

*United States – Origin Marking Requirement*

**(DS597)**

**RESPONSE OF THE UNITED STATES TO THE QUESTIONS FROM THE  
PANEL TO THE PARTIES AFTER THE FIRST SUBSTANTIVE MEETING**

October 14, 2021

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## INTRODUCTION

1. This submission provides written responses to the questions from the Panel to the parties after the first videoconference with the Panel. As the Panel is aware, the United States has invoked Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures at issue. The U.S. position, as explained in its First Written Submission and during the videoconference, is that, in light of the invocation, the Panel need not, and should not, reach the merits of the claims by Hong Kong, China. Although in this submission, the United States has provided answers to questions that address the merits in the interest of being responsive to the Panel’s inquiries, those responses are without prejudice to the U.S. position regarding Article XXI(b).

## ORDER OF ANALYSIS

### QUESTION 1

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

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

2. The United States responds to parts (i) and (ii) of Question 1 together.

3. As explained below, to decide on the merits of the claims made by Hong Kong, China, before assessing the invocation of Article XXI(b) would be legally erroneous.

4. The United States understands “to decide” to mean to make findings in the Panel’s written report to the DSB. Article 12.7 of the DSU provides for a panel to “submit its findings in the form of a written report to the DSB”, which “shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes”.

5. DSU Article 7.1 provides for a panel “[t]o examine . . . the matter”, and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in” the covered agreements. As the United States has explained, the terms of Article XXI do not provide for an assessment of the measure which a Member considers necessary for the protection of its essential security interests.<sup>1</sup> And therefore there is no finding of inconsistency and no recommendation that the Panel may make. Put differently, whatever the Panel’s internal

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<sup>1</sup> See U.S. First Written Submission, paras. 34-67.

ordering of its analysis, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole finding that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has invoked Article XXI.<sup>2</sup> For the Panel to decide on any matter not related to the invocation of Article XXI(b) would not be a finding that “assist[s] the DSB in making the recommendations or in giving the rulings provided for in the covered agreements”.

6. This approach is also consistent with Article 19 of the DSU. Article 19.1 provides that “recommendations” 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 that agreement”. Article 19.2 clarifies that, “in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”. A Member’s invocation of Article XXI(b) means that an essential security action cannot be found to be inconsistent with a covered agreement. Thus, it would diminish the right of a Member to take essential security actions if a panel or the Appellate Body purported to find such an action to be so inconsistent.

7. The United States notes further that, while *intermediate findings of breach* with respect to the claims brought by Hong Kong, China, could not assist the DSB in making recommendations because an essential security measure as to which Article XXI(b) is invoked cannot be WTO-inconsistent, if the panel were to make *intermediate negative findings* on those claims, those findings would be unnecessary in light of Article XXI, and thus mere advisory opinions.

8. The United States also observes that a number of third parties have suggested that Article XXI(b) serves as an affirmative defense, akin to that of Article XX, and some have suggested that a breach must be first established before assessing Article XXI(b).<sup>3</sup> The United States does not agree with this characterization of Article XXI, and, moreover, the characterization or label does not determine the answer to the question posed by the Panel. As noted in the U.S. Opening Statement,<sup>4</sup> even if one were to accept the categorization of Article XXI as an “affirmative defense,” the Panel would not be required to begin its analysis with the complainant’s claims. In fact, the DSU does not use the term “affirmative defense” or “order of analysis”. Instead, the DSU calls on the Panel to interpret Article XXI, like any other provision, in accordance with customary rules of interpretation. As interpreted according to these customary rules, Article XXI is a self-judging exception to a Member’s obligations.

9. The characterization of Article XXI as an “affirmative defense” thus would not change the ordinary meaning of Article XXI, nor the proper order of analysis. Under the text of Article XXI, the invoking party does not have to make a legal or evidentiary showing; rather, for the Member to “consider” the action necessary for the protection of its essential security interests is determinative. In other words, the characterization as an “affirmative defense” would not

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<sup>2</sup> See U.S. First Written Submission, paras. 321-327; U.S. Opening Statement, paras. 69-79.

<sup>3</sup> See Canada’s Third Party Written Submission, paras. 3-6; European Union’s Third Party Written Submission, paras. 28-29; Switzerland’s Third Party Written Submission, paras. 49-53.

<sup>4</sup> U.S. Opening Statement, paras. 74-79.

determine, in the abstract, what burden is placed on the party invoking the defense. In short, the United States has invoked Article XXI on the basis that the United States considers the measures at issue necessary to protect its essential security interests. Therefore, even if Article XXI is an “affirmative defense”, the United States has met its burden associated with that defense.

10. With respect to the efforts by certain third parties, as well as Hong Kong, China, to analogize Article XXI(b) with Article XX, as the United States has demonstrated in its First Written Submission, the text and structure of Article XX and Article XXI are fundamentally different. Article XXI(b) includes the key language “which it considers”, and the function of the subparagraphs in Article XX differs drastically from that of Article XXI. In Article XXI the operative language is in the main text: “any action which it considers necessary for the protection of its essential security interests.” And, unlike Article XX, Article XXI includes no additional non-discrimination requirement. As such, there is no basis to apply the analytical approach used in cases in which a Member seeks to justify a measure under Article XX to a case in which a Member has invoked Article XXI(b).

## QUESTION 2

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

11. Question 2 is for Hong Kong, China.

## CLAIMS UNDER ANNEX 1A AGREEMENTS

### Factual background

## QUESTION 3

**To the United States: Can the United States confirm that it continues to treat goods manufactured, produced, or substantially transformed, in Hong Kong, China, as goods originating in Hong Kong, China for all customs purposes except for country-of-origin marking, as asserted by Hong Kong, China at paragraph 34 of its first written submission and at the first substantive meeting?<sup>1</sup> In your response, please comment on Exhibit HKG-12.**

<sup>1</sup> See also Hong Kong, China's first written submission, para. 17 and Annex a, para. 14.

12. The United States confirms that it continues to treat goods manufactured, produced, or substantially transformed, in Hong Kong, China, as goods originating in Hong Kong, China, for purposes of determining the applicable tariff rate. This is confirmed in Exhibit HKG-12, which indicates that the requirement to mark goods as “China” does not affect the country of origin determination for purposes of assessing ordinary customs duties, or temporary or additional duties, provided for in the U.S. Harmonized Tariff Schedule; nor does it affect Outward Processing Arrangements.

13. As noted in the U.S. First Written Submission, the essential security concerns underlying the measure changing the marking requirement also result in changes (other than marking) in the treatment of goods traded with Hong Kong, China.<sup>5</sup> Although these other changes are not at issue in this dispute, the existence of these other changes may be helpful context in understanding the measures at issue. For example, the Executive Order also suspended differential treatment with respect to the Arms Export Control Act.

14. Given Hong Kong, China's apparent interest in consistency, the United States does not understand whether Hong Kong, China, considers that goods of Hong Kong should in turn be treated as goods of China for other customs purposes, such as tariffs. In any event, the WTO Agreement does not require that the link between a good and the country of origin be the same for all purposes.<sup>6</sup>

#### QUESTION 4

**To the United States: The revised origin marking requirement applies to "goods produced in Hong Kong".<sup>2</sup>**

- a. Given this, does the application of this origin marking requirement therefore require, first, a determination that a good originates from Hong Kong, China?**
- b. If so, at what point in time, in the process of applying the revised origin marking requirement, is that determination of origin made and on the basis of what rules?**

<sup>2</sup> US Federal Register Notice, "Country of Origin Marking of Products of Hong Kong", 11 August 2020, (Exhibit HKG-10/ Exhibit USA-7), p. 1.

15. The United States responds to subparts (a) and (b) of Question 4 together, without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China.

16. The U.S. marking statute, at 19 U.S.C. § 1304, generally requires articles of foreign origin imported into the United States to be marked "in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article". Although the term "origin marking requirement" has been used as shorthand in this dispute, there is no separate marking requirement that requires a distinct determination that the good is from

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<sup>5</sup> U.S. First Written Submission, para. 21.

<sup>6</sup> With respect to the Agreement on Rules of Origin, for example – while the United States does not agree that Hong Kong, China, has established that the Agreement on Rules of Origin applies to the measures at issue – the United States notes that, while Article 3(a) of the Agreement on Rules of Origin provides for Members to ensure that "they apply rules of origin equally for all purposes as set out in Article 1" after completion of the Harmonized Work Program, Article 2 does not include this language. Similar language was included in negotiating drafts of the Agreement on Rules of Origin, but not the final text. *See* Draft Final Act, MTN.TNC/W/35/Rev.1, pp. 14-15 (US-145).

Hong Kong, China. Rather, the same analysis that would apply to determine the origin of any good from any source applies. This analysis is conducted on a case-by-case basis. If, as a result of this analysis, a finished good is a product of Hong Kong, China, that product would be marked with “China”.

17. For purposes of the U.S. marking statute, the rules by which the country of origin for a particular good are determined depends on the good. In general, in the context of non-preferential trade, CBP regulations (19 CFR part 134) provide that the country of origin for marking purposes is the country of manufacture, production, or growth of an article; further work or material added to an article in another country must effect a substantial transformation in order for the second country to be the “country of origin”. In addition, CBP issues and publishes administrative rulings by which an importer may seek a determination of the country of origin for marking purposes, what terminology would be acceptable marking, and other issues.

### Agreement on Rules of Origin (ARO)

#### QUESTION 5

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

18. As indicated in response to Question 4 (and, again, without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China). The requirement as to what marking is acceptable with respect to a particular country or territory – in particular, for purposes of this dispute, what terminology is used – is distinct from the determination that a specific country is the country of origin for marking purposes.

19. The requirement to indicate a particular country as a country of origin does not necessarily involve a prior determination that that country is the country of origin. The determination of what terminology (marking) is permissible is fundamentally different from, and in turn can be made independently of, a determination that the particular country is the country of origin for goods. The former may involve a political or diplomatic determination as to what is a country, and what is its territory.<sup>7</sup> For example, if Country A considers that territory B is within the boundaries of Country B, and not Country C, it will presumably not consider “Country C” to be acceptable marking with respect to goods from territory B. This is not by virtue of a rule or determination of origin, but a reflection of Country A’s political determination

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<sup>7</sup> To the extent that marking is intended to inform a Member’s consumers, the determination of permissible marking may also be made independently of a determination that a particular country is the country of origin. Rather, it may reflect factors such as the potential to cause confusion among consumers, or the language commonly understood by consumers, among others.

as to the territorial boundaries over which Country B and Country C exercise sovereignty. Country A's political determination in this regard is independent of a determination with respect to the origin of a particular good. The former is the type of determination that Hong Kong, China, challenges, and such a determination is not covered by the Agreement on Rules of Origin.

20. With respect to the measures at issue in this dispute, the *Federal Register Notice* published at 85 FR 48551 (Aug. 11, 2020) does not determine that any country is the country of origin with respect to any particular import. Likewise, Executive Order 13936 does not determine that Hong Kong, China, is or is not the country of origin for any particular purpose. As explained in the U.S. First Written Submission, in Executive Order 13936 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, among other U.S. laws, the marking statute.

#### QUESTION 6

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

21. The United States responds to Questions 6 and 7 together.

#### QUESTION 7

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

22. The United States responds to Questions 6 and 7 together.

23. Without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China, the United States notes that a complainant challenging another Member's measures under the Agreement on Rules of Origin (in this case, Hong Kong, China) has the burden of establishing that the measures at issue are "rules of origin" within the meaning of the Agreement.

24. As discussed in more detail below, the Agreement on Rules of Origin establishes that a "rule of origin" is used to match a good – based on its processing – with a certain territorial region. (The United States provides examples below of the types of processing the Agreement explicitly mentions.) This matching exercise is fundamentally different than a marking decision. In particular, the marking decision is the name – with which the good must be marked – associated with the geographic region. That name is *not* addressed by the Agreement on Rules of Origin. For example, one importing Member may require the marking of a good produced (as specified in its rules of origin) in Hong Kong, China, as "China"; another Member may require a marking as "Hong Kong"; another Member may require a marking as "Hong Kong, China"; another Member may require a marking as "the Hong Kong Special Administrative Region of the People's Republic of China"; another Member may require no marking at all. Each of these

marking decisions is independent of the rules of origin that a Member applies, and not governed by the Agreement on Rules of Origin.

25. Applying that principle here, the United States requires the marking of a good produced in the geographic region of Hong Kong, China, as China. 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. This determination of the appropriate marking or label does not implicate any discipline under the Agreement on Rules of Origin.

26. In Article 1, the Agreement on Rules of Origin by its terms defines “rules of origin” that are subject to the agreement as “laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods . . . .” This definition of “rules of origin” does not include the underlying measure that might require use of a rule of origin, as the EU noted in its third party submission.<sup>8</sup> Rather, the definition captures measures that are “applied . . . to determine” the country of origin of goods. Article 1.2 of the Agreement confirms this distinction, by providing that rules of origin referred to in paragraph 1 include rules of origin “used in the application of,” among others, origin marking requirements.

27. The ordinary meaning of “applied” is “put to practical use”.<sup>9</sup> The ordinary meaning of “determine” is “[f]ix or decide causally, condition as a cause or antecedent, be a deciding or the decisive factor in; decide on, select, choose;” or “[d]efinitely locate, identify, or establish the nature of; ascertain exactly.”<sup>10</sup> Thus, “rules of origin” are the rules that a Member puts to use to decide or ascertain the country of origin of goods for certain purposes.

28. The provisions of Articles 2 and 3 of the Agreement on Rules of Origin confirm that rules of origin within the scope of the Agreement relate to the method or criteria by which origin is determined, and are applied with respect to goods themselves. Article 2(a), for example, disciplines cases in which the following criteria for rules of origin are used: tariff classification, ad valorem percentage, and manufacturing or processing operations. Article 2(c) provides that Members shall not require the fulfillment of a “certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin”; the third sentence of Article 2(c) refers to the ad valorem percentage criterion, for example. Article 2(d) disciplines “the rules of origin that [Members] apply *to imports and exports*,” and provides that they not be more stringent than the rules applied to determine “whether or not a good is domestic” and not discriminate between other Members, “irrespective of the affiliation of the manufacturers *of the*

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<sup>8</sup> EU Third Party Submission, para. 45.

<sup>9</sup> *The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.) (Clarendon Press, 1993), at 100 (US-146)

<sup>10</sup> *The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.) (Clarendon Press, 1993), at 651 (US-147)

*good concerned.*”<sup>11</sup> Article 2(f) disciplines the use of “[r]ules of origin that state what does not confer origin.” These provisions refer to criteria that are applied with respect to a good.<sup>12</sup>

29. Similarly, Article 3(b) provides that, upon implementation of the Harmonized Work Program, Members shall ensure that, “under their rules of origin, the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out.” This provision confirms that rules of origin set out the activity that confers origin with respect to goods. Notably, Article 3 does not suggest that upon completion of the Harmonized Work Program all Members will have made common determinations as to what is a country, or what would be acceptable marking for that country.

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

31. The United States notes that, in the above examples, Country B’s determination of whether the territory of Country A or the territory of Country C has a particular name under a marking requirement is not the product of the application of a rule of origin within the meaning of the Agreement on Rules of Origin. (In the above hypothetical, Country B and Country C may provide the same rule of origin with respect to apples, but require an apple imported from Country A to be marked differently because they have a different name for the territory of Country A.) Furthermore, whether the territory in which the apple was grown is part of Country A, and whether the territory in which the animal feed was processed is part of Country C, also is not part of Country B’s rule of origin. These are political determinations of Country B, and they are not governed by the Agreement on Rules of Origin.

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<sup>11</sup> See *US – Textiles Rules of Origin (Panel)*, para. 6.246 (“In our view, the use of the singular [‘the good concerned’] suggests that, for the purposes of assessing whether there is discrimination ‘between Members’, a comparison should be made between the rule of origin *applicable to a particular good* when imported from one or more Members and the rule(s) of origin applicable to the same good – ‘the good concerned’ – when imported from one or more other Members.”) (emphasis added).

<sup>12</sup> See *US – Textiles Rules of Origin (Panel)*, n. 258 (noting that “provisions like the second sentence of Article 2(c), the first clause of Article 2(d), Article 2(f) and Article 3(a) of the RO Agreement cannot reasonably be read to lay down disciplines for anything other than individual rules of origin [as they apply to individual goods]” as opposed to a “system” for rules of origin).



