]

92. This view is contrary to the plain meaning of the terms "which it considers", "essential security interests", and "emergency". As the United States has explained, the question of whether a situation constitutes an "emergency", that is, whether the situation is "serious, unexpected, and often dangerous" and "requires action", is inherently subjective.[80] Likewise, in the term "its essential security interests", it is clear that it is the interests of the invoking Member that are relevant, and whether interests involve the "potential detriment or advantage" to the "essence" of a Member's safety or "being protected from danger"[81] is an assessment that can only be conducted by the invoking Member, based on its understanding of the risks presented and other factors.[82]

93. Hong Kong, China's conclusion in its response underscores why negotiators agreed, in the text of Article XXI(b), that the assessment of whether a situation constitutes an "emergency in international relations" such that a Member would act to protect "its" essential security interests would be left to the Member. Hong Kong, China, apparently considers that concerns about freedom and democracy, or concerns about events outside a Member's territory, are not and cannot be essential security interests, and may not give rise to an emergency in international relations. The United States does not agree, as is clear from the face of the measures at issue and the other evidence that the United States has submitted.

94. Negotiators of Article XXI(b) understood that, as is clear in the present dispute, Members might not have a shared set of concerns, and in turn in the text reserved judgment as to the assessment of a Member's essential security interests and what constitutes an emergency in international relations such that it would need to act to protect those interests to the Member alone. Negotiators did not task the dispute settlement system with evaluating the merits of those actions. To conclude otherwise – that is, here, for example, to determine that the multilateral trading system should decide whether a Member may consider concerns regarding democratic norms and human rights and freedoms to be essential security interests that warrant action in response, or whether there is some sufficient territorial link to a Member's essential security interests or a war or other emergency in international relations – would undermine the credibility of the system.

**Question 110.**

**To both parties: In paragraph 3 of its opening statement at the second meeting of the Panel, the United States referred to a joint statement issued by the United States and 20 other**

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[79] Hong Kong, China's Responses to the Second Set of Questions, para. 114.

[80] U.S. First Written Submission, paras. 44, 227-244; U.S. Response to Panel Questions 48, 104, 107-108.

[81] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-11).

[82] U.S. First Written Submission, paras. 39, 45; U.S. Response to Panel Questions 117, 120.

**countries (Exhibit US-210). What is the relevance of this statement for the panel's assessment of the existence of an emergency in international relations?**

95. Hong Kong, China, rejects the potential relevance of Exhibit US-210 on the grounds that, in its view, it does not implicate U.S. defense or military interests, or maintenance of law and public order interests. However, nothing in the text of Article XXI(b) limits an "emergency in international relations" to situations implicating defense or military interests, or maintenance of law and public order interests.[83]

96. In its response, Hong Kong, China, suggests that, as member States of the European Union, certain of the signatories of the joint statement do not consider the circumstances described in Exhibit US-210 to constitute an emergency in international relations. Again, the United States does not purport to speak for other Members with respect to their assessment of their own essential security interests, or actions they might take under Article XXI(b). However, the United States recalls that in its third-party submission the European Union indicated that it "considers that there are significant elements which can indicate that the situation to which the United States sought to respond by its measures is one of an 'emergency in international relations' within the meaning of Article XXI(b)(iii) of the GATT 1994".[84]

**Question 111.**

**[to the United States – omitted]**

**Question 112.**

**To both parties: In paragraph 7.108 of its report, the panel in *Russia – Traffic in Transit* observed that Article XXI(b)(iii) "acknowledges that a war or other emergency in international relations involves a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measures at issue is to be evaluated". Please comment on whether, and if so, how, the concept of "fundamental change of circumstances" may inform an interpretation of the concept of "emergency in international relations" in Article XXI(b)(iii).**

97. Hong Kong, China, understands this quote to relate to the conclusion by the *Russia – Traffic in Transit (Panel)* report that subparagraph (iii) "must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b)". As reflected in the U.S. response, the United States understands this quote differently. The United States comments below on Hong Kong, China's understanding.

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[83] U.S. First Written Submission, paras 233-243; Response to Panel Questions 102-103.