## QUESTION 8

**To Hong Kong, China: With reference to paragraph 47 of its first written submission, does the Panel understand Hong Kong, China correctly to be arguing that the determination of origin, i.e. the determination that the goods originate in the People's Republic of China, is made in the August 11 Federal Register notice (Exhibit HKG-10/Exhibit USA-7)?**

32. This question is for Hong Kong, China.

## QUESTION 9

**To both parties: In paragraph 296 of its first written submission, the United States argues that "Hong Kong, China, appears to seek a finding that the *Agreement on Rules of Origin* not only disciplines *how* Members determine the country of origin, but also obligates Members to recognize particular claims of sovereignty or territory. Hong Kong, China, would require an importing Member agree with an exporting Member's claims as to territorial boundaries, for purposes of its origin marking requirements. Put simply, this is not a determination that WTO Members agreed to assign to dispute settlement panels." Similarly, in paragraph 6 of its third-party statement Canada states that the determination of what constitutes a country "is not a 'rule of origin' *per se*, and therefore not governed by the ARO. The ARO governs rules that determine whether a product originates in a particular country, not the identification of that particular country."<sup>3</sup>**

- a. **Is the determination of "what constitutes a 'country' for country of origin marking purposes" a question of interpretation of the term "country" in Articles 1 and 2 of the ARO? In this context what is the relevance of the Explanatory Notes to the WTO Agreement, discussed by Hong Kong, China in paragraphs 26 *et al.* of its first written submission and by Canada in paragraphs 7 to 8 of its third-party submission?**
- b. **For purposes of clarifying the meaning of "country of origin" in Article 1.1 of the ARO, is it the Panel's task to clarify the meaning of "country" pursuant to Article 3.2 of the DSU? If not, why not?**

<sup>3</sup> See also Canada's third-party submission, para. 6 and third-party statement, paras. 4 to 7.

33. The United States responds to subparts (a) and (b) of Question 9 together.

34. As a general matter, and without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China, the United States considers that the determination of what constitutes a "country" for purposes of origin marking is not a question of interpretation of the term "country" in Articles 1 and 2 of the Agreement on Rules of Origin.

35. The Agreement on Rules of Origin disciplines the rules by which the origin of a good is determined, as described in the response to Question 5. That is, the Agreement on Rules of Origin disciplines the process by which origin of a particular good is matched to a particular

geographic area, and does not mandate that a Member under its marking rules use a particular label for that geographic region. Thus, a Member may find that a specific country name is the appropriate marking, regardless of how the term “country” is defined. As such, Article 3.2 of the DSU does not task the Panel with clarifying the meaning of “country” within Article 1.1 of the Agreement on Rules of Origin.

36. The Agreement on Rules of Origin does not define what “country” means for purposes of the Agreement. While the Explanatory Notes provide that the term “country” is understood to include a separate customs territory, this does not mean that a separate customs territory needs to be the label required under the marking rules of a Member, or that any particular term needs to be used to identify that territory. The Agreement on Rules of Origin simply does not govern questions of the nomenclature or territorial boundaries of a “country.”

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

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

37. The United States responds to subparts (c) and (d) of Question 9 together.

38. The United States notes that the measures at issue involve the terminology used for marking goods produced in the geographic area Hong Kong, China. While decisions regarding marking could reflect decisions as to territory (for example, the marking permitted with respect to a good produced in a disputed territory), the U.S. measures at issue do not themselves address the territorial boundaries of Hong Kong, China.

39. Without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China, the United States considers that the disciplines set out in Articles 1 and 2 do not limit the manner in which Members must recognize territorial boundaries of other Members. As explained in the response to Question 6, Articles 1 and 2 define rules of origin as rules “applied . . . to determine the country of origin of goods”, including rules “used . . . in the application of” certain instruments.

40. With respect to Article IX:1, the United States notes that it does not use the term “country or “country of origin”, much less offer a definition of that term. In addition, Article IX:1 disciplines the “treatment” accorded to “products” with respect to marking requirements. (In contrast, Article IX:2 refers to “the commerce and industry of exporting countries.”) Thus, for example, a requirement that the products of one Member be marked in a certain way – such as etching on the product itself, while products from other Members need not be so marked, might be shown to constitute less favorable treatment for purposes of Article IX:1, if the requirement modified the conditions of competition with respect to that product. But this is a

function of the treatment to which the product is subject, not whether the Member at issue is a “country”, or what “country” the territory in which the goods originate belongs to.

41. In addition, the United States notes that, as recognized by previous dispute settlement reports, marks of origin serve the legitimate purpose of providing information regarding origin to consumers.<sup>13</sup> In that regard, the United States questions whether – if a Member has made a determination regarding the autonomy or territory of a country, for example – a mark of origin that indicates to the contrary would in fact serve the purpose of conveying information to its consumers.

#### QUESTION 10

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

42. The United States understands this question to ask under what circumstances a determination of the country of origin would breach a specific article of the Agreement on Rules of Origin. Without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China: as noted in the responses to Questions 6 through 9, the Agreement on Rules of Origin does not require a Member to confer a certain origin. The Agreement on Rules of Origin does not include any obligation providing for outcomes of the determination of a country of origin; rather, it has explicit disciplines, none of which are implicated by the marking requirement at issue.

43. Under Article 1 of the Agreement, the rules of origin applied to determine origin are not “wrong,” or “incorrect” in some normative sense. Rather, such determinations are only inconsistent with the Agreement if they breach a specific provision of the Agreement that sets forth disciplines for rules of origin as defined by Article 1.

44. Hong Kong, China, alleges that the measures at issue are inconsistent with Articles 2(c) and 2(d) of the Agreement on Rules of Origin. Neither of those provisions implicates the U.S. measures at issue. In paragraph 30 of its first written submission, Hong Kong, China, asserts that Article 2(c) requires that a “mark of origin must *correctly* indicate the country of origin when conditions relating exclusively to manufacturing or processing are taken into account”. But Article 2(c) disciplines rules of origin “themselves”; it does not establish that a specific country is the “correct” country of origin, nor does it require a specific mark be used to identify that country.

45. By way of hypothetical, an example of the fulfilment of a certain condition not related to manufacturing or processing under Article 2(c) would be a rule of origin that requires a particular nationality of company ownership, or a requirement that a good be certified by several authorities through a time consuming process in the exporting country in order to be declared as originating in that country. What is “wrong” or “incorrect” in those circumstances is the rule

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<sup>13</sup> See, e.g., *Australia – Plain Packaging (Panel)*, paras. 7.3003; *US – COOL (AB)*, para. 445.

that requires those conditions, regardless of what country is determined to be the origin as the result of the rule. Proper application of a rule of origin consistent with the Agreement on Rules of Origin might result in the same country being the country of origin as application of the “wrong” rule.

46. Similarly, Article 2(d) provides that “rules of origin” (as defined by Article 1) “appl[ie]d to imports and exports” may not discriminate between other Members. Article 2(d) does not establish that a specific country (or Member) must be the “correct” country of origin, nor does it require a specific mark be used to identify that country (or Member).

47. Other provisions of the Agreement on Rules of Origin itself confirm that the Agreement does not provide for outcomes with respect to the determination of the country of origin. The Agreement on Rules of Origin provides for changes to origin regimes (Article 2(i)), and allows varying origin criteria to be used until harmonization is completed (compare Article 2(a) with Article 3(b)). This means that the results of a Member’s application of a rule of origin will not necessarily be the same over time, nor would it lead to the same origin determination as that of another Member. These provisions confirm that the Agreement on Rules of Origin does not require a specific outcome (e.g., the “correct” outcome) with respect to the country of origin.

#### QUESTION 11

**To both parties: Canada argues that the [ARO] provisions at issue in this dispute "do not discipline or dictate what the actual country of origin of a good must be".<sup>4</sup> Please comment.**

<sup>4</sup> Canada's third-party submission, para. 6.

48. Without prejudice to the U.S. position that, in light of the U.S. invocation of Article XXI(b), the Panel should not reach the merits of the claims by Hong Kong, China, the United States agrees with Canada, for the reasons explained in responses to Questions 5 through 7 and 9 above. The Agreement on Rules of Origin provides disciplines with respect to the rules that are applied to determine origin. It does not require a Member to reach a specific outcome, that is, to determine that a specific country is the country of origin with respect to a particular good, and even more than this – the Agreement simply does not address the label to be used for that country under a marking requirement.

#### Agreement on Technical Barriers to Trade (TBT Agreement)

#### QUESTION 12

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

49. Annex 1.1 of the TBT Agreement defines a technical regulation as:

Document which lay down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with

terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

*Explanatory note*

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called “building block” system.

50. Hong Kong, China, bears the burden of establishing that the measures at issue in this dispute constitute a “technical regulation” as set forth in Annex 1.1, that is, showing how the measures at issue meet those elements.<sup>14</sup> Hong Kong, China, has not met this burden. Hong Kong, China, merely asserts that 19 U.S.C. § 1304, part 134 of CBP’s regulations, and “rulings and notices relating thereto” is a “technical regulation” because it is a “marking requirement” that “applies to a product” and that the U.S.-Hong Kong Policy Act, Executive Order 13936, and the August 11 *Federal Register* notice “form part” of the marking requirement.<sup>15</sup>

51. Furthermore, with respect to the reference to “rulings and notices relating to” 19 U.S.C. 1304 or part 134 of CBP regulations, the United States notes that “rulings and notices relating to” 19 U.S.C. 1304 or part 134 are not identified in the panel request by Hong Kong, China, and accordingly not within the terms of reference. In addition, a measure that has not even been identified cannot be shown to meet the definition of a technical regulation set forth in Annex 1.1. Hong Kong, China, makes no effort to demonstrate how the content of each of these various unidentified measures and instruments is a 1) document 2) which lays down product characteristics or their related processes and production methods 3) with which compliance is mandatory.<sup>16</sup>

### QUESTION 13

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

52. This question is for Hong Kong, China.

### QUESTION 14

**To both parties: Without prejudice to the parties' respective views on the applicability of Article XXI of the GATT 1994 to the TBT Agreement, could essential security interests be**

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<sup>14</sup> See also Canada’s Oral Statement, para. 9 (noting that “Hong Kong has the burden of articulating how the country of origin labelling or marking measure at issue sets out a product characteristic or applies to a product and is therefore a ‘technical regulation’.”)

<sup>15</sup> First Written Submission of Hong Kong, China, paras. 52-53.

<sup>16</sup> Annex 1.1 of the TBT Agreement.

**taken into account in assessing whether the revised origin marking requirement results in less favourable treatment under Article 2.1 of the TBT Agreement?**

53. Without prejudice to the U.S. position on the applicability of Article XXI, the assessment of whether a measure accords less favorable treatment would take into account security interests<sup>17</sup> – if applicable to the circumstances – in assessing whether a measure is accorded less favorable treatment for purposes of Article 2.1 of the TBT Agreement.<sup>18</sup> Indeed, Article 2.2 of the TBT Agreement explicitly recognizes that security interests, i.e., “national security requirements”, are among the legitimate regulatory objectives contemplated by the TBT Agreement. Therefore, in the context of an Article 2.1 analysis of whether a measure accords “less favorable” treatment, security interests may be taken into account.

54. There are two approaches before the Panel – the correct one, and the Appellate Body’s flawed one – for assessing this element of Article 2.1. Under both approaches, security interests (if applicable) can and should be taken into account. Both approaches take regulatory purposes and objectives of the disputed measures into consideration. Therefore, if the regulatory purpose or objective of the measure is for the protection of security interests, or if the factual circumstances indicate that the measure is for the protection of security, then a panel cannot ignore these purposes or factual circumstances in its assessment of whether the measure accords less favorable treatment.<sup>19</sup>

55. The proper approach is based on the ordinary text of Article 2.1. A measure may, on its face, treat imported products less favorably than other like foreign products (or treat foreign products less favorably than domestic products). Where the measure does not, sufficient facts would be needed to demonstrate that the measure treats certain imports less favorably than other like foreign product (or domestic like products).

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<sup>17</sup> The United States uses the term “security interests” for purposes of this response. Article XXI(b) uses the term “essential security interests”, and, as the United States has explained, the scope of a Member’s “essential security interests”, and whether a measure is necessary to protect those interests, is a matter to be decided by the Member adopting the measure.

<sup>18</sup> The United States notes that the European Union and Singapore suggested that the textual basis for taking into account essential security interest in the interpretation of the operative TBT provisions is in the seventh recital of the preamble. *See* European Union’s Written Submission, para. 52 and Singapore’s Oral Statement, para. 9. However, the United States maintains that the purpose served by the seventh recital is that it supports the conclusion that Article XXI(b) is applicable to claims made under the TBT Agreement. *See* U.S. First Written Submission, paras. 299-302. Recourse to the seventh recital is not necessary in order to take into account “essential security interest” in the interpretation of the operative provisions of the TBT Agreement; the TBT Agreement specifically recognizes security concerns as a regulatory objective.

<sup>19</sup> U.S. First Written Submission, paras. 39-40. The United States explains in the response to Question 16(c) how “essential security interest” referred in the seventh recital is in reference to the “essential security interest” in Article XXI.

56. Similar to Article III:4 of the GATT 1994,<sup>20</sup> which also uses the term “no less favorable” in the context of national treatment, Article 2.1 does not forbid Members from making regulatory distinctions between different products that may fall within a single group of “like products”.<sup>21</sup> Nor does Article 2.1 prohibit measures that may result in some detrimental impact on the concerned imports as compared to other foreign like products. Instead, 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*.

57. That is, when based on an overall evaluation and assessment of the facts and circumstances, if it is found that there is detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and if that detrimental impact is based on the administration of an origin-based discrimination, then the element of “less favorable treatment” can be established. However, if the detrimental impact can be explained on the basis of origin-neutral factors, then those circumstances are indicative of non-discrimination.

58. The question of whether any detrimental impact is based on factors not relating to the origin of the products in question is one that should be answered taking all relevant facts into account. A panel would evaluate this as part of the overall assessment of whether a measure modified the conditions of competition. For example, if the regulatory purpose invoked bears a rational relationship to the measure at issue, this would be indicative of non-discrimination. Similarly, if the measure is apt to advance the regulatory purpose identified by the regulating Member, this too would be indicative of non-discrimination. In such a situation, the claim fails to establish that the measure at issue accords “less favorable” treatment.

59. It is incumbent on the complainant to establish detrimental impact in establishing a *prima facie* case. This is a fact-intensive exercise – and one that Hong Kong, China, glosses over in its written submission and oral statements. Even if the complainant (in this case, Hong Kong, China) demonstrates detrimental impact, the panel would then have to take into account the regulatory purpose of the disputed measures and whether the impact is rationally related to an origin-neutral regulatory purpose.

60. In this current dispute, the United States has made very clear in its First Written Submission and oral statements that the purpose of the disputed measures is for the protection of U.S. essential security interests. The measures at issue reflect the determination that Hong Kong, China is no longer sufficiently autonomous with respect to the People’s Republic of China for

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<sup>20</sup> Based on the plain text, Article 2.1 mirrors Article III:4 of the GATT 1994, where both requires a complainant to show three elements: (1) that the measures falls within the scope; (2) that the products are like, and (3) that treatment accorded to the concerned import is less favorable than that accorded to like domestic product or another like foreign product. *Compare US – Clove Cigarettes (AB)*, para. 87 and *US – Tuna II (Mexico) (AB)*, para. 202, with *Korea – Beef (Panel)*, para. 617.

<sup>21</sup> See *EC – Asbestos (AB)*, para. 100 (“[A] Member may draw distinctions between products which have been found to be “like” without, for this reason alone, according to the group of “like” *imported* products “less favorable treatment” than that accorded to the group of “like” *domestic* products.”); *Korea – Beef (AB)*, para. 136.

purposes of U.S. law, including the marking statute, and that the situation with respect to Hong Kong, China, is a threat to U.S. security. The basis for this determination, among other things, includes findings with respect to the human rights and freedoms of the people in Hong Kong, China, and the erosion of the democratic institutions that was promised by the Sino-British Declaration, which the United States views as relevant to its essential security interests.<sup>22</sup> U.S. concerns for human rights, fundamental freedoms, and democratic norms are all origin-neutral factors, i.e., concerns that are not exclusively or applicable to only Hong Kong, China.

61. Under a second approach, which has been put forward by other third parties<sup>23</sup> and used by the Appellate Body in certain disputes,<sup>24</sup> security interests could similarly be taken into account when assessing whether the measure accords less favorable treatment.

62. Under this approach, it must first be established that there is detrimental impact to the conditions of competition, and second, a panel must then further analyze whether such detrimental impact stems exclusively from a legitimate regulatory distinction. The United States does not agree with the second element. In simple terms, under this approach, any detrimental impact could constitute a breach of Article 2.1 not because the impact is related to the origin of the product, but because the measure was not designed to eliminate all detrimental impact not exclusively related to the regulatory distinction. The United States considers this interpretation as inconsistent with the plain text of Article 2.1.

63. Nonetheless, for purposes of answering this question, similar to the reasoning set out under the U.S. approach, security interests can be taken into account in assessing whether the detrimental impact from a measure – assuming such impact has been established – stems exclusively from a legitimate regulatory distinction.

#### QUESTION 15

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

64. To be clear, the United States does not submit that “an origin-based distinction would exclude any consideration of the aim/objective of the measures for purposes of assessing the claim under Article 2.1 of the TBT Agreement.” Instead, the United States considers that, if detrimental impact can be explained on the basis of origin-neutral factors or is rationally linked to a regulatory purpose or objective that is origin-neutral, then those circumstances are indicative of non-discrimination. In other words, if the measure is based solely on origin-based discrimination, with no other regulatory purpose or objective that is origin-neutral that can

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<sup>22</sup> U.S. Opening Statement, para. 5.

<sup>23</sup> Canada’s Oral Statement, para. 10; EU’s Third Party Written Submission, para. 52.

<sup>24</sup> See *US – Clove Cigarettes (AB)*, para. 174; *US – Tuna II (Mexico) (AB)*, para. 215; *US – COOL (AB)*, para. 271.



explain the detrimental impact, then such a measure would be inconsistent with Article 2.1 of the TBT Agreement.

65. Furthermore, an origin-based distinction by itself may not necessarily lead to treatment that is “less favorable” per the plain meaning of the text of Article 2.1. A complainant must still demonstrate how such origin-based distinction is less favorable. The United States observes that any mark of origin requirement makes a distinction based on origin. But this is not a breach of any WTO agreement. In fact, such origin marking is *explicitly contemplated* under Article IX of the GATT 1994.

66. As discussed above, and without prejudice to the U.S. position on the applicability of Article XXI to the TBT Agreement, the regulatory purpose and objective of the measure at issue is the protection of U.S. essential security interests, in light of the determination that Hong Kong, China, is no longer sufficiently autonomous for purposes of certain U.S. laws. That determination is based on factors that include concerns regarding the human rights, fundamental freedoms, and democratic participation of the people of Hong Kong, China. Those are not factors based solely on origin.

#### QUESTION 16

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

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

67. The United States agrees with Canada that the complainant bears the burden of proof in establishing all elements of a *prima facie* case that a respondent has violated Article 2.1 of the TBT Agreement.<sup>25</sup> That is, the burden of proof rests on the complaining party to prove its affirmative claims.<sup>26</sup> As such, to prove its Article 2.1 claim, the complainant must put forward

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<sup>25</sup> As discussed in the U.S. response to Question 14, the United States does not agree that the second element as put forward by certain third parties and by the Appellate Body in certain disputes – that the detrimental impact stem exclusively from a legitimate regulatory distinction – is part of Article 2.1 analysis. For purpose of being responsive to the Panel’s inquiry in Question 16, the United States provides comments with respect to paragraph 14 of Canada’s statement that the complainant bears the burden of proof in establishing the first element of detrimental impact and the second element of whether such impact stems exclusively from a legitimate regulatory distinction. However, the U.S. position that the complainant has the burden of proof in establishing all elements of a *prima facie* case equally applies to what the United States considers the proper analytical approach regarding Article 2.1. That is, the complainant must show that there is detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and that such detrimental impact is based on the administration of an origin-based discrimination, that is, address how the regulatory purposes and objectives, as well as the factual circumstances, are not rationally linked to that detrimental impact.

<sup>26</sup> See, e.g., *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 (“[T]he burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it

evidence and argument sufficient to establish a *prima facie* case on each element of its claim. Only if the complainant has done so does the burden shift to the United States as respondent.<sup>27</sup>

68. Accordingly, regardless of which approach discussed in Question 14 is followed (although as noted one of these is plainly incorrect), Hong Kong, China, must establish a *prima facie* case with evidence and argument “that the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country.”<sup>28</sup>

69. In response to follow-up questions from the Panel, Hong Kong, China, tried to evade its burden of making a *prima facie* case by complaining that it would be “difficult” to take into account essential security interest in assessing a breach of Article 2.1 claim given the U.S. position with respect to Article XXI of the GATT 1994 that it is self-judging. That is precisely the U.S. point. Even if justiciable – which it is not – for a complaining party to argue against one Member’s assertion of essential security interests is difficult because it should be. These are political matters not amenable to WTO dispute settlement. And certainly, the solution is not – as Hong Kong, China, appears to argue – that the complainant’s burden of proof is lower because security is involved.

70. Moreover, the allocation of the burden of proof does not depend on how difficult it is for the complainant to prove its case – as explained in a previous report, “the complainant must prove its claim” regardless of the “degree of difficulty” of doing so.<sup>29</sup> If the complainant fails to

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establishes a *prima facie* case by putting forward adequate legal arguments and evidence.”); *EC – Hormones (AB)*, para. 98 (“The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.”); *US – Wool Shirts and Blouses (AB)*, p. 14 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.”).

<sup>27</sup> *US – Tuna II (Mexico) (AB)*, para. 216.

<sup>28</sup> *US – Tuna II (Mexico) (AB)*, para. 216 (“In the context of Article 2.1 of the TBT Agreement, the complainant must prove its claim by showing that the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country.”); *US – COOL (AB)*, para. 272 (“With respect to the burden of proof under Article 2.1, the Appellate Body found in *US – Tuna II (Mexico)* that, as with all affirmative claims, it is for the complaining party to show that the treatment accorded to imported products is less favourable than that accorded to like domestic products.”).

<sup>29</sup> *EC – Sardines (AB)*, para. 281 (“The *degree of difficulty* in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of

meet its burden of proof in the initial step, the panel must decide in favor of the respondent. A panel may not relieve a party of its burden and make a prima facie case for one of the parties.<sup>30</sup> To do so constitutes error.<sup>31</sup>

71. Furthermore, Article XXI(a) provides that Members shall not be compelled to “furnish any information the disclosure of which it considers contrary to its essential security interest.” As such, a panel might have limited information on which to consider the essential security interests involved. Nonetheless, the United States notes that, without prejudice to its view that a Member invoking Article XXI(b) satisfies its burden by making that invocation, in this dispute, the measure on its face identifies essential security interests. Specifically, based on various findings and concerns regarding the rights and freedoms of the people of Hong Kong, China, the United States has determined that Hong Kong, China, is no longer sufficiently autonomous to warrant differential treatment vis-à-vis the People’s Republic of China.<sup>32</sup> The United States has further articulated certain of those interests in its submissions and oral statements to the Panel. That is, “the United States has long valued the fundamental freedoms and human rights of the people of Hong Kong, China, and considered the continued existence of those freedoms and human rights after the resumption of sovereignty by the People’s Republic of China to be relevant to U.S. interests . . . [and the] United States has determined the situation with respect to Hong Kong, China, to be a threat to its essential security.”<sup>33</sup> Again, without prejudice to the U.S. position that the Panel should not reach the merits of the claims by Hong Kong, China, were the

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Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. *But, in both of those situations, the complainant must prove its claim.* There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.” (emphasis added).

<sup>30</sup> See *Japan – Agricultural Products II (AB)*, para. 129 (“Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on the specific legal claims asserted by it.”); see also *US – Gambling (AB)*, para. 282 (“[A] panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so.”).

<sup>31</sup> See *US – COOL (AB)*, para. 469 (“[W]e agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof.”).

<sup>32</sup> See Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2) (“Under this law, the people of Hong Kong may face life in prison for what China considers to be acts of secession or subversion of state power—which may include acts like last year’s widespread anti-government protests. The right to trial by jury may be suspended. Proceedings may be conducted in secret. China has given itself broad power to initiate and control the prosecutions of the people of Hong Kong through the new Office for Safeguarding National Security. At the same time, the law allows foreigners to be expelled if China merely suspects them of violating the law, potentially making it harder for journalists, human rights organizations, and other outside groups to hold the PRC accountable for its treatment of the people of Hong Kong.”)

<sup>33</sup> U.S. Oral Statements, para. 5.

Panel nonetheless to do so, all of those statements and facts should form part of the Panel's consideration.

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

72. As mentioned in response to Question 14, the purpose served by the recitals in the preamble is that they support the conclusion that Article XXI(b) is applicable to claims made under the TBT Agreement.<sup>34</sup> Because the recitals set forth the object and purpose of the Agreement, any interpretation of the Agreement's provision should be made in light of this object and purpose.

73. The seventh recital states, "[N]o country should be prevented from taking measures necessary for the protection of its essential security interest". As discussed in the U.S. First Written Submission, the ordinary meaning of "its essential security interest" is by nature a political question that can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances.<sup>35</sup> Therefore, if a Member invokes its essential security interest pursuant to Article XXI(b) of the GATT 1994, as part of assessing the less favorable treatment element of Article 2.1, the panel should note such invocation and make a single finding that the responding member had invoked its essential security interest.<sup>36</sup>

74. The sixth recital states, "[N]o country should be prevented from taking 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," but "subject to" certain requirements. In particular, the sixth recital includes language indicating that those measures are subject to GATT Article XX chapeau-like conditions and should be "otherwise in accordance with the provisions" of the TBT Agreement. This last clause additionally highlights the key difference between sixth and seventh recitals, and parallels key differences between Articles XX and XXI, in particular that the latter is not subject to the same qualifications as those set forth in the Article XX chapeau.

**c. how would such an examination compare to an examination of the same interests in Article XXI(b) of the GATT 1994? In this regard, please consider the European Union's submission that there are textual differences between the 7th recital of the preamble of the TBT Agreement and Article XXI(b). Specifically, there are no sub-paragraphs describing specific situations in the 7th recital, and the terms "which it considers" are missing from that recital<sup>5</sup>;**

<sup>5</sup> European Union's third-party submission, para. 51.

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<sup>34</sup> See U.S. First Written Submission, paras. 299-302.

<sup>35</sup> U.S. First Written Submission, paras. 39-40.

<sup>36</sup> See U.S. First Written Submission, paras. 321-327.

75. As discussed in the response above, the preamble reflects the object and purpose of the Agreement, and does not contain operative provisions. It would be plain legal error to treat the preamble in the same way as the Article XXI exception, which is an operative provision. More specifically, the suggestion that one should draw conclusions from a close comparative reading of preambular language and an operative provision is senseless. By its very nature, preambular language is less detailed and less specific than an operative provision. And that is all one can conclude from comparing the TBT Agreement preamble to the text of Article XXI of the GATT 1994.

76. The operative provision in the Annex 1A agreements that addresses the invocation of essential security interests is located in Article XXI of the GATT 1994. Specifically, Article XXI(b) is the only provision that provides guidance as to a Member’s invocation of its essential security interests (that a Member may take action that it considers necessary for the protection of its essential security interests if it considers the situations described in the subparagraphs to be present). As the United States has explained in its First Written Submission, the addition of the term “essential security interest” used in the TBT Agreement dates back to the Tokyo Round, and it was specifically contemplated that the preamble should “refer” to the exception articles of the GATT.<sup>37</sup> So the negotiating history of the seventh recital suggests that “essential security interest” was meant to refer to the “essential security interest” in Article XXI of the GATT. Furthermore, there is no indication in the negotiating history to suggest that the drafters intended that the “essential security interest” in the preamble was meant to refer to a narrower set of interest than those in Article XXI.

77. Hence, the language “any action which it considers necessary for the protection of its essential security interest” used in Article XXI of the GATT 1994 serves as context for interpreting “measures necessary for the protection of its essential security interest” in the seventh recital. The ordinary meaning of “any” “action” implies that such action could include (but not be limited to) measures within the scope of the TBT Agreement. That is, the “measures necessary” in the seventh recital of the TBT Agreement fall under the scope of “any action which it considers necessary” in Article XXI.

78. The negotiating history of Article XXI supports this understanding. As discussed in the U.S. First Written Submission,<sup>38</sup> the predecessor provisions of Articles XX and XXI were originally included in a single provision with each other in the draft Havana Charter, but they were then split into two separate articles in the Charter. The draft single provision including the predecessor provisions of Articles XX and XXI were included in Chapter V, which related to “general commercial policy”.<sup>39</sup> However, the predecessor to Article XXI was separated into a separate article, in a separate chapter, and was intended to apply to the Charter as a whole.<sup>40</sup>

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<sup>37</sup> U.S. First Written Submission, paras. 310-318.

<sup>38</sup> U.S. First Written Submission, paras. 81-87.

<sup>39</sup> U.S. First Written Submission, para. 83; Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947) (US-23).

<sup>40</sup> U.S. First Written Submission, paras. 86-87.

Hence, the usage of the phrase “any action it considers necessary” should be broadly interpreted as actions that include (but are not limited to commercial measures), and TBT measures are subsumed by the broader term “any action which it considers necessary.”

79. Turning back to the fact that the preamble does not contain detailed, precise wording, as contained in Article XXI of the GATT 1994, this is to be expected for a preambular provision. Rather, the seventh recital reflects Members’ recognition of their rights to take actions; the fact that Members did not repeat the entirety of the substance of Article XXI(b) in the recital does not mean that they were recognizing some other or lesser right. Furthermore, just because the recital does not use the precise language of Article XXI does not sever the connection between the recital and Article XXI(b). That is, the “essential security” measures referred in the recital are meant to refer to those invoked under Article XXI(b).

80. Furthermore, with regard to the subparagraphs, as the United States explained in its First Written Submission, the subparagraphs in Article XXI(b) of the GATT 1994 serve as a guide for the invoking Member, and there is no requirement for the United States (or any Member who chooses to invoke Article XXI) to identify which subparagraph it is invoking.<sup>41</sup> Moreover, as explained in the U.S. response to Question 63, Members need not establish the applicability of the subparagraphs when invoking Article XXI(b). Because the seventh recital is a clear reference to Article XXI(b), a Member would look to the subparagraphs as guidance in exercising its rights to take an action it considers necessary for the protection of its essential security interests.

**d. how would such an examination compare to the necessity test carried out in respect of "national security requirements" in Article 2.2 of the TBT Agreement. In this context, what is the relevance, if any, of this term, as used in Article 2.2, to the assessment of a claim under Article 2.1?**

81. The Panel’s question involves two entirely different scenarios. On the one hand, where a Member invokes Article XXI because the Member considers an action “necessary for the protection of its essential security interests,” the matter is not subject to examination in WTO dispute settlement. Rather, in those circumstances, the Panel’s role is limited to noting that the Member has invoked Article XXI.

82. The other scenario addressed in the Panel’s question is whether a measure within the scope of the TBT Agreement is based – in whole or in part – on security objectives, but where the Member adopting the measure has not invoked Article XXI. In this case, the regulatory objective related to security would be evaluated under the TBT Agreement framework as would any other regulatory objective.

83. With respect to “relevance” between the examination of a claim under Article 2.1 and the language “national security requirement” in Article 2.2, as the United States explained above in Question 14, the inclusion of the term “national security requirements” in the illustrative list in

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<sup>41</sup> U.S. First Written Submission, paras. 41-46.

Article 2.2 confirms that security interests are among the regulatory objectives contemplated by the TBT Agreement.

## GATT 1994

### QUESTION 17

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

84. Article IX:1 provides, “Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country”. Under the customary rules of treaty interpretation as provided for in the DSU, interpretation of Article IX of the GATT 1994 should be based on its plain text, in its context, and in light of the object and purpose of the agreement. As the complainant in this dispute, Hong Kong, China, has the burden of establishing each of the elements of a claim under Article IX:1 with respect to the measures at issue.

85. One distinction between “less favorable treatment” under Article IX:1 and “less favorable” treatment under Article 2.1 of the TBT Agreement is that Article IX:1 does not provide an obligation to provide “no less favorable” treatment to the treatment provided to domestic products.

86. In addition, the treatment in question for purposes of Article IX:1 must be “with regard to marking requirements”. The ordinary meaning of “marking” is “the action of MARK, v[er]b; an instance of this”; the relevant ordinary meaning of “mark” is “a sign, a token, an indication”, or “[a] stamp, seal, label, inscription, etc. on an article, identifying it or indicating its ownership, origin, good quality, etc.”<sup>42</sup> The ordinary meaning of “requirement” is “something called for or demanded; a condition which must be complied with”.<sup>43</sup> As such, Article IX:1 disciplines the treatment of products of one Member vis-à-vis the products of other Members with respect to conditions of the action of marking that must be complied with; it does not prohibit (and indeed condones) a requirement that imported goods be marked with origin. Rather, Article IX:1 requires a Member to provide the products of one Member treatment “no less favorable” with respect to marking requirements than it does the products of other Members.