[84] EU Third Party Statement, para. 39; *see also* paras. 11-16, 40. *See also Media Freedom Coalition Statement on Closure of Media Outlets in Hong Kong* (US-210) ("A stable and prosperous Hong Kong in which human rights and fundamental freedoms are protected should be in everybody's interest.").

98. As discussed in the U.S. First Written Submission, and in the U.S. response to Question 117, the conclusion that subparagraph (iii) is limited to "eliciting the same type of interests" as those in subparagraphs (i) and (ii) does not reflect application of the customary rules of treaty interpretation.

99. Subparagraphs (i) through (iii) are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph is integrated with the main text of Article XXI(b), but would contain different subject matter and scope in relation to the other subparagraphs. And each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

100. Unlike subparagraphs (i) and (ii), which indicate the particular types of essential security interests a Member considers to be implicated by the action taken, subparagraph ending (iii) does not speak to the nature of the security interests at all. Subparagraph (iii) contains no limitation on the type or nature of the essential security interests involved. This reflects an understanding that there may be a wide range of interests that become essential to a Member's security when it considers a war or other emergency in international relations exists. Hong Kong, China's efforts to limit the scope of what a Member may consider to be its essential security interests lack any textual basis, and should be rejected.

**Question 113.**

**To both parties: Please comment on the following statement by Canada in paragraph 136 of its third-party response to Panel question No. 52: "… States must retain a certain level of flexibility to determine, for themselves, what constitutes an emergency in international relations serious enough to warrant taking measures(s) in response. This does not detract from the requirement that Members demonstrate that such circumstances objectively exist and that there is a sufficient connection between the measures and those circumstances."**

101. The United States refers the Panel to its own response to Question 113.

**Question 114.**

**To both parties: Please comment:**

a. **on the European Union's statement in paragraph 36 of its third-party submission that the terms "in time" in Article XXI "require a sufficient nexus between the action taken by the invoking Member and the situation of war or emergency in international relations, including in temporal terms"; and**

b. **on Canada's statement in paragraph 26 of its third-party submission that "a panel's assessment of whether the requirements of Article XXI(b) (iii) have been met must include a determination of whether there is a 'sufficient nexus' between the measure adopted by the invoking Member and the circumstances set out in subparagraph (iii)".**

102. By its terms, Article XXI(b) does not require demonstration of a "sufficient nexus" between the measures as to which Article XXI(b) is invoked and the circumstances in subparagraph (iii). The relative clause beginning "which it considers" includes what follows, including the text of each subparagraph. Thus, the issue is not simply whether a Member considers an action "necessary". Instead, it is whether that Member considers the action "necessary for" a purpose – namely, the protection of its essential security interests relating to subject matters in subparagraph endings (i) and (ii), or for the protection of its essential security interests in the temporal circumstance provided for in subparagraph ending (iii).

103. The response of Hong Kong, China, to this question is telling. Hong Kong, China, reduces the interpretation of Article XXI(b)(iii) to an inquiry as to whether "it would [ ] make sense . . . if . . . 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."[85] From this "does nothing" assertion, it is abundantly clear that Hong Kong, China, or its political masters, does not appear to consider human rights or freedoms, or democratic norms or rule of law in other countries to be relevant to its essential security interests. The United States has a fundamentally different sense of its own values and interests.

104. The text of Article XXI(b) does not provide a role for another Member, or a dispute settlement panel, to second-guess a Member's own consideration of whether a measure is "necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations" – and in turn recommend that the action be withdrawn or modified based on its own view that the action "does not make sense". In any event, the United States does consider the suspension of differential treatment with respect to marking "makes sense" and "does something" in light of the lack of sufficient autonomy of Hong Kong, China. The basis for this consideration is established on the face of the measures, and supported by the evidence submitted.

105. Put simply, the inquiry suggested by Hong Kong, China, has no basis in the text of Article XXI(b), and is not one that serves the credibility and stability of the multilateral trading system. A Member's consideration of its essential security interests, and what action is necessary to protect those interests and in what circumstances, would, in the view of the United States, generally be based on an assessment of geopolitical risks that will not necessarily be shared by all Members, and that trade experts are not positioned to undertake. Whereas one Member may consider a situation (even outside of its territory) heinous and destabilizing and necessitating a response, another Member may choose to stay silent. The WTO is not the appropriate forum to decide that the Member who chooses to act is wrong for doing so.

[85] Emphasis added.

**Question 115.**

**To both parties: During the Geneva Session of the ITO Charter negotiations, the delegate of the United States explained the following with respect to what its delegation understood was meant to be covered by the terms "other emergency in international relations": "[W]e had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take any measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on" (Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, 33rd Meeting of Commission A, E/PC/T/A/PV/33, 24 July 1947, (Exhibit US-30) at p. 20). Please comment whether and how, if at all, this statement clarifies the type of link that must exist between the Member invoking Article XXI(b)(iii) and the situation or war or other emergency in international relations at hand.**

106. Hong Kong, China, errs in concluding that this statement confirms that Article XXI(b)(iii) is limited to situations that involve defense or military interests, or maintenance of law and public order interests. As explained in the U.S. response to this question, the statement makes clear that it was the United States that made the assessment regarding its own measures, and does not purport to limit the assessment (whether made by the United States or any other country) as to the circumstances that a Member might consider warrant action to protect a Member's essential security interests.

107. In addition, Hong Kong, China's statement that what it characterizes as "conditions" for invoking Article XXI(b) "would have been satisfied, in the case of the United States, in the years immediately preceding its involvement in World War II" cannot be reconciled with its view that "the situation alleged to constitute an 'emergency in international relations' must implicate defence or military interests, or maintenance of law and public order interests, *within* the territory of the invoking Member",[86] or its general endorsement of the analysis of the *Russia – Traffic in Transit* report (including that an "emergency in international relations" refers to situations "engulfing or surrounding a state"). The statement by the U.S. delegate describes activities prior to the incursion into U.S. territory in December 1941 and to U.S. participation in the war. Under the unsupported territorial limitation that Hong Kong, China, reads into Article XXI(b), the measures taken prior to the U.S. involvement in World War II would not appear to have been taken in an "emergency in international relations".

**Question 116.**

**[to the United States – omitted]**

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[86] Hong Kong, China's Responses to the Second Set of Questions, para. 108 (emphasis in original); *see also* para. 110.

**Question 117.**

**To both parties: In paragraph 7.74 of the Panel Report in *Russia – Traffic in Transit*, the panel considered that the interests that would arise from the enumerated subparagraphs of Article XXI(b) are all defence and military interests, as well as maintenance of law and public order interests. Please comment on whether these interests could arise from a reading of the text of Article XXI(b), specifically subparagraphs (i) and (ii); and whether other types of interests could be implicated by the phrase "other emergency in international relations" in subparagraph (iii). Do subparagraphs (i) to (iii) of Article XXI(b) inform each other as to the overall subject matter and scope of applicability of the provision?**

108. By its terms, Article XXI(b) does not limit the scope of "essential security interests" to "defence and military interests" and "maintenance of law and public order interests". There is no basis in the text to conclude, as Hong Kong, China, suggests, that those are the only interests that may be addressed in an "emergency in international relations".

109. Hong Kong, China, seeks to establish to the contrary by citing first the title of Article XXI, Security Exceptions. The title of a provision is context, and the operative language of Article XXI(b) itself refers to "its essential security interests", and reflects a Member's right to take "any action which it considers necessary for the protection of" those interests.

110. The ordinary meaning of the terms of Article XXI(b) establishes that "essential security interests" are not limited to "defense and military interests, as well as maintenance of law and public order interests". The term "security" refers to "[t]he condition of being protected from or not exposed to danger; safety."[87] As this definition indicates, the term "security" is broad and could encompass many types of security interests that are critical to a Member; it is not limited to "defense and military" or "maintenance of law and public order" considerations. The term "essential" refers to significant or important, in the absolute or highest sense.[88] This term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.

111. As the United States noted in its response to Question 117, limiting the scope of "essential security interests" to defense and military interests is not only contrary to the ordinary meaning of the terms, but it also fails to reflect the scope of interests identified by WTO Members and the United Nations as having a significant relationship to national and international security more generally.