87. For both Article IX:1 of the GATT 1994 and Article 2.1 of the TBT Agreement, the fact that a measure may provide for *different* treatment does not necessarily mean that it provides for

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<sup>42</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1700, 1698 (US-159).

<sup>43</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2557 (US-160).

*less favorable* treatment.<sup>44</sup> Like Article III:4 of the GATT 1994, Article IX:1 is directed to preventing discrimination on the basis of origin. As certain past reports analyzing measures alleged to breach Article III:4 have correctly found, a measure does not “modify[y] the conditions of competition in the relevant market to the detriment of imported products,” if the alleged detriment is explained by factors unrelated to the foreign origin of the product.<sup>45</sup>

88. The repetition of the basic “no less favorable treatment” principle in different agreements underscores the overlapping nature of the claims asserted by Hong Kong, China. In this instance, Hong Kong, China, claims that the disputed measure is a marking requirement, disciplined both under Article IX:1 of the GATT 1994 and Article 2.1 of the TBT Agreement, and its claim under both provisions is a non-discrimination claim.<sup>46</sup> Therefore, analysis as to whether the elements of non-discrimination have been established under both provisions should be the same.

89. In this regard, under the incorrect interpretation that Article XXI does not apply to Article 2.1 of the TBT Agreement, if Article XXI(b) is invoked as pertaining to a marking requirement, while being applicable to an MFN claim under Article IX:1 of the GATT 1994, it would somehow not be applicable to principally the same MFN claim under Article 2.1 of the TBT Agreement.<sup>47</sup> There is no logical basis for concluding that Members tolerate “less favorable” treatment with respect to marking requirements for purposes of Article IX:1 of the GATT 1994, but not “less favorable treatment” with respect to the same measures under an MFN provision in another trade in goods agreements.<sup>48</sup>

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<sup>44</sup> *Thailand – Cigarettes (AB)*, para. 128 (citing *Korea – Beef (AB)*, para. 137). As 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.

<sup>45</sup> See *Dominican Republic – Cigarettes (AB)*, para. 96 (finding that “the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case” (italics added); *Korea – Beef (AB)*, para. 144; *Mexico – Soft Drinks (Panel)*, para. 8.118.

<sup>46</sup> Hong Kong, China, also claims that the disputed measure is a rule of origin disciplined under Article 2(a) of the Agreement on Rules of Origin, which is likewise a non-discrimination claim, and Article 2(c) in that the alleged discrimination is a factor unrelated to manufacturing or processing. That is, all of the claims by Hong Kong, China, under the agreements at issue overlap.

<sup>47</sup> See *China – Publications and Audiovisual Products (AB)*, para. 229 (“In our view, the introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China’s trading rights commitments”).

<sup>48</sup> Similarly, there is no basis for finding that a marking requirement as to which Article XXI(b) is invoked would be accepted with respect to an MFN claim under Article IX:1 of the GATT, but not with respect to the alleged discrimination under Article 2(c).



## QUESTION 18

**To both parties: Hong Kong, China describes as less favourable treatment, under Article IX of GATT 1994, treatment where "goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin".<sup>5</sup> In this regard, please comment on the following:**

- a. Under what circumstances would a country indication on an origin mark be wrong or incorrect. In particular, does an origin mark, in order to be consistent with Article IX, have to indicate the "actual" country of origin?**
- b. On what basis does a Member determine what the "actual" country of origin is?**
- c. What is the relevance of the 1958 GATT Decision referred to by Hong Kong, China in paragraph 74 of its first written submission?**
- d. On what basis should a Member determine what the correct "full English name" of a country is?**

<sup>5</sup> Hong Kong, China's First Written Submission, para. 72.

90. The United States responds to subparts (a) through (d) of Question 18 together.

91. As reflected in the Panel's question, the United States understands the claim by Hong Kong, China, under Article IX:1 of the GATT 1994 to be that "the measures at issue accord less favourable treatment to goods of Hong Kong, China, in respect of marking requirements because the United States does not determine the country of origin of goods imported from Hong Kong, China, in the same manner that it determines the country of origin of like products imported from other Members, with the result that goods imported from Hong Kong, China, may not be marked with the full English name of their actual country of origin."<sup>49</sup>

92. Thus, the issues in this dispute do not involve the abstract question of whether an origin mark could be "wrong" or "incorrect." The claim by Hong Kong, China, under Article IX:1 is that the United States does not determine the country of origin with respect to goods of Hong Kong, China, "in the same manner" as it determines the origin of goods from other WTO Members. Although this question may not be examined by the Panel in light of the U.S. invocation of Article XXI of the GATT 1994, the record clearly shows that Hong Kong, China, has made no such showing. Rather, nothing in the record indicates that the United States determines country of origin for Hong Kong, China, in a manner different than for any other WTO Member. Instead, the U.S. measures at issue simply involve the specification for a marking of the goods of Hong Kong, China, with which Hong Kong, China, is dissatisfied. And

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<sup>49</sup> First Written Submission of Hong Kong, China, para. 72.

dissatisfaction with the mark chosen by the United States would not amount to a breach of the WTO Agreement.

93. Further, Article IX:1 does not use the term “actual” country of origin, nor *a fortiori* a definition of such a concept or any related criteria.<sup>50</sup>

94. For those reasons, the Report by the Working Party as adopted by the Contracting Parties at their meeting of 21 November 1958 (referred to in subpart c) , is not relevant to the issues in this dispute. The treaty provisions at issue – including Article IX:1 of the GATT 1994 – by their terms do not require a Member to use a particular mark to identify a country, or purport to define what the “actual” country of origin is or how that would be determined.

#### QUESTION 19

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

95. Article I:1 of the GATT 1994 provides, in relevant part, “[W]ith respect to all rules and formalities in connection with importation and exportation . . . any advantage . . . granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members”.

96. Hong Kong, China, has not established as a factual matter what it characterizes as an “advantage”; for example, it has not shown that any particular mark provides more favorable competitive opportunities or affects the competitive relationship” when compared to imports of other like foreign products.

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

#### QUESTION 20

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

97. As the United States noted in its oral statement, the Panel need not make a finding that the Article XXI(b) exception applies to each and every provision of the Annex 1A Agreements.

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<sup>50</sup> With respect to the “manner” in which the United States determines origin for marking purposes, although Hong Kong, China, takes issue with the U.S. determination regarding the lack of autonomy, Hong Kong, China, provides no evidence that the United States does not otherwise consider autonomy or similar factors for purposes of what marking is permissible.

While the structure of the WTO Agreement would support such a finding, it is not an issue that the Panel needs to address in order to resolve the issues in this dispute.

98. Rather, the “subject” of this interpretative exercise 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. That is an interpretive inquiry that the Panel must conduct on a case-by-case basis.

99. The United States has outlined the specific steps to reach that result in the present case in its First Written Submission.

100. To summarize, as part of customary rules of treaty interpretation, the Panel should look to the single undertaking structure of the WTO Agreement, which provides context to the application of Article XXI(b) to the specific claims. The WTO Agreement comprises several annexes, three of which are each an integral part of the Agreement. Each of those three annexes (Annex 1A on trade in goods, Annex 1B on trade in services, and Annex 1C on trade-related intellectual property rights) recognizes that Members have the right to take action they consider necessary to protect their essential security interests.

101. Each of the agreements at issue in this dispute – the GATT, the Agreement on Rules of Origin, and the TBT Agreement – is in Annex 1A on goods, and the security exception should apply to the provisions of these agreements based on the single undertaking structure. The position that the exception applies only to part of Annex 1A, the GATT 1994, and not to other agreements on goods, even though they cover the same subject matter as the GATT, is unsupported by the single undertaking structure.

102. The Panel should also look to the specific textual links between the Agreement on Rules of Origin and the TBT Agreement and the GATT. In its First Written Submission, the United States identified the various specific linkages contained within the GATT, the Agreement on Rules of Origin, and the TBT Agreement, which establish that the essential security exception applies to the provisions at issue in this dispute.

103. Those linkages are particularly stark in the specific circumstances of this dispute. First, the claims under each of those agreements in this dispute overlap. Even Hong Kong, China itself characterizes these as “essentially the same” MFN claims.<sup>51</sup> Second, the measure being challenged is an origin marking requirement. Article IX of the GATT specifically disciplines marking requirements; marking requirements would be covered under the two other agreements only if they were within the set of measures defined as “rules of origin” or “technical regulations”.<sup>52</sup> That is, Hong Kong, China, claims that an origin marking requirement provides discriminatory or “less favourable treatment” under Article I:1 of the GATT, Article IX:1 of the

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<sup>51</sup> First Written Submission of Hong Kong, China, para. 66.

<sup>52</sup> The TBT Agreement also applies to conformity assessment procedures and standards, but Hong Kong, China, has asserted only that the measures at issue are technical regulations.

GATT, Article 2.1 of the TBT Agreement, and Article 2(d) of the Agreement on Rules of Origin, and that the alleged discrimination is a factor unrelated to manufacturing or processing under Article 2(c) of the Agreement on Rules of Origin.

104. Under an interpretation that Article XXI does not apply to the rules of the other two agreements, the origin marking requirement could be excepted from MFN claims under the GATT based on essential security, but the very same measure could not be excepted from “essentially the same” non-discrimination claims under the other two agreements based on essential security. Nothing in the single undertaking structure of the WTO Agreement suggests that the MFN principle is different among the agreements, or that Members had a different view of essential security with respect to marking requirements if they were also considered to be rules of origin or technical regulations.

105. As explained in the U.S. First Written Submission and opening statement, this interpretation leads to an absurd and untenable result. Application of the customary rules of treaty interpretation is not supposed to produce absurd interpretations.

106. The United States observes that certain third parties assert that application of Article XXI to any other covered agreement that is not the Agreement on Import Licensing, TRIMS, or the Trade Facilitation Agreement (TFA) would render the exception provisions in those agreements ineffective or redundant. With respect to the TFA, as noted in the first videoconference with the Panel, that agreement was signed decades after the conclusion of the Uruguay Round and therefore does not demonstrate that the negotiators of the Uruguay Round intended there to be no essential security exception for the Uruguay Round goods agreements.

107. Moreover, as the United States explained in its oral statement, such an assertion does not accurately reflect the principle of effectiveness. That is, the principle of effectiveness is not meant to provide the maximum effectiveness to all provisions, but rather it means that interpretation should not deprive the effectiveness of provisions. In other words, if the customary rules of treaty interpretation establish that Article XXI(b) applies – as the United States has shown – that interpretation is consistent with the principle of effectiveness. There is no separate rule of effectiveness that dictates the conclusion that Article XXI(b) does not apply, simply in order to render express incorporation of that provision in certain agreements uniquely effective.

## QUESTION 21

**To both parties: Should the Panel, in your view, in its analysis on the availability, or not, of Article XXI(b) to the claims at issue in this dispute follow the analytical approach applied by the Appellate Body, in for example *China – Rare Earths* (paragraphs 5.61-5.62 and 5.74), and by previous panels referred to by some third parties (European Union<sup>6</sup>, Singapore<sup>7</sup> and Switzerland<sup>8</sup>)? If not, do you consider this approach legally incorrect? In your response, please indicate whether there are any relevant differences between Article XX and Article XXI of the GATT 1994 for applying such an analytical approach, in determining the applicability of Article XXI of the GATT 1994 to non-GATT provisions.**

<sup>6</sup> European Union's third-party submission, paras. 24 and 47

<sup>7</sup> Singapore's third-party statement, para. 4.

<sup>8</sup> Switzerland's third-party submission, paras. 59-60.

108. The DSB has established the Panel’s terms of reference under Article 7.1 of the DSU. Under these standard terms of reference, the Panel’s task is to “examine . . . the matter” and to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreements. Article 3.2 of the DSU directs WTO panels to interpret the existing provisions of the covered agreements “in accordance with customary rules of interpretation of public international law.”

109. There is no provision in the DSU that requires a panel to follow legal interpretations in previous reports. To the contrary, the WTO Agreement explicitly reserves to the Ministerial Conference and General Council the “exclusive authority” to adopt “authoritative interpretation” of a provision of the covered agreements.<sup>53</sup> As such, it is only through appropriate action by those bodies (and not the DSB) that this Panel would be bound to follow a legal interpretation. That said, the Panel may take previous reports into account to the extent it finds them persuasive.

110. The United States understands the references to the report in *China – Rare Earths (AB)* and previous reports identified in third party submissions to include reports that have addressed applicability of Article XX to non-GATT instruments.<sup>54</sup> The United States set forth the proper application of the customary rules of treaty interpretation with respect to the applicability of Article XXI(b) to the Agreement on Rules of Origin and the TBT Agreement in its First Written Submission. In particular, the text of the Agreement on Rules of Origin and the TBT Agreement (including their textual links to the GATT 1994), in their context – which includes the structure of the WTO Agreement – and in light of their object and purpose establishes that Article XXI(b) applies to each agreement.

111. In this regard, the United States considers that previous reports, in analyzing the applicability of GATT Article XX to a non-GATT agreement, correctly recognized that lack of explicit incorporation of an exception is not dispositive – notwithstanding that GATT Article XX begins with the clause “[n]othing in this Agreement”. Instead, those reports analyzed the question of applicability on a case-by-case basis.<sup>55</sup> The *China – Rare Earths (AB)* report also specifically noted that this analysis must take account of the structure of the WTO Agreement: “The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be

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<sup>53</sup> *Marrakesh Agreement Establishing the World Trade Organization*, Article IX:2; DSU, Article 3.9.

<sup>54</sup> The United States notes that, while the Panel’s question appears directed at the issue of applicability of Article XXI, paragraph 24 of the EU’s third party submission also references the panel report in *Russia – Traffic in Transit*. The United States explained in its First Written Submission why the Panel should not adopt the flawed approach taken by the panel in that dispute. U.S. First Written Submission, paras. 215-266.

<sup>55</sup> See *Thailand – Cigarettes (Article 21.5 – Philippines) (Panel)*, paras. 7.743-7.744; *China – Rare Earths (AB)*, paras. 5.55-5.56; *China – Raw Materials (AB)*, paras. 278-307; *China – Audiovisual Products (AB)*, paras. 229-233.

applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.”<sup>56</sup>

112. That said, Article XX is different from Article XXI in key respects, and the Panel’s analysis should account for those differences. First, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau – “any action which it considers necessary for the protection of its essential security interests”. As the United States has explained, the requirement for applicability of Article XXI(b) is that the Member taking the action must consider that action necessary for the protection of its essential security interests.

113. In Article XX, the subparagraphs themselves contain the operative language regarding the relationship between the measure taken and the Member’s objective (for example, “necessary to”, “relating to”, or “essential to” the relevant objective), and none of the Article XX subparagraphs use the phrase “which it considers” to introduce the word that establishes that relationship. That is, the subparagraphs of Article XX indicate on what basis a Member may avail itself of the exception – for example, when the measure at issue is “necessary to protect public morals”. In addition, the chapeau of Article XX includes an additional non-discrimination requirement. Under this structure, then, a Member: 1) may take a measure that is necessary to protect public morals, for example, but only if 2) that measure does not arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade. These two substantive obligations in the text led the Appellate Body to its statement that the “structure and logic of Article XX” suggests a two-step analysis. The “structure and logic” of Article XXI is fundamentally different. By its terms, Article XXI(b) does not permit a panel to substitute its judgment for that of a WTO Member as to whether an action is necessary for that Member to protect its essential security interests.

114. Moreover, with respect to the structure of the WTO Agreement, as explained in the U.S. First Written Submission, the essential security exception applies to each of Annexes 1A, 1B, and 1C to the WTO Agreement.<sup>57</sup> The security exceptions in each of Annexes 1B (GATS) and 1C (TRIPS) mirror the security exception in Annex 1A (GATT).<sup>58</sup> 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.

115. 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

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<sup>56</sup> *China – Rare Earths (AB)*, para. 5.62; see also paras. 5.56-5.57.

<sup>57</sup> U.S. First Written Submission, paras. 268-272.

<sup>58</sup> U.S. First Written Submission, paras. 109-117.

language on exceptions to the GATS provisions on MFN and national treatment,<sup>59</sup> 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.

116. As explained above, and in the U.S. First Written Submission, 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.