112. Hong Kong, China, also suggests that the scope of "essential security interests" must be limited in light of the subject matters of subparagraphs (i) and (ii). However, as the United States has explained, subparagraph ending (iii) does not speak to the nature of the security

[87] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-11).

[88] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852 (US-11).

interests at all, and contains no limitation on the type or nature of the essential security interests involved. Subparagraphs (i) through (iii) are not separated by a conjunction that would suggest they refer to alternative or cumulative situations. Accordingly, while each subparagraph is integrated with the main text of Article XXI(b), it would contain different subject matter and scope in relation to the other subparagraphs.

113. Finally, Hong Kong, China, suggests that the scope of "essential security interests" must be limited to "defense and military interests" and "maintenance of law and public order interests" because of the reference to "war" in subparagraph (iii). However, the ordinary meaning of the term "emergency in international relations" is not limited to situations implicating "defense and military interests" or "maintenance of law and public order interests". Rather, a broad understanding of the term "emergency" is supported by the ordinary meaning, that is, "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention."[89] This broad understanding is also reflected in the fact that, unlike other provisions of the GATT 1994 and other covered agreements, which enumerate certain items on a list and thereafter refer to "similar" items, Article XXI(b)(iii), in contrast, does not refer to "war or other 'similar' emergency in international relations".[90]

**Question 118.**

**To both parties: Please comment on the views of the panel in *Russia – Traffic in Transit* that the interpretation and application of the *chapeau* of Article XXI(b) is subject to a good faith obligation (Panel Report, *Russia – Traffic in Transit*, paragraphs 7.132-7.133).**

114. The United States provides comments on Hong Kong, China's responses to Questions 118 and 119 together.

**Question 119.**

**To both parties: The panel in *Russia – Traffic in Transit* derived two consequences from the application of the good faith obligation to the *chapeau* of Article XXI(b).**

a. **Please comment on whether the good faith obligation would require a Member invoking Article XXI(b) to articulate the essential security interests said to arise from the emergency in international relations "sufficiently enough to demonstrate their veracity" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.134); and**

b. **Please comment on the view that the obligation of good faith is "crystallized" in the application of Article XXI(b)(iii) in demanding that the measures at issue meet a "minimum requirement of plausibility in relation to the proffered essential**

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[89] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-193).

[90] *See* U.S. Response to Question 103.

**security interests, i.e. that they are not implausible as measures protective of these interests" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.138).**

115. The United States provides comments on Hong Kong, China's responses to Questions 118 and 119 together.

116. Hong Kong, China, errs in reading a "good faith" obligation into the text of Article XXI(b). Hong Kong, China, identifies nothing in the text of Article XXI(b) that establishes such an obligation – because there is no such language.[91]

117. Rather, Hong Kong, China, suggests that a panel must review a Member's action for compliance with Article 26 of the VCLT. There is no textual basis in the GATT 1994 or the WTO Agreement for this position. Under the DSU, the mandate of the WTO dispute settlement system (and in turn a panel established under that system)[92] is to determine conformity with the "covered agreements," and not international law more generally. There is no basis in the DSU for examining the consistency of a Member's action with Article 26 of the VCLT, or with a principle of good faith more generally. These are not provisions of the "covered agreements".

118. Hong Kong, China, also now appears to suggest that Article 31 of the VCLT imposes a good faith obligation on WTO Members that is reviewable by a panel. This suggestion is also not based in the text of either the DSU or Article 31 itself. Article 3.2 of the DSU calls for interpretation of the covered agreements in accordance with customary rules of interpretation, which are reflected in Articles 31 through 33 of the VCLT – that is, they must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Hong Kong, China, seeks to equate *interpretation* of a treaty in good faith with *performance or observation* of that treaty in good faith, and in turn suggests that the latter is an obligation as to which a panel must review compliance. The VCLT itself distinguishes between these concepts,[93] and Article 31 – which is itself not a provision of

[91] U.S. Second Written Submission, paras. 29-31; U.S. Opening Statement at the Second Videoconference, paras. 15-16; U.S. Response to Panel Questions 118-119.

[92] *See* DSU Article 3.2; *see also* DSU Article 7.1 (providing that the standard terms of reference are "To examine, in the light of the relevant provisions in (*name of the covered agreement(s)* cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and *to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)*) (emphasis added); DSU Article 11 "[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and *the applicability of and conformity with the relevant covered agreements*, and *make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements*. (emphasis added); DSU Article 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent *with a covered agreement*, it shall recommend that the Member concerned bring the measure into conformity *with that agreement*.") (emphasis added).

[93] For example, the title to Part III of the VCLT is "Observance, Application and Interpretation of Treaties". Section 1 of Part III, which includes Article 26, is entitled "Observance of Treaties". Section 2 is entitled "Application of Treaties". Section 3, which includes Articles 31 through 33, is entitled "Interpretation of Treaties".

the "covered agreements" – does not operate to convert Article 26 into a provision of the "covered agreements" for purposes of Article 3.2 of the DSU.

**Question 120.**

**To both parties: Please comment on the following observations from the panel in *Russia – Traffic in Transit* that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity" (paragraph 7.134) and that when the emergency at issue is " further […] removed from armed conflict, or a situation of breakdown of law and public order … a Member would need to articulate its essential security interests with greater specificity…." (paragraph 7.135). In your response, please indicate whether you consider that, and, if so, how this statement relates to the facts of this case.**

119. Hong Kong, China's assertions that the United States has failed to articulate its essential security interests, and failed to act in good faith in invoking Article XXI(b), are baseless. The United States has, from its First Written Submission, provided significant explanation – including language on the face of the measures at issue – regarding the essential security issues at stake and the circumstances that gave rise to those measures.[94] Hong Kong, China, has refused to engage with that explanation other than to dismiss the U.S. concerns, and erroneously suggests that the Panel should – if it considers that it has the authority to review the merits of the U.S. invocation – similarly ignore the evidence on the record.

120. That said, the United States observes that, under Hong Kong, China's interpretation of Article XXI(b), it would be impossible for a Member to "articulate the essential security interests" that arise from an emergency in international relations "sufficiently to demonstrate their veracity" other than in situations that "relate[] to the protection of the [invoking Member's] territory and its population from external threats, or the maintenance of law and public order internally". Again, there is no basis for this restrictive reading of "emergency in international relations" in the text of Article XXI(b). And this restrictive reading would preclude a Member from taking action with respect to circumstances in which the United States understands that certain Members have significant concerns, and in turn may seek to act to protect their essential security interests.

121. It is abundantly clear that the United States and Hong Kong, China, have very different views about what their respective "essential security interests" are, and in what circumstances they might act to protect those interests. For its part, Hong Kong, China, does not appear to consider human rights or freedoms, or democratic norms or rule of law in other countries to be relevant to its essential security interests. The United States does. Article XXI(b) does not task a dispute settlement panel with resolving those kinds of disagreements, or permit a finding that

[94] U.S. First Written Submission, paras. 7-8, 16-23; *see also* Exhibits US-119 to US-133, US-197 to US-200, US-209, US-210; Opening Statement of the United States of America at the First Videoconference with the Panel, paras. 19-32; U.S. Responses to First Set of Panel Questions, paras. 60, 66, 71; U.S. Second Written Submission, paras 5; Opening Statement of the United States of America at the Second Videoconference with the Panel, paras. 3, 24.

the United States is in breach of its WTO commitments by virtue of having those concerns and seeking to protect them.

**Question 121.**

**To both parties: Please comment on the European Union's view that the "panel in *Russia – Traffic in Transit* made it clear that not *any* interest would qualify under the exceptions in Article XXI(b). The interest must relate genuinely to 'security' and be 'essential'" (European Union's Exhibit EU-5, paragraph 143, emphasis original).**

122. The United States comments on Hong Kong, China's responses to Questions 121 through 123 together.

**Question 122.**

**To both parties: Would a panel be prevented from clarifying the meaning of "essential security interests" in accordance with Article 3.2 of the DSU, if and because these terms are covered by the "which it considers" language?**