## QUESTION 22

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

117. To the extent that Hong Kong, China, considers that the “starting point” of the interpretive analysis begins with the Agreement on Rules of Origin or the TBT Agreement, the United States does not agree. Article 3.2 of the DSU provides that provisions of the agreement be interpreted in accordance with customary rules of interpretation of public international law. The customary rules of interpretation of public international law do not dictate a “starting point” as a general matter. Instead, treaty interpretation is a holistic analysis under which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

118. In this dispute, the United States has invoked Article XXI with respect to the claims under the Agreement on Rules of Origin, the TBT Agreement, and the GATT 1994. In light of the nature of Article XXI, it is appropriate to “start” with analysis of that provision. And because Article 3.2 provides for interpretation of the text, in its context and in light of the object and purpose of the agreement, that analysis starts with analysis of the terms of Article XXI, in the context of the WTO Agreement.

## QUESTION 23

**To the United States: In paragraph 22 of its opening statement at the first substantive meeting, Hong Kong, China observes that "the fact that a covered agreement refers to certain provisions of the GATT 1994, or otherwise elaborates upon certain provisions of the GATT 1994, is not a sufficient basis to conclude that the GATT exception provisions apply". In its oral reply to advance question 4, Hong Kong, China specified that the textual link has to show the applicability by "necessary implication". Please comment.**

119. The United States does not agree that the Agreement on Rules of Origin and the TBT Agreement simply “refer to” or “elaborate on” the GATT 1994 in the context of this dispute.

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<sup>59</sup> See GATS Article XIV(e) and (d), respectively.

Furthermore, the United States has not suggested that application of the customary rules of treaty interpretation is limited to examining whether those agreements “refer to” or “elaborate on” the GATT 1994. Rather, as explained in its First Written Submission, based on the customary rules of treaty interpretation, the text of the Agreement on Rules of Origin and the TBT Agreement, in their context – which includes the structure of the GATT 1994 – and in light of the object and purpose of the respective agreement – establishes that Article XXI(b) applies.

120. With respect to a “necessary implication” standard suggested by Hong Kong, China, the United States observes that this language is not treaty text, nor a standard set forth in the customary rules of treaty interpretation. Further, the term is not self-defining, and the United States does not understand how this term fits with the customary rules of interpretation of public international law that the DSU specifies should be used. Thus, whatever Hong Kong, China, means by the phrase “necessary implication,” the term has no legal meaning and validity and has no role with respect to any issue in this dispute.

121. Hong Kong, China, seeks to rely on two past reports – *China – Rare Earths (AB)*, and *Thailand – Cigarettes (Article 21.5 – Philippines)* in support of its observation in paragraph 22 of the opening statement. As the United States noted in its oral statement,<sup>60</sup> and in response to Question 21, the *China – Rare Earths (AB)* report (in the same quote Hong Kong, China, refers to in paragraph 22) observed that the relationship between individual provisions of the multilateral trade agreements “must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, **with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations**, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A).”<sup>61</sup> Thus, even the Appellate Body report that Hong Kong, China, relies on for its interpretive arguments supports the U.S. approach that the structure of the WTO Agreement serves as interpretive context of whether the GATT exceptions applies to the specific claims at issue.

122. Hong Kong, China, also relies on the panel report from *Thailand – Cigarettes (Article 21.5)*. However, that reliance is misplaced. In that dispute, in arguing that Article XX applies to the Customs Valuation Agreement, Thailand pointed to the title of the agreement, “Agreement on Implementation of Article VII of the GATT 1994”; the preamble, which recognized the importance of the provisions of Article VII of GATT 1994 and desir[e] to elaborate rules for the application in order to provide greater uniformity and certainty in their implementation”; and GATT Article XX(d) itself, which refers to laws “relating to customs enforcement.”<sup>62</sup> The panel considered that those links were general and do not establish “textual links” to Article XX.<sup>63</sup>

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<sup>60</sup> U.S. Opening Statement, para. 40.

<sup>61</sup> *China – Rare Earths (AB)*, para. 5.56 (emphasis added).

<sup>62</sup> *Thailand – Cigarettes (Article 21.5 – Philippines) (Panel)*, para. 7.747.

<sup>63</sup> *Thailand – Cigarettes (Article 21.5 – Philippines) (Panel)*, para. 7.748-7.749.



123. The present dispute differs from *Thailand – Cigarettes* in at least two important aspects. First, the issue in this dispute is whether Article XXI(b) (not Article XX) applies to the claims by Hong Kong, China under the Agreement on Rules of Origin and the TBT Agreement (not the Customs Valuation Agreement). The United States has demonstrated, based on the customary rules of treaty interpretation – including the structure of the WTO Agreement as context – that it does. The various linkages identified by the United States in this present dispute are not limited to the title of the agreements and the preamble, but are also reflected within operative provisions of the agreements.

124. Second, as the United States has shown in its First Written Submission, oral statements and in the responses above, those linkages underscore two points about the nature of the claims at issue in this dispute.<sup>64</sup> That is, the claims with respect to the measures at issue are “essentially the same” under the each of the covered agreements. And in light of both the textual linkages to the GATT 1994 and the overlap with the claims made under the GATT, the only logical interpretation that the panel may make is that Article XXI applies to the claims under the Agreement on Rules of Origin and the TBT Agreement.

#### QUESTION 24

**To the United States: The United States proposes both in paragraph 273 of its first written submission and in paragraphs 46 and 47 of its opening statement at the first substantive meeting that there are two possible interpretations of the structure of the WTO Agreements, only one of which the United States considers "legally tenable", namely that the WTO Members understood that Article XXI applies to the Annex 1A Agreements:**

**Thus, is the United States arguing that the exception in Article XXI(b) applies to all Annex 1A Agreements irrespective of the claims at issue?**

**Does the United States also consider that the exceptions in Article XX of the GATT 1994 apply to all Annex 1A Agreements? If not, please explain what element(s) more precisely render(s) Article XXI applicable to all Annex 1A Agreements, while Article XX would not apply to those agreements.**

125. As the United States has explained, the structure of the WTO Agreement supports an interpretation that Article XXI would apply to all the Annex 1A agreements. However, that issue is not presented in this dispute. Rather, the issue is that Article XXI(b) applies to the specific claims of breach, and Hong Kong, China, disputes this.

126. With respect to Article XX, the United States in the answer to question 21 above has noted textual and structural differences between Article XX and Article XXI, and moreover the applicability of Article XX is not at issue in this dispute.

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<sup>64</sup> U.S. Oral Statement, paras. 46-47; U.S. First Written Submission, paras. 267, 280-288, 294-296, 305, 319-320.

## QUESTION 25

**To the United States: Please comment on Hong Kong, China's argument in paragraph 14 of its opening statement at the first substantive meeting and Switzerland's argument in paragraph 56 of its third-party submission, respectively, that Article XXI of the GATT 1994 contains the wording "[n]othing in this agreement", which is a specific reference to the GATT 1994 and does not encompass other Multilateral Agreements on Trade in Goods. With respect to the United States' argument in paragraph 273 of its first written submission, if the drafters had wanted the exception to apply to all agreements contained in Annex 1A, why did they not modify this wording to refer to all agreements contained in Annex 1A?**

127. With respect to the significance of the phrase “[n]othing in this Agreement”, please see the response to Question 26 below.

128. With respect to why the drafters did not modify the wording of Article XXI(b) during the Uruguay Round, the answer is simply that the negotiators chose not to rewrite the GATT 1947, but to incorporate it into the WTO Agreement without textual changes.

129. In particular, the WTO Agreement replaces the GATT 1947 with the GATT 1994, which is defined as the text of the of the GATT 1947, as amended prior to entry into force of the WTO Agreement, as well as six Understandings and various waivers and protocols. Explanatory notes in the GATT 1994 addressed certain anachronisms (e.g., use of “Member” and “WTO” instead of “Contracting Parties”) and authentic languages.<sup>65</sup> In this light, the Uruguay Round process did not involve an exercise of redrafting the GATT 1947 that could have included the change that HKC suggests should have been made in the GATT 1947 text.

130. The wholesale incorporation of GATT into the WTO Agreement as the lead agreement in Annex 1A further demonstrates the relationship of other multilateral trade in goods agreements with the GATT “as the central pillar of the MTO package”.<sup>66</sup> As the United States has noted, the multilateral trade in goods agreements become subject to WTO dispute settlement by virtue of the application of Articles XXII and XXIII of GATT 1994 (and the DSU).<sup>67</sup> Those dispute settlement provisions remain subject to Article XXI. Thus, the dispute settlement provisions in the GATT 1994 when applied in relation to a substantive provision of a multilateral trade in goods agreement cannot be used to undermine a Member’s essential security rights under Article XXI because “[n]othing in this Agreement [including Articles XXII and XXIII] shall prevent” the exercise of those rights.

131. Furthermore, the Uruguay Round negotiating history shows a continued interest in maintaining a meaningful essential security exception. As explained in the U.S. First Written

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<sup>65</sup> GATT 1994, para. 2.

<sup>66</sup> 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).

<sup>67</sup> See, e.g., Articles 7 and 8, Agreement on Rules of Origin; Article 14, TBT Agreement.

Submission,<sup>68</sup> during the Uruguay Round, the Negotiating Group on GATT Articles (which also considered understandings that ultimately were included in the GATT 1994) rejected proposals by Nicaragua and Argentina to amend Article XXI in a manner that would have limited Members' discretion when taking action under that provision.<sup>69</sup> During these discussions, which took place in June 1988, statements by delegates indicate that Uruguay Round negotiators did not intend to alter the self-judging nature of Article XXI, and they rejected proposals that would have done so. In addition, Uruguay Round negotiators of the DSU discussed the reviewability of Article XXI, and decided not to include terms that would have diverged from the long-standing understanding that actions taken under Article XXI are not reviewable by a panel.<sup>70</sup>

132. The rejection of proposals to change the self-judging nature of Article XXI(b), and the incorporation of the GATT 1947 into the GATT 1994, and in turn into Annex 1A of the WTO Agreement, reflects negotiators' understanding that Article XXI(b) would apply to the Annex 1A agreements. That is, there is an essential security exception for trade in goods (Annex 1A), trade in services (Annex 1B), and trade-related intellectual property rights (Annex 1C). While negotiators also could have provided for applicability by other means, such alternative means were not the exclusive way of doing so.

#### QUESTION 26

**To both parties: Some third parties (Brazil<sup>10</sup>, Norway<sup>11</sup>, and Switzerland<sup>12</sup>) and Hong Kong, China have referred to the text "[n]othing in this agreement" in Article XXI as proof that Article XXI does not apply per se to agreements other than the GATT 1994 itself. What relevance should the Panel attribute to that text when determining the applicability of Article XXI to Hong Kong, China's claims under the ARO and the TBT Agreement?**

<sup>10</sup> Brazil's third-party submission, para. 24.

<sup>11</sup> Norway's third-party statement, para. 3.

<sup>12</sup> Switzerland's third-party submission, para. 56.

133. To determine whether Article XXI(b) applies to the Agreement on Rules of Origin and the TBT Agreement, the Panel must look to those agreements, and interpret them in accordance with the customary rules of treaty interpretation.

134. The fact that the GATT 1947 (and its successor the GATT 1994) uses the term "this agreement" simply reflects the fact that in 1947, the GATT 1947 was the **only** agreement. So of course the GATT 1947 uses the phrase "only agreement." And, as explained in the answer to Question 25, the Uruguay Round did not involve a redrafting of the GATT 1947, so, again, of course the phrase in the GATT 1994 remains "this agreement." Thus the use of the term "this agreement" is to be taken account in the interpretive process, but given the context and the way

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<sup>68</sup> U.S. First Written Submission, paras. 107-108.

<sup>69</sup> See Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-44); Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-45).

<sup>70</sup> U.S. First Written Submission, paras. 118-122.

the WTO Agreement evolved from the GATT 1947, the presence of this term is not particularly significant.

135. Rather, as the United States demonstrated in its First Written Submission, the application of those rules results in an interpretation that Article XXI(b) applies to the Agreement on Rules of Origin and the TBT Agreement, and in particular the claims at issue in this dispute. That is, the text of both the Agreement on Rules of Origin and the TBT Agreement, in their context – which includes the structure of the WTO Agreement, and in light of the object and purpose of the respective agreement – demonstrates that Article XXI(b) applies.

136. In addition, as noted in the U.S. First written Submission,<sup>71</sup> the Agreement on Rules of Origin and the TBT Agreement are subject to dispute settlement by virtue of the application of Articles XXII and XXIII of the GATT 1994, as provided for by the texts of those agreements. Articles XXII and XXIII are, of course, subject to Article XXI. Thus, because dispute settlement under the Agreement on Rules of Origin and TBT Agreement is subject to the GATT 1994, Members are bounded by Article XXI in the assertion of a breach or nullification or impairment of benefits under those agreements. The dispute settlement provisions in GATT 1994, when applied in relation to a substantive provision of a multilateral trade in goods agreement, cannot be used to undermine a Member's essential security rights under Article XXI because "[n]othing in this Agreement [including Articles XXII and XXIII] shall prevent" the exercise of those rights.

#### QUESTION 27

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

137. The considerations cited in the question are 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. As the United States explained in its First Written Submission and in its oral statement, the customary rules of treaty interpretation call for consideration of the structure of the treaty as context.<sup>72</sup> The Panel should consider the relationship between Article XXI of the GATT 1994 and the provisions of the Agreement on Rules of Origin and the TBT Agreement at issue in this dispute in light of the fact that each of

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<sup>71</sup> U.S. First Written Submission, paras. 287-288, 308-309.

<sup>72</sup> See U.S. First Written Submission, paras. 266-279; U.S. Opening Statement, paras. 37-49.

these agreements is an Annex 1A agreement on trade in goods, and the overall structure of the WTO Agreement as a single undertaking.

138. This structural consideration is relevant not only for the relationship between the agreements themselves, but also between the particular claims. As Hong Kong, China, itself has noted, the specific substantive claims at issue are “essentially the same” MFN claims,<sup>73</sup> brought against the same measures. Based on the overlaps between the claims at issue under each of the agreements, with respect to the applicability of Article XXI(b), the Panel should find that the exception applies to the specific claims at issue. There is no dispute that Article XXI applies to MFN claims with respect to an origin marking requirement under Article I:1 of the GATT 1994, or Article IX:1 of the GATT 1994 – a provision that deals specifically with marking requirements. In light of the single undertaking structure of the WTO Agreement, to the extent that the origin marking requirement falls within the larger set of measures that are subject to Article 2 of the Agreement on Rules of Origin (rules of origin) or Article 2.1 (technical regulations), the exception should apply to essentially the same claims with respect to that same measure under those provisions.

#### QUESTION 28

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

139. The lack of express textual reference is not dispositive of whether an exception in the GATT 1994 applies to another Annex 1A agreement because the question of applicability is an interpretive inquiry that is conducted on a case-by-case basis. Such an inquiry should be based on the customary rules of treaty interpretation by interpreting the plain text of the provision in its context in light of its object and purpose. That is, it cannot be inferred from mere silence that the application of an exception is prohibited. To be clear, the United States does not suggest that silence in the Agreement on Rules of Origin or TBT Agreement is itself the basis for finding that Article XXI(b) applies, but rather that, in light of the structure of the WTO Agreement, silence in another Annex 1A agreement supports an interpretation that the Article XXI exception applies.

140. As the United States has demonstrated in its oral statement, consideration of the structure of the treaty as context is part of customary rules of treaty interpretation. Therefore, for purposes of the present specific inquiry – whether Article XXI(b) applies to the specific claims under the

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<sup>73</sup> With respect to the claim of Hong Kong, China, under Article 2(c) of the Agreement on Rules of Origin, while not an MFN claim in the sense that alleges discriminatory treatment vis-à-vis other Members, it is still closely connected to the rest of the claims. That is, Hong Kong, China, alleges that the United States applies a factor unrelated to manufacturing or processing that it does not apply with respect to imports from other Members.

Agreement on Rules of Origin and the TBT Agreement – this Panel needs to take into account the single undertaking structure that is established in the WTO Agreement. As cited in the U.S. opening statement, as reflected in previous reports, the relationship between individual provisions of the multilateral trade agreements “must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A).”<sup>74</sup>

141. As the United States has explained, the text of Article XXI(b), various textual linkages to the GATT 1994, and 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. In the context of the single undertaking, and in light of the textual links between the GATT and the agreements at issue, silence in the Agreement on Rules of Origin and TBT Agreement confirms this interpretation – that negotiators understood that Article XXI of the GATT 1994, an Annex 1A agreement, would apply to those Annex 1A agreements on trade in goods.