123. The United States comments on Hong Kong, China's responses to Questions 121 through 123 together.

**Question 123.**

**To Hong Kong, China: Please comment on whether the terms "which it considers" qualifies the terms "its essential security interests" in the *chapeau* of Article XXI(b). In your response, please indicate the type of review that a panel could undertake with respect to a Member's articulation of its essential security interests.**

124. The United States comments on Hong Kong, China's responses to Questions 121 through 123 together.

125. Hong Kong, China's assertions regarding a panel's review of a Member's consideration of "its essential security interests" are not based in the text of Article XXI(b) or the DSU. Hong Kong, China, claims that a panel must evaluate a Member's invocation of Article XXI(b) for compliance with a free-standing obligation of good faith, such that the panel must determine whether a Member's interests are "genuine" and "sufficiently articulated" to demonstrate their veracity and whether the measures at issue meet "a minimum requirement of plausibility in relation to the proffered essential security interests".

126. As the United States has explained, neither Article XXI(b) nor the DSU establish a "good faith" obligation as to which a Member could be found in breach.[95] And nothing in the text of

[95] U.S. Second Written Submission, paras. 29-31; U.S. Opening Statement at the Second Videoconference, paras. 15-16; U.S. Response to Panel Questions 118-119.

Article XXI(b) requires a Member to make an articulation of its essential security interests and the extent to which they relate to the circumstances at issue, or enables a panel to test the "veracity" of the Member's appraisal of its essential security interests and the circumstances giving rise to action to protect those interests.[96]

127. Rather, what is sufficient for purposes of Article XXI(b) is that the invoking Member considers the action necessary for the protection of its essential security interests. This conclusion is established by the terms of Article XXI(b) itself – in particular, the terms "which it considers" (which precedes the remaining text of the chapeau and the text of each subparagraph) and "its essential security interests". It is further supported by context – including, for example, Article XXI(a) and those other WTO provisions that *do* provide explicit notification requirements.[97]

128. In its responses, Hong Kong, China, argues that a panel should interpret the term "its essential security interests" with a view to determining whether the invoking Member has acted in good faith. Hong Kong, China, appears to suggest that Article 31 of the VCLT itself imposes an obligation to perform a treaty in good faith, such that Article 3.2 of the DSU authorizes a panel to find that a Member has breached a good faith obligation. As explained in the comments on Hong Kong, China's response to Question 119, this theory has no basis in either the DSU or the VCLT. And it would mean that *every* provision of the WTO agreements would be subject to a "good faith" claim, beyond assessment of a Member's conformity with its substance.

129. The mandate of a panel under the DSU is limited to interpreting provisions of the covered agreements. Neither Article 26 nor Article 31 (nor a general principle of good faith) is one of those provisions, and they are not converted into such a provision by virtue of Article 3.2 of the DSU. And, under Articles 7.1 and 11 of the DSU, the purpose of that interpretative exercise is for a panel to make such "findings *as will assist the DSB in making the recommendations* or in giving the rulings provided for" in the covered agreements – not to determine whether a Member has or has not acted in good faith as a general matter.

130. In other words, under the DSU, the Panel should interpret the terms of Article XXI(b) (including "its essential security interests") in accordance with the customary rules of treaty interpretation, in order to "make such findings as will assist the DSB in making the recommendations" provided for in the covered agreements. That interpretation does not involve an inquiry into the good faith of a Member, and is not conducted toward that end.

131. Rather, under the Panel's terms of reference, and the objective assessment of Article XXI(b) contemplated by the DSU, the sole finding that the Panel may make is to recognize the

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[96] U.S. Response to Panel Questions 117-120.

[97] U.S. First Written Submission, paras. 50-51; U.S. Second Written Submission, paras. 58-61; U.S. Response to Panel Question 113.

Member's invocation of Article XXI(b).[98] Because Article XXI(b) is self-judging in its entirety, no additional findings will assist the DSB in resolving this dispute. This means that the Panel cannot, consistent with its terms of reference, make findings of inconsistency or provide a recommendation on that issue. As Article 19.1 of the DSU provides, the "recommendations" referred to in Articles 7.1 (with respect to a panel's terms of reference) and 11 (with respect to a panel's functions) are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." To make the sole finding that the U.S. has invoked Article XXI(b) is the only result consistent with Article 19.2 of the DSU because finding an essential security measure to breach a covered agreement would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests.