#### QUESTION 29

**To both parties: Would the supposed unavailability of an exception in respect of the claims under the ARO or the TBT Agreement, which is available to Hong Kong, China's claims under the GATT 1994, result in a conflict subject to the General Interpretative Note to Annex 1A?**

142. The unavailability of an Article XXI exception would not result in a “conflict” – as that term is used in the Interpretive Note – between the specific provisions in the GATT 1994 and the Agreement on Rules of Origin or TBT Agreement. Rather, as the United States has explained, an interpretation that did not allow for the application of Article XXI to the Agreement on Rules of Origin and TBT Agreement is incorrect under the customary rules of interpretation of public international law, as properly applied to the matters at issue in this dispute.

143. The “conflict” in the General Interpretative Note to Annex 1A refers to a situation where “a provision” of the GATT 1994 conflicts with “a provision” of one other Annex 1A agreement. In such an event, the latter provision prevails “to the extent of the conflict”. As the United States noted in its First Written Submission, this reflects the general rule that more specific provisions prevail over general provisions, as the new trade in goods agreements were generally viewed as an elaboration upon the disciplines in the GATT 1994.<sup>75</sup>

144. As the United States explained in its First Written Submission, Article XXI(b) reflects an inherent right of sovereign governments to take actions they consider necessary to protect their essential security interests. That is, Article XXI(b) does not itself *permit* Members to take such

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<sup>74</sup> *China – Rare Earths (AB)*, para. 5.56.

<sup>75</sup> U.S. First Written Submission, para. 274.

action; rather, Article XXI(b) establishes that Members are not prohibited from taking such action. In this regard, the United States does not consider that finding that Article XXI(b) does not apply to the Agreement on Rules of Origin or the TBT Agreement would result in a “conflict” in the sense that one provision prevails over the other. Rather, what it would result in is the diminishing of a Member’s rights, contrary to the DSU, and the surrender of a Member’s inherent sovereign right, which Members did not intend to relinquish when they drafted the WTO Agreement.

145. The United States also observes that whether two provisions conflict – either in a technical sense, as used in the General Interpretive Note to Annex 1A, or as a conceptual or thematic matter – may depend on how they are interpreted. That is, two provisions could be interpreted in a way that avoids a tension between the two.<sup>76</sup>

146. The provisions at issue in this dispute in the GATT 1994, the Agreement on Rules of Origin, and the TBT Agreement, may be interpreted in a way that avoids any tension or incoherence. The United States has set forth this interpretation, applying the customary rules of treaty interpretation, in its First Written Submission: Article XXI(b) applies, based on the text, in its context, and in light of the object and purpose of the respective agreements. In the context of this dispute in particular, all of the claims by Hong Kong, China, under each of the agreements at issue, amount to a challenge to a U.S. determination with respect to autonomy for purposes of (among other things) origin marking.

147. As explained, the United States considers it untenable to interpret Article XXI(b) as only applicable to the GATT claims in this dispute. Such an interpretation would fail to account for the structure of the WTO Agreement, and mean that provisions that are overlapping in disciplines would be interpreted to require different things, with respect to the same measures. As a result, non-discrimination provisions under the GATT would not prohibit a Member from taking actions it considers necessary to protect its essential security interests, but similar provisions under other agreements would prohibit that same action – even in the absence of language in those agreements rendering Article XXI(b) inapplicable. However, if Article XXI(b) is correctly interpreted as applicable to provisions within the specific Annex 1A agreements at issue, this situation does not arise.

### QUESTION 30

**To Hong Kong, China: Hong Kong, China and some third parties (Brazil<sup>13</sup>, the European Union<sup>14</sup>, Norway<sup>15</sup>, Singapore<sup>16</sup> and Switzerland<sup>17</sup>) have noted that, while some Annex 1A Agreements specify that the GATT 1994 exceptions apply to their provisions, the ARO and the TBT Agreement do not contain such specifications. The United States, however, submits that its interpretation of the applicability of Article XXI does not deprive these explicit**

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<sup>76</sup> See *US – Upland Cotton (AB)*, para. 549 (“a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously”) (quoting *Argentina – Footwear (EC) (AB)*, para. 81; *US – Gasoline (AB)*, p.23, DSR 1996:I, 3 at 21; *Japan – Alcoholic Beverages II (AB)*, p.12, DSR 1996:I, 97 at 106; and *India – Patents (AB)*, para. 45.)

references of their effectiveness. The United States argues that "an article providing explicitly for incorporation is not 'ineffective' as a legal matter simply because it is not uniquely effective." (opening statement at the first substantive meeting, paragraphs 57 and 58) Please comment.

<sup>13</sup> Brazil's third-party submission, paras. 25-26.

<sup>14</sup> Exhibit EU-5, para. 172.

<sup>15</sup> Norway's third-party statement, para. 4.

<sup>16</sup> Singapore's third-party statement, paras. 6-7.

<sup>17</sup> Switzerland's third-party submission, para. 58.

148. This question is for Hong Kong, China.

### QUESTION 31

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

149. In its First Written Submission, the United States explained how the negotiating history of the Agreement on Rules of Origin and the TBT Agreement confirms that negotiators understood those agreements to relate to the GATT 1994.<sup>77</sup>

150. With respect to the Uruguay Round more generally, the United States observes that the single undertaking, and the integration of the agreements in Annex 1A (including the GATT itself) into that undertaking, was not established until relatively late in the Round. The Draft Final Act prepared in advance of the Ministerial meeting in Brussels in December of 1990 reflected the possibility that the GATT might be separate from the Uruguay Round Agreements, and that parties would not have to accept all agreements.<sup>78</sup> Annex I included the "Uruguay

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<sup>77</sup> U.S. First Written Submission, paras. 293-294, 310-318.

<sup>78</sup> Paragraph 5 of the Draft Final Act provided, "5. Participants further agree that in order to provide the administrative Infrastructure for the international implementation of the Uruguay Round results, it would be desirable to establish [a new Multilateral Trade Organization] [a new organisational structure] which shall service the General Agreement on Tariffs and Trade, [and the Uruguay Round Agreements and shall provide the forum for negotiations of agreements in areas related to trade and development] [shall oversee and ensure the operation of the Uruguay Round Agreements, and shall service negotiations falling within the purview of the Uruguay Round Agreements [and in related trade areas], and take action as appropriate]." Paragraph 8 provided, "[Participants agree that the Uruguay Round Agreements, [enumerated in Annexes I to III] shall be open for [simultaneous] acceptance [as a whole], by signature or otherwise, by all participants in the Uruguay Round of Multilateral Trade Negotiations.] [Participants agree that the Uruguay Round Agreements can only enter into force upon acceptance, by signature or otherwise, of all legal texts and instruments, without exception, that are included in [Annexes I and II].] This is without prejudice to the requirement that such participants who are not contracting parties to the GATT must negotiate their terms of accession to the GATT." A footnote to paragraph 8 stated, "The question of the acceptance by participants in the Uruguay Round who have not accepted Tokyo Round Agreements and Arrangements, of texts



Round Agreements on Trade in Goods”. Annex I did not appear to refer to the GATT itself, but did include two bracketed versions of TRIPS text: the first on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, and the second on Trade in Counterfeit and Pirated Goods. Annex II included the GATS. Annex III was itself bracketed, to refer to the “Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods” text set forth in Annex I.

151. The Draft Final Act circulated in 1991, prepared by the Chairman of the Trade Negotiations Committee Arthur Dunkel (commonly referred to as the “Dunkel Draft”) provided for the single undertaking in Article II of the Draft Agreement Establishing the Multilateral Trade Organization: “Agreements and legal instruments set out in Annexes 1, 2 and 3 (herein after referred to as the Multilateral Trade Agreements) shall have all members as parties”.<sup>79</sup> Annex IA included “the General Agreement on Tariffs and Trade, as it results from the Final Act of the Uruguay Round, and its associated legal instruments, except the Protocol of Provisional Application; the Tokyo Round Agreements and Arrangements as they result from the Final Act of the Uruguay Round and their associated legal instruments, except those Agreements and Arrangements found in Annex 4”. Annex IB included the “General Agreement on Trade in Services, and its associated legal instruments”, and Annex 1C included “the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs)”.

152. The history of the placement of the TRIPS Agreement within the structure of the WTO Agreement, and the inclusion of a security exception in the TRIPS Agreement, supports the conclusion that the security exception in Article XXI of the GATT applies to the trade in goods agreements. The security exception that appears in Article 73 of the TRIPS Agreement was not included in the 1990 text that appeared in “Annex I”, the “Uruguay Round Agreements on Trade in Goods”. In July 1990, the Chairman of the Negotiating Group’s Report to the GNG explained two approaches to the text: One of which would have been “implemented as an integral part of the General Agreement,” and the other of which would have included two parts, one of which overlapped with the content of the first approach, and the second part “on standards and principles concerning the availability, scope and use of intellectual property rights” and which “would be implemented in the “relevant international organisation, account being taken of the multidisciplinary and overall aspects of the issues involved”.<sup>80</sup>

153. The July 1990 text suggests that availability of exceptions in turn depended on their relationship to the GATT. For example, draft Article 6.4A provided, “With respect to the protection of intellectual property, PARTIES shall comply with the provisions of Article III of

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resulting from the renegotiation of such Agreements or Arrangements remains to be considered.” Draft Final Act, MTN.TNC/W/35/Rev.1 (US-145).

<sup>79</sup> Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 Dec. 1991), p. 92 (US-162).

<sup>80</sup> Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods: Status of Work in the Negotiating Group, Chairman’s Report to the GNG, MTN.GNG/NG11/W/76 (23 July 1990) (US-163).

the General Agreement on Tariffs and Trade, subject to the exceptions provided in that Agreement”. A footnote to this provision indicated, “This provision would not be necessary if, as proposed by some participants, the results of the negotiations were to be an integral part of the General Agreement on Tariffs and Trade”. Draft Article 7.2A included similar language.

154. The TRIPS text included in the December 1990 Draft Final Act provided that the national treatment obligation was “subject to the exceptions” provided for in other intellectual property instruments and, as noted, appeared in both Annex I and Annex III to the Act. As the Chairman’s Commentary explained, “The presentation of two draft agreements, the first on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods and the second on Trade in Counterfeit and Pirated Goods, is a reflection of two basically different approaches to the question of the relationship of the eventual results to the GATT. Some participants, whose positions are identified in the draft by the letter A, envisage a single TRIPS agreement encompassing all the areas of negotiation; this agreement would be implemented as an integral part of the General Agreement. Other participants, whose positions are identified by the letter B, envisage two separate agreements, one on Trade in Counterfeit and Pirated Goods, to be implemented in GATT, and the second on standards and principles concerning the availability, scope and use of intellectual property rights. The latter agreement would be implemented in the ‘relevant international organisation, account being taken of the multidisciplinary and overall aspects of the issues involved’”.<sup>81</sup>

155. The 1991 Dunkel text removed the TRIPS text from the annex on trade in goods. As it appeared in Annex 1C, the TRIPS text included the security exception at Article 73.<sup>82</sup> As one TRIPS negotiator has explained, “Article 73 of the TRIPS Agreement sets out the security exception to the provisions of the Agreement with language taken from Article XXI of the GATT, thus avoiding any question as to whether measures permitted under Article XXI of the GATT (1994) could be contrary to the TRIPS Agreement.”<sup>83</sup>

156. This negotiating history thus confirms the interpretation advanced by the United States -- that is, the structure of the WTO Agreement establishes that Article XXI(b) applies to the Annex 1A agreements on trade in goods at issue in this dispute. The Annex 1B and 1C agreements were understood not to be as integrally linked to GATT, and therefore each received its own essential security provision. The Annex 1A goods agreements, however, retained the textual and structural connections at one point envisioned for all the agreements. The negotiation of different Annex 1A agreements, conducted in different negotiating groups, did not ensure consistency of language regarding GATT exceptions across those agreements. However, in linking those agreements to the GATT in a single annex on trade in goods, and incorporating that annex (along with its services and intellectual property counterparts) into the single undertaking,

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<sup>81</sup> Draft Final Act, MTN.TNC/W/35/Rev.1 at 193 (US-145).

<sup>82</sup> MTN.TNC/W/FA (20 Dec. 1991), p. 90 (US-162).

<sup>83</sup> C. Field, “Negotiating for the United States”, in *Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations*, J. Watal & A. Taubman, eds. (2015), at 150 (US-164).

negotiators reflected their understanding that the security exception applies with respect to trade in goods, as well as trade in services and trade-related intellectual property rights.

### QUESTION 32

**To the United States: Please clarify whether the position of the United States, as expressed in paragraphs 289 to 291 of its first written submission, is that the disciplines in Article 2 of the ARO are such that Members retain a degree of discretion, which includes "taking action to protect their essential security interests"? If this is correct, in your response, please elaborate on why the action would need to be justified under Article XXI of the GATT 1994 if the disciplines in Article 2 are sufficiently flexible to permit a Member to take action to protect its essential security interests. Please also comment on the views expressed on this matter in paragraph 28 of Hong Kong, China's opening statement at the first substantive meeting.**

157. The United States agrees that the Agreement on Rules of Origin preserves discretion for WTO Members to take action to protect their essential security interests, as explained in its First Written Submission. Furthermore, the existence of this discretion is in no way inconsistent with the separate matter that Members may invoke Article XXI with respect to the Agreement on Rules of Origin.

158. As explained in the U.S. First Written Submission and in response to Questions 1, 63, and 64, a Member's invocation of Article XXI(b) is not reviewable by a panel. In the absence of such an invocation, whether a measure is subject to the Agreement on Rules of Origin, in contrast, would be reviewable. In turn, this could result in a recommendation to withdraw or modify the Member's essential security measure. Under the appropriate circumstances (and as explained further in response to Questions 16(d), 36, and 42 with respect to the TBT Agreement), a Member might choose to invoke Article XXI with respect to a claimed breach under the Agreement on Rules of Origin, but it is not required to do so; the Member might instead seek to defend the merits of its measure under the relevant provisions of the Agreement on Rules of Origin.

159. In paragraph 28 of its oral statement, Hong Kong, China, asserts that the measures at issue "condition the conferral of origin of goods from Hong Kong, China upon conditions unrelated to the manufacturing or processing of such goods". This is simply untrue. As explained above, the marking required under the U.S. measures at issue for a good produced in the territory of Hong Kong, China, is a different issue than the "conferral of origin" raised by Hong Kong, China.

160. Furthermore, the "measures at issue" reflect a determination "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 . . . to the national security, foreign policy, and economy of the United States."<sup>84</sup> The "condition" that Hong Kong,

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<sup>84</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

China, claims that the United States applies to goods from Hong Kong, China (and not other WTO Members) is “sufficient autonomy”.<sup>85</sup> In other words, Hong Kong, China, asserts that notwithstanding a WTO Member’s essential security interests in the autonomy or political status of another territory, considering the autonomy of a country (and relatedly over what territory that autonomy extends) is something that a WTO Member “cannot do”. The United States does not agree with this assertion. WTO Members did not relinquish this right when they signed the WTO Agreement, including the Annex 1A agreements.

### QUESTION 33

**To both parties: In paragraph 29 of its opening statement at the first substantive meeting, Hong Kong, China argues that “[i]f the drafters of the ARO had considered that policy considerations of the types enumerated in Articles XX and XXI of the GATT 1994 may permissibly enter into a country-of-origin determination, they would have provided for this expressly”. Please comment on where in the interpretive analysis on the applicability of Article XXI to the claims at issue in this dispute this consideration would be relevant.**

161. With respect to Article XX of the GATT 1994, the United States has not asserted that the measures at issue are justified under Article XX of the GATT 1994. In addition, as the United States explained in its First Written Submission,<sup>86</sup> the text and structure of Article XXI(b) is fundamentally different from that of Article XX. As such, the United States does not consider that the applicability of Article XX to the Agreement on Rules of Origin, or the extent to which the Agreement on Rules of Origin permits Members to take account of the objectives of Article XX, is relevant to this dispute.

162. With respect to Hong Kong, China’s argument that Article XXI of the GATT 1994 cannot apply to the Agreement on Rules of Origin without explicit incorporation, the United States has addressed this extensively in its First Written Submission, as well as in answers to Questions 20, 21, and 23 above.

### QUESTION 34

**To the United States: With reference to paragraphs 288, 308 and 309 of the United States' first written submission, please explain why the reference to "its obligations under this Agreement" in Article XXIII of the GATT 1994 (referred to in Article 8 of the ARO and Article 14 of the TBT Agreement) should be interpreted as including the substantive provisions of the ARO and the TBT Agreement in addition to the GATT 1994.**

163. The application of Articles XXII and XXIII of GATT 1994 to the Agreement on Rules of Origin and the TBT Agreement is accomplished by the texts of those agreements. As an initial matter, the United States would highlight that this reference to GATT 1994 is a reflection of the

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<sup>85</sup> First Written Submission of Hong Kong, China, para. 40.

<sup>86</sup> U.S. First Written Submission, paras. 53-57.

structural relationship between these multilateral trade in goods agreements and the GATT 1994. And by making dispute settlement under these agreements subject to the GATT 1994, Members are bounded by Article XXI in the assertion of a breach or nullification or impairment of benefits under those agreements. This is because Articles XXII and XXIII remain subject to Article XXI. Thus, the dispute settlement provisions in GATT 1994, when applied in relation to a substantive provision of a multilateral trade in goods agreement, cannot be used to undermine a Member’s essential security rights under Article XXI because “[n]othing in this Agreement [including Articles XXII and XXIII] shall prevent” the exercise of those rights.

164. As to why “obligations under this Agreement” in Article XXIII of the GATT 1994 applies to obligations under the ARO and TBT Agreements, this follows directly from that fact that Article 8 of the Agreement on Rules of Origin and Article 14 of the TBT Agreement provide, respectively, that the provisions of Article XXIII of the GATT 1994 “are applicable to this Agreement”, and that the settlement of disputes “shall follow” those provisions. This text means that, for purposes of disputes alleging breaches of the Agreement on Rules of Origin or the TBT Agreement, the reference to “this Agreement” in Article XXIII:1 also encompasses the Agreement on Rules of Origin or the TBT Agreement. A Member alleging a breach of the Agreement on Rules of Origin or the TBT Agreement is alleging that the responding Member has failed “to carry out its obligations under” the Agreement on Rules of Origin or the TBT Agreement, respectively.<sup>87</sup> Subjecting claims under these agreements to common dispute settlement provisions further reflects that all the Annex 1A Agreements are a single undertaking, and each forms an integral part of the WTO Agreement.<sup>88</sup>

165. Both Article 8 of the Agreement on Rules of Origin and Article 14 of the TBT Agreement also provide that the provisions of Article XXIII of the GATT 1994 be “as elaborated and applied by the Dispute Settlement Understanding.” As discussed in the U.S. First Written Submission, the first sentence of Article 1.1 of the DSU provides that “[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultations and dispute settlement provisions listed in Appendix 1.” Appendix 1 includes the agreements in Annex 1A to the WTO Agreement, which in turn include the GATT 1994 as well as the Agreement on Rules of Origin and the TBT Agreement. Thus, Article XXIII of the GATT, Article 8 of the Agreement on Rules of Origin, and Article 14 of the TBT Agreement are all “consultations and dispute settlement provisions” described in the first sentence of Article 1.1 of the DSU.

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<sup>87</sup> The subsequent agreement between the the GATT contracting parties in the context of the *United States Export Measures* dispute addresses the application of GATT Article XXIII in cases in which a Member invokes Article XXI(b), as discussed in the U.S. First Written Submission. See U.S. First Written Submission, paras. 68-78; US-15; US-16; US-17. In discussing the decision to be taken under Article XIII:2, the question was not whether the United States had breached Article I as Czechoslovakia had claimed, but, in light of the invocation of Article XXI, whether the United States had “failed to carry out its obligations” under the GATT 1994.

<sup>88</sup> As discussed below in the U.S. response to Question 38, one of the main concerns among GATT contracting parties about the relationship between the Codes, such as the Standards Code, and the GATT was that parties to the Codes might use the Codes to undermine the integrity of the parity of rights and obligation of the GATT. This concern was an impetus for providing that all the WTO Agreements should be a single undertaking.

### QUESTION 35

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

166. This question is for Hong Kong, China.

### QUESTION 36

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

167. In response to Questions 16(c) and 16(d), respectively, the United States explained the meaning of "essential security interest" in the seventh recital and highlighted that "national security requirement" as used in Article 2.2 (and its conformity assessment analogue in Article 5.4) should be interpreted in the immediate context of that provision, which disciplines the trade restrictiveness of technical regulations.

168. Without prejudice to its position as to the applicability of Article XXI(b) to the TBT Agreement and the self-judging nature of Article XXI(b), the United States notes that, whereas Article 2.1 is a retention of general GATT principles and objectives, Articles 2.10 and 5.7 impose specific publication and notification requirements with respect to technical regulations and conformity assessment procedures. The terms in each of those articles must be also read in their context as such, as is the case for Articles 2.2 and 5.2.

169. In addition, as used in Articles 2.10 and 5.7, "national security" is used in the context of "urgent problems" – as opposed to matters of "essential security interests" as contemplated in Article XXI(b) – and those Articles contemplate that "urgent problems of national security" may be such that a Member may not be able to satisfy the publication, notification, and notice and comment procedures set forth in Articles 2.9 and 5.6, respectively. Hence, a "national security" event that arises in the context of Articles 2.10 and 5.7, as with Articles 2.2 and 5.4, does not necessarily mean that a Member would invoke "essential security interests" under Article XXI(b). The operation of those articles is neither an application of the Article XXI(b) exception, nor a qualification of the terms within Article XXI(b). Therefore, the references to "national security" in Articles 2.10 and 5.7 are not a basis for concluding that Article XXI(b) does not apply to the TBT Agreement, and in particular Article 2.1.

170. With respect to Article 10.8.3, in the U.S. First Written Submission, the United States explained how the reference to “essential security interest” in that article lends support to the applicability of Article XXI(b). The United States reiterates that this article is part of Article 10, which sets forth disciplines regarding the management and administration of enquiry points and transparency requirements with respect to TBT measures. In short, Article 10 sets forth obligations to identify contact points and provide certain documents when requested. In this context, Article 10.8.3, provides that Members may not be forced to furnish documents if they consider it as “contrary to their essential security interests.”

171. Furthermore, although Articles 10.8.3, 2.10, and 5.7 are all provisions relating to the furnishing, publication, or notification of documents, Article 10.8.3 includes the term “essential security interest” rather than “urgent problems . . . of national security” in Articles 2.10 and 5.7. In this way, these provisions of the TBT Agreement support the existence of an important difference between, on the one hand, “national security” in the context of an “urgent problem” and, on the other hand, situations that are “contrary to [a Member’s] essential security interest.” This distinction supports an interpretation that the references to “national security” in Articles 2.2, 5.4, 2.10, and 5.7 do not qualify the meaning of “essential security interest” in Article XXI, while the reference to “essential security interest” in Article 10.8.3 supports an interpretation that Article XXI(b) applies and that “essential security interest” as mentioned in the TBT Agreement has the same meaning as used in the GATT 1994.

#### **QUESTION 37**

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

172. This question is for Hong Kong, China.

#### **QUESTION 38**

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

173. The fact that non-GATT contracting parties were able to enter into the Standards Code, and the fact that no non-GATT contracting parties were able to accede to the Standards Code, provides a partial explanation for the single undertaking structure that resulted from the Uruguay Round. That is, the Standards Code being open to accession by non-GATT contracting parties created questions and concerns that the single undertaking structure serves to address. As the United States has demonstrated, as part of customary rules of treaty interpretation, the Panel should look to the single undertaking structure of the WTO Agreement in evaluating the applicability of Article XXI(b) to the specific claims.

174. Article 15.1 of the Standards Code provided that the Code was open for acceptance to GATT contracting parties, and Article 15.3 provided that the Code was open for acceptance to

“any other government” that was not a GATT contracting party or had provisionally accepted the terms of the GATT. During the last year in which the Code was in operation, there were 43 signatories to the Code, all of which had acceded to the Code under Article 15.1 (i.e., were GATT contracting parties).<sup>89</sup> None of the signatories to the Code were non-GATT contracting parties.

175. One possible reason no non-GATT member signatories successfully acceded to the Code was the complicated task of balancing the GATT rights and obligations of GATT contracting parties during accession negotiations. During the Tokyo Round negotiations, with respect to “accession to instruments by non-contracting parties,” the Chairman of the Trade Negotiations Committee stated that “the basis of the [accession] negotiations would be that a Party which is not a contracting party to the GATT shall not directly or indirectly nullify or impair advantages which accrue to other Parties under the Agreement by taking action which, had it been a contracting party to the GATT, it would have been debarred from taking by virtue of its GATT obligations.”<sup>90</sup>

176. In 1980, as a non-GATT contracting party, Bulgaria applied for accession to the Standards Code.<sup>91</sup> Bulgaria had provisionally agreed that it would abide by the statement by the Chairman of the TNC quoted above.<sup>92</sup> Negotiation over Bulgaria’s terms of accession focused at least in part on the dispute settlement provisions of the Code, specifically Article 14.23.<sup>93</sup>

177. The dispute provisions of the Standards Code reflected the relationship between the GATT and the Standards Code, but without fully accounting for cases in which one of the parties to a dispute under the Code was not a GATT contracting party. The dispute settlement provisions of the Code in Article 14.23 were titled “Relationship of Code to GATT” in an earlier proposal,<sup>94</sup> and provided:

If disputes arise between Parties relating to rights and obligations of this Agreement, Parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT. Parties recognize that, in any case so referred to the CONTRACTING PARTIES, any finding, recommendation or ruling pursuant to Article 14, paragraphs 9 to 18 may be taken into account by the CONTRACTING PARTIES, to the extent they relate to matters involving equivalent rights and obligations

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<sup>89</sup> Report (1995) of the Committee on Technical Barriers to Trade (L/7646), para. 1 (US-166).

<sup>90</sup> Proceedings of the Session, Trade Negotiations Committee, July 9, 1979 (MTN/P/5), para. 4 (US-167).

<sup>91</sup> Working Party on the Accession of Bulgaria, Committee on Technical Barriers to Trade, December 5, 1980 (TBT/4) (US-168).

<sup>92</sup> Working Party on the Accession of Bulgaria, Second Progress Report by the Chairman, Committee on Technical Barriers to Trade, June 19, 1981 (TBT/7), para. 5 (US-169).

<sup>93</sup> See Working Party on the Accession of Bulgaria, Second Progress Report by the Chairman, Committee on Technical Barriers to Trade, June 19, 1981 (TBT/7), para. 8 (US-169).

<sup>94</sup> MTN/NTM/W/192/Add.2 (US-170).



under the General Agreement. When Parties resort to GATT Article XXIII, a determination under that Article shall be based on GATT provisions only.

178. In order to reconcile Article 14.23 with Bulgaria’s accession as a non-GATT contracting party, the draft terms of accession suspended the applicability of Article 14.23 to Bulgaria, and provided that, in the event of a dispute,

“the Party or Bulgaria may, in exceptional circumstances in which the balance of rights and obligations under the Agreement cannot be preserved otherwise, take provisional action in order to suspend such obligations under the Agreement which it deems necessary in the circumstances to preserve the balance of rights and obligations under the Agreement.

Should any Party or Bulgaria consider that the action taken is not appropriate in the circumstances it may refer the matter to the Committee on Technical Barriers to Trade which will, upon request from such Party or Bulgaria, examine the action.”<sup>95</sup>

179. It appears that the latter provision, that the Committee may “examine the action” of suspending Code obligations, became a major impasse for Bulgaria’s accession. Specifically, meeting minutes reflect that Hungary, which considered the draft terms of accession to have been agreed *ad referendum*, considered that the European Union,

“would wish to exclude the multilateral, collective function of the signatory countries, represented by the Committee, from authorizing the suspension of obligations under the Agreement between Bulgaria and a signatory country. The Community would wish to replace that multilateral authority and function of the Committee by seeking to get a free hand for bilateral actions, which would be totally out of the control of the Committee

...

The difference between the European Communities' approach and that of other signatories including Hungary was that the [draft] terms of accession gave a certain authority to the signatory countries' collective entity in the course of dispute settlement between Bulgaria and the signatory countries, in accordance with the Agreement provisions.”<sup>96</sup>

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<sup>95</sup> Working Party on the Accession of Bulgaria, Third Progress Report by the Chairman, Committee on Technical Barriers to Trade, June 19, 1981 (TBT/9), page 3 (US-171).

<sup>96</sup> Minutes of Meeting Held on 12 June 1981, Committee on Technical Barriers to Trade (TBT/M/7), para. 5 (US-172).

180. In response, the European Union asserted that the terms were not *ad referendum* and that the terms of accession must be based on “mutually satisfactory terms.”<sup>97</sup> The accession of Bulgaria to the Standards Code was ultimately not completed.<sup>98</sup>

181. This history highlights the significance of the single undertaking structure that resulted from the Uruguay Round. Specifically, as expressed in Article 14.23, there was a recognition that the Standards Code was separate from the GATT in that both were subject to two dispute mechanisms, with the dispute provisions in the Standards Code taking priority over the GATT in disputes relating to rights and obligations under the Code. However, even in light of the two agreements being two separate instruments in this respect, drafters of the Standards Code recognized that the Code and the GATT involved “equivalent rights and obligations,” and that disputes under the GATT 1947 could “tak[e] into account” the recommendation or rulings pursuant to the dispute provisions of the Standards Code. At the same time, despite these “equivalent rights and obligations” there was real concern that non-GATT contracting parties may use agreements such as the Standards Code to undermine the GATT rights of GATT contracting parties.

182. In the years leading up to the launch of the Uruguay Round, concerns were expressed at the Working Group on MTN Agreements and Arrangement as to whether the “creation of separate bodies to administer the [MTN] agreements did not constitute a violation of the principle of unconditional most-favoured-nation treatment”<sup>99</sup>, because a majority of GATT contracting parties did not participate in the negotiations of these MTN agreements, and contracting parties may not fully participate in MTN bodies.

183. Those concerns carried forward into the Uruguay Round. For example, certain Members expressed concern about the perceived “effects of the Codes on the unity and integrity of the GATT system and the threat that the Codes could pose to the balance of rights and obligations under the General Agreement,” and certain delegates indicated a desire to ensure that “the Codes did not undermine the unity of the GATT system insofar as they reflected differing degrees of willingness among contracting parties to enter into higher levels of contractual obligations.”<sup>100</sup>

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<sup>97</sup> Minutes of Meeting Held on 12 June 1981, Committee on Technical Barriers to Trade (TBT/M/7), para. 6 (US-172).

<sup>98</sup> Minutes of Meeting Held on October 4-5, 1983, Committee on Technical Barriers to Trade (TBT/M/7), para. 39 (US-172) (noting that the latest proposal “clearly stipulated the possibility of taking provisional unilateral action and ensured multilateral surveillance of the Committee and the completion of the multilateral dispute settlement procedures.”).

<sup>99</sup> Working Group on MTN Agreements and Arrangements, Report to the Council, L/5832, July 5, 1985, paras. 3 (US-173).

<sup>100</sup> Negotiating Group on MTN Agreements and Arrangements, Meeting of 6 March 1987, Note by the Secretariat, MTN.NGN/NG8/1, March 23, 1987, para. 2 (US-174). *See also* Working Group on MTN Agreements and Arrangements, Report to the Council, L/5832, July 5, 1985, paras. 3-4 (US-173).

184. As a result of the Uruguay Round, the relationship between the Codes and the GATT was molded into a single undertaking under the WTO Agreement, where each of the agreements became an integral part of the WTO Agreement. In the TBT Agreement context, this is in part reflected in dispute settlement provisions; the Standards Code dispute settlement provisions were replaced with Article 14, which states that dispute settlement shall, *mutatis mutandis*, follow Article XXII and XXIII of the GATT 1994. Effectively, the dispute settlement procedures of the present-day TBT Agreement, unlike its predecessor, do not take precedence over those in the GATT 1994, and disputes over “equivalent rights and obligations” are to be made “mutatis mutandis” pursuant to the substantive GATT 1994 provisions of Article XXII and XXIII “as elaborated and applied by the Dispute Settlement Understanding.” This change suggests that Article 14 served to address at least in part concerns over the parity of rights and obligations between the GATT 1994 and the other agreements.

185. And as explained in the U.S. First Written Submission,<sup>101</sup> the dispute settlement provision of the TBT Agreement is one of a number of specific textual supports reflecting the applicability of Article XXI(b), in light of the single undertaking of the WTO agreement. That is, this reference to GATT 1994 is a reflection of the structural relationship between the multilateral trade in goods agreements (here, the TBT Agreement) and the GATT 1994. And by making dispute settlement under these agreements subject to the GATT 1994, Members are bounded by Article XXI in the assertion of a breach or nullification or impairment of benefits under those agreements, because Articles XXII and XXIII remain subject to Article XXI. Thus, the dispute settlement provisions in GATT 1994, when applied in relation to a substantive provision of a multilateral trade in goods agreement, cannot be used to undermine a Member’s essential security rights under Article XXI because “[n]othing in this Agreement [including Articles XXII and XXIII] shall prevent” the exercise of those rights.