132. As the United States has previously explained, Hong Kong, China, was aware of the U.S. invocation of Article XXI. It could therefore have chosen to advance a non-violation nullification or impairment claim. Such a claim could have led to reciprocal authorization to withdraw concessions and would have avoided asking the WTO, the DSB, and WTO adjudicators to second-guess a Member's assessment of action it considers necessary to protect its essential security interests. Regrettably, Hong Kong, China, chose not to proceed in this manner, inappropriately seeking an inherently political judgment from this Panel.

**Question 124.**

**To both parties: As explained in paragraph 5 of the United States' second written submission, the revised origin marking requirement was adopted in conjunction with other measures mandated in Presidential Executive Order 13936 and other legal acts. What relevance, if any, do you consider that the Panel should give to that overall package of measures when examining the United States' invocation of Article XXI(b)(iii) with respect to the revised origin marking requirement?**

133. As the United States has explained, without prejudice to its position that the Panel should not examine the U.S. invocation of Article XXI(b)(iii) with respect to the measures at issue, were the Panel to consider the merits of U.S. invocation of Article XXI(b), the actions set forth in the Executive Order beyond suspension of differential treatment of the marking requirement provide context for that evaluation.

134. Hong Kong, China, provides no basis for its assertion that those other actions are "irrelevant" to the Panel's analysis. Indeed, Article 11 of the DSU provides that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ." Without prejudice to the U.S. position that the invocation of Article XXI(b) is unreviewable, should the Panel nonetheless conduct such a review, the United States would expect it to

[98] U.S. First Written Submission, Section III.E; U.S. Opening Statement at the First Videoconference, paras. 69-79; U.S. Response to Panel Questions 1, 47, 53; U.S. Second Written Submission, Section V.

consider the evidence on the record regarding the basis for the measures at issue and the circumstances and context in which they were taken.

135. Hong Kong, China, further suggests that the Panel should adopt the approach with respect to a Member's invocation of Article XXI(b) in the *Saudi Arabia – IPR (Panel)* report. As explained in the U.S. First Written Submission[99] and during the first videoconference with the Panel, that panel simply "transposed" the *Russia – Traffic in Transit* panel's analysis.[100] Transposing the approach of a prior panel is not consistent with the function of panels as set out in the DSU, and the *Saudi Arabia – Protection of IPRs* panel did not engage in any interpretive effort that could be examined by this Panel for assistance in its own interpretive exercise.

136. Moreover, with respect to the measures as to which the *Saudi Arabia – IPR* panel found were not justifiable under Article 73 of the TRIPS Agreement, discussed in paragraph 138 of Hong Kong, China's Response to Question 124, the United States recalls that, at the DSB meeting following the circulation of the panel report, Saudi Arabia indicated that it had not invoked Article XXI(b) with respect to this claim. At that time, Saudi Arabia stated that it would appeal the panel report and opined that "[b]ased on the prevailing emergency in international relations, the Panel found that Saudi Arabia's invocation of the Security Exception under Article 73 of the TRIPS Agreement in the dispute was justified where it was invoked by Saudi Arabia."[101] Saudi Arabia further stated that "[t]he Panel clearly acknowledged Saudi Arabia's confirmation that it did not invoke the Security Exception with respect to its protection of intellectual property rights."[102] Therefore, in addition to the interpretative issues that the United States raised, the report in *Saudi Arabia – Protection of IPRs* would not appear to provide any additional relevant guidance to the Panel in this dispute.

**Question 125.**

**[to the United States – omitted]**

**Question 126.**

**[to the United States – omitted]**

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[99] U.S. First Written Submission, n. 293.

[100] *Saudi Arabia – Protection of IPR*, para. 7.243.

[101] *See* Minutes of Meeting Held in the Centre William Rappard on 29 July 2020, WT/DSB/M/443 (14 Oct. 2020), para. 9.4.

[102] *See* Minutes of Meeting Held in the Centre William Rappard on 29 July 2020, WT/DSB/M/443 (14 Oct. 2020), para. 9.4.