186. As the United States has consistently emphasized throughout these proceedings, with respect to the TBT Article 2.1 claim in the present dispute, the “equivalent rights and obligations” is “essentially the same” MFN principle as that provided in the GATT 1994. Thus, Article XXI(b) should equally apply to Article 2.1 of the TBT Agreement, as it would to the “equivalent rights and obligations” under the GATT 1994.

### QUESTION 39

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

187. The inclusion of the clause “and are otherwise in accordance with the provisions of this Agreement” in the sixth recital, and its absence in the seventh recital, highlights the difference

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<sup>101</sup> U.S. First Written Submission, paras. 287-288, 308-309.

between “essential security interests” as identified in the seventh recital and the various purposes identified in the sixth recital.<sup>102</sup> As discussed in the U.S. First Written Submission, the negotiating history of the TBT Agreement confirms this difference, and suggests that the TBT Agreement was meant to “supplement” Article XX, but negotiators did not consider the same approach for Article XXI.<sup>103</sup>

188. The lack of the clause in the seventh recital underscores the interpretation that a Member’s actions that it considers necessary to protect “its essential security interests” should not be subject to review by the WTO. While the sixth recital recognizes that certain of the purposes listed therein are subject to a requirement akin to the Article XX chapeau and need somehow be “in accordance with the provisions of” the TBT Agreement, and “measures necessary for the protection of [a Member’s] essential security interest” are neither subject to a “requirement”, nor contemplated to be “in accordance with the provisions” of the TBT Agreement.

#### QUESTION 40

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

189. Paragraph 50 of the European Union’s written submission states that there is a distinction between operative provisions and the recital, and that the recital can “enlighten as to the object and purpose of an agreement, but it is not as such part of the disciplines (or rights and obligations) stipulated in that agreement.”<sup>104</sup> The EU observation is fully consistent with the interpretation that Article XXI of the GATT 1994 applies to the TBT Agreement claims in this dispute. Further, the United States agrees that the recital can serve as an “enlightenment” as to the object and purpose of the TBT Agreement. As discussed in response to Question 14, the recital serves as immediate context in the interpretation of Article 2.1 of the TBT Agreement.

190. And to be clear, it does not follow from the fact that the seventh recital is not itself an operative provision of the TBT Agreement that Article XXI(b) does not apply. The customary rules of treaty interpretation provide that a treaty should be interpreted in light of its object and purpose. Because the preamble – of relevance here, the seventh recital – sets forth the object and purpose of the Agreement, a proper interpretation of the operative provisions of the Agreement must reflect this object and purpose. If a Member invokes Article XXI(b), assessment of the Member’s compliance with certain provisions of the TBT Agreement must take into account such invocation. The United States has explained that the textual links between the TBT Agreement and the GATT 1994, in their context – in particular, the structure of the WTO Agreement, in light of the object and purpose provided by the preamble, establish that Article

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<sup>102</sup> See also Response to Question 16(c).

<sup>103</sup> See U.S. First Written Submission, para. 315.

<sup>104</sup> EU’s Third Party Submission, para. 50.

XXI(b) applies. In the context of this dispute in particular, the claims of breach under the TBT Agreement overlap with claims brought under an equivalent provision of the GATT 1994, with respect to measures that are likewise asserted to be subject to the GATT 1994.

#### QUESTION 41

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

191. The U.S. answer to Question 16(c) addresses the textual differences between the seventh recital and Article XXI(b). With respect to the relevance of these differences to the applicability of Article XXI(b), those differences do not undermine the interpretation regarding the applicability of Article XXI(b). The seventh recital is not the sole link establishing the applicability of Article XXI(b) to Article 2.1 of the TBT Agreement. The interpretation that Article XXI(b) applies to the TBT Agreement is based on the context of the single undertaking structure of the WTO, the various specific textual linkages throughout the TBT Agreement, and in light of the agreement's object and purpose.

#### QUESTION 42

**To both parties: Please comment on the relevance of the practice of Members to notify to the TBT Committee certain measures as taken for "national security", as well as raising Specific Trade Concerns on this type of measures, in determining the applicability of Article XXI(b) to the TBT Agreement.<sup>18</sup>**

<sup>18</sup> See "The WTO Agreement Series: Technical Barriers to Trade" (third edition), [https://www.wto.org/english/res\\_e/booksp\\_e/tbt3rd\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/tbt3rd_e.pdf), pp. 161-164.

192. The U.S. answers to Questions 16 and 36 address the use of the term "national security" as used in certain provisions of the TBT Agreement. As a general matter, the reference to "national security" requirements used in certain articles of the TBT Agreement (for example, Articles 2.2 or 2.10) does not mean that measures imposing such requirements are measures as to which a Member would invoke the essential security exception in Article XXI(b). It is up to the invoking Member's discretion and judgment as to whether the situations provided for under the Article XXI(b) subparagraphs have occurred, as established by the plain text of that provision.

193. If a Member notifies to the TBT Committee that a certain TBT measure is for "national security requirement" purposes, it does not mean the notifying Member considers that one of the situations in Article XXI(b) is present, or that it is conceding that such "national security requirement" measures are in breach of the TBT Agreement.

194. The same applies with respect to Specific Trade Concerns, where a Member raises such concerns to the TBT Committee about another Member's "national security" measure. Responding to these Specific Trade Concerns does not imply that the Member maintaining such measures considers invoking Article XXI(b) would be appropriate. Conversely, there may be a

situation in which the Member raising the special trade concern does not consider or did not note the measure as implicating “national security”.<sup>105</sup> The responding Member may nonetheless, as in the present dispute, consider that the measure is necessary to protect its essential security interests in the circumstances described in the subparagraphs of Article XXI(b). This highlights the subjective nature of the invocation of Article XXI(b).

#### QUESTION 43

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

195. There are textual distinctions between paragraphs (a) and (b) of Article XXI, and that of (c). In particular, the phrase “which it considers necessary” is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The self-judging nature of Article XXI(b) is relevant to the analysis of applicability, in that it establishes that a panel may not second-guess a Member’s judgment as to whether the disclosure of information is contrary to its essential security interests, or whether an action is necessary to protect its essential security interests relating to the matters in subparagraphs (i) or (ii), or taken in time of war or other emergency in international relations.

196. That said, the customary rules of treaty interpretation call for interpretation of terms in their context, and the structural context of the WTO Agreement is the same. Thus, in evaluating the applicability of any of the subparagraphs to an agreement in Annex 1A other than the GATT 1994, a panel should take into account the fact that the essential security exception is repeated in each of Annex 1A, Annex 1B, and Annex 1C. The interpretation suggested by that structure is the same with respect to all three subparagraphs: Members did not decide during the Uruguay Round that essential security interests, whether as reflected in subparagraph (a), (b), or (c), were just no longer a concern with respect to trade in goods in agreements. As noted in the U.S. First Written Submission, to find that Article XXI does not apply to the Agreement on Rules of Origin or the TBT Agreement would mean that WTO Members could not take actions in contravention of those agreements in order to meet their obligations under the UN Charter to maintain international peace and security.<sup>106</sup> While it appears that Hong Kong, China, considers this the correct interpretative result, the United States does not.

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<sup>105</sup> Indeed, with respect to the present dispute, Hong Kong, China, raised such Special Trade Concern before the TBT Committee in October 2020, but identified the objective of the disputed measure as “Consumer Information” rather than “National Security.” See Hong Kong, China, Special Trade Concern, IMS ID: 664, available at <http://tbttims.wto.org/en/SpecificTradeConcerns/View?ImsId=664> (US-175).

<sup>106</sup> U.S. First Written Submission, para. 278.

197. To be clear, this does not mean that a particular set of circumstances would require a determination of the applicability of each of the subparagraphs, or that a Member could not seek to rely on one of the subparagraphs independently of the other. For example, as discussed in Question 42, another Member may request the notification of a measure by another Member and related information, but the Member imposing the measure may invoke its Article XXI(a) rights without necessarily noting that the situations in XXI(b) have arisen. By way of another example, as in the present case, a Member may file a dispute alleging that another Member's essential security measure is in violation of one of the Annex 1A agreements. In such a situation, the responding Member may invoke Article XXI(b), or Article XXI(c), or both; but in either case the Member would not be required to furnish documents "contrary to [the Member's] essential security interest".

## **NATURE OF ARTICLE XXI(B) OF THE GATT 1994**

### **QUESTION 44**

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

- a. Which of the three possible readings do you consider to be correct?
- b. Does the qualification of a particular element of Article XXI(b) by the phrase "which it considers" make that element partially self-judging or entirely self-judging?

198. This question is for Hong Kong, China.

### **QUESTION 45**

**To the United States:** In paragraph 46 of its first written submission, the United States submits that the subparagraphs of Article XXI(b) "guide a Member's exercise of its rights under this provision...". Can the United States point to other examples of "guidance" provided in the covered agreements?

199. Other provisions of the covered agreements, like the subparagraphs of Article XXI(b), guide a Member's exercise of its rights. In providing such "guidance", these provisions accord a certain level of discretion among the Members when exercising the rights.

200. As noted in the U.S. First Written Submission, Article 3.7 of the DSU is a provision that imposes an obligation on a Member and – similar to Article XXI(b) – does not permit a panel to

look behind a Member’s decision.<sup>107</sup> Article 3.7 provides, “Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.” Article 3.7 provides no basis for a panel to opine on whether or not a Member has exercised its judgment “before bringing a case”,<sup>108</sup> but provides guidance for a Member’s exercise of its rights under the DSU. DSU Article 3.7 shows that for certain obligations, the drafters chose to impose obligations but did not permit a panel to look behind the decision of a Member in carrying out that obligation. Similarly, given the terms of Article XXI, an adjudicator cannot assume for itself the authority to second-guess the determination of a Member as to the necessity of its action for the protection of its essential security interests

201. Annex A(5) of the SPS Agreement is another example of an obligation that is not subject to Panel review in a sense that the Panel can test the Member’s determination. Annex A(5) defines “appropriate level of sanitary or phytosanitary protection” as “[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.” By its terms, this provision establishes a self-judging standard. However, this language would guide a Member’s discretion in determining the appropriate level of SPS protection. Although the text of this provision differs from the text of Article XXI(b), Annex A(5) may be seen as another example of a matter that is left to the discretion of a Member,

202. Article IX:6 of the GATT 1994 provides that Members “shall cooperate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product”. Article 4.3 of the DSU provides that a Member to which a request for consultations pursuant to a covered agreement is made “shall enter into consultations . . . with a view to reaching a mutually satisfactory solution”. In each provision, the clause beginning with “with a view to” provides guidance as to how Members approach cooperation and consultations, respectively.

203. In addition, Article 7.3 of the Agreement on Textiles and Clothing provided, “Where any Member considers that another Member has not taken the actions referred to in paragraph 1, and that the balance of rights and obligations under this Agreement has been upset, that Member may bring the matter before the relevant WTO bodies and inform the TMB [Textiles Monitoring Body]”. That is, Article 7.3 vested “consideration” of whether another Member had taken the actions described in Article 7.1, and whether the balance of rights and obligations under the ATC

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<sup>107</sup> U.S. First Written Submission, para. 59.

<sup>108</sup> The United States also notes the findings in the *Saudi Arabia – Measures Concerning the Protection of IPRs (Panel)* report regarding DSU Article 3.7. In that dispute, Saudi Arabia argued that Qatar “had not exercised sound judgment in taking action under Article 3.7 of the DSU” due to “the comprehensiveness of the diplomatic and economic measures imposed by Saudi Arabia and other Members in the region, and the underlying rationale for those measures.” The panel rejected Saudi Arabia’s argument based on the discretion granted to Qatar under Article 3.7. As that panel explained, “[g]iven the discretion granted to complainants in deciding whether to bring a dispute under the DSU, the Panel does not consider that Qatar failed to exercise its judgment within the meaning of Article 3.7 in bringing this case.” See also *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 73 (quoting *EC – Bananas III (AB)*, para. 135) (emphasis in *Mexico – Corn Syrup (Article 21.5 – US) (AB)*).



had been upset, with the Member who sought to bring the matter before WTO bodies and the TMB.

204. The text of Article XXI(b), by setting forth guidance for a Member's exercise of discretion without subjecting it to review by a panel, contrasts with other provisions in which Members have agreed to empower an adjudicator to decide, for example as in the case of DSU Article 22.3, whether a party, on the basis of the facts, could plausibly arrive at a certain conclusion.<sup>109</sup> Members have not done so through the text in other provisions, like Article XXI. Given that text, an adjudicator cannot assume for itself the authority to second-guess the determination of a Member as to the necessity of its action for the protection of its essential security interests.

#### QUESTION 46

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

205. The role of the subparagraphs of Article XXI(b) is to guide a Member's discretion by identifying the situation that a Member considers to be present when it takes an action that it considers necessary to protect its essential security interests.

206. As the United States explained in its First Written Submission and in its opening statement, this interpretation – that Article XXI(b) reserves for an invoking Member the determination of whether the grounds for invocation are present – is consistent with the customary rules of treaty interpretation, and in turn with the principle of effectiveness as reflected in those rules.

207. Hong Kong, China, claims that the subparagraphs of Article XXI(b) would serve no purpose if those subparagraphs were reserved to the judgment of the WTO Member taking action it considers necessary to protect its essential security interests.<sup>110</sup> By arguing that the subparagraphs of Article XXI would be ineffective if they are not reviewable by a panel, Hong Kong, China, suggests that the effectiveness of a treaty provision depends on whether it is reviewable in a dispute settlement mechanism, and whether that review can result in a recommendation to withdraw or modify the underlying measure.

208. This is not correct as a matter of treaty interpretation. The principle of effectiveness is not a separate principle that requires “maximum” effectiveness.<sup>111</sup> “Effective” does not mean

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<sup>109</sup> See U.S. First Written Submission, paras. 58-64.

<sup>110</sup> Opening Statement of Hong Kong, China, para. 37.

<sup>111</sup> See U.S. Opening Statement, paras. 50-63.

that each treaty provision must impose an obligation, or conditions for the exercise of a right, that is reviewable under a dispute settlement mechanism.<sup>112</sup>

209. As the United States explained, in drafting the customary rules of treaty interpretation, the International Law Commission (ILC) specifically rejected a proposal to provide a separate rule on effectiveness, in part so as not to “encourage attempts to extend the meaning of treaties illegitimately on the basis of the principle of ‘effective interpretation’”.<sup>113</sup> Instead, the ILC understood the principle of effectiveness to be embodied in what became Article 31 of the VCLT.<sup>114</sup>

210. Interpretation of Article XXI(b) under the customary rules of treaty interpretation establishes that all of the elements in the text, including each subparagraph ending, are part of a single relative clause, and they are left to the determination of the Member.<sup>115</sup> Article XXI(b) is fundamentally about a Member taking “any action which it considers necessary.” The relative clause that follows the word “action” describes the circumstances which the Member “considers” to be present when it takes such an “action”. The clause begins with “which it considers necessary” and ends at the end of each subparagraph ending. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member. The subparagraphs establish three circumstances in which a Member may act:

- (1) when a Member takes action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived”;
- (2) when a Member takes action it considers necessary for the protection of its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”; and
- (3) when a Member takes action it considers necessary for its essential security interests in time of war or other emergency in international relations.

In this way, the subparagraph endings, along with the main text, help guide a Member’s exercise of its rights under Article XXI(b) by identifying the circumstances in which it is appropriate for a Member to invoke those rights.<sup>116</sup>

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<sup>112</sup> See also response to Question 53.

<sup>113</sup> See Draft Articles on the Law of Treaties with Commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, at 219 (US-12).

<sup>114</sup> Draft Articles on the Law of Treaties with Commentaries (1966), Yearbook of the International Law Commission, 1966, vol. II, at 219 (US-12).

<sup>115</sup> See U.S. First Written Submission, paras. 35-67; see also responses to Questions 48, 63.

<sup>116</sup> In this regard, the subparagraphs of Article XXI(b) are not “[l]ike” the subparagraphs of Article XX, contrary to argument by Hong Kong, China. See U.S. First Written Submission, paras. 53-57; Response to Question 1.

211. Because an interpretation under the customary rules of treaty interpretation establishes that the subparagraphs serve to guide a Member's discretion, it is consistent with the principle of effectiveness, properly understood. There is no basis in the text to find that Article XXI(b) is ineffective simply because a panel may not substitute its judgment for that of the invoking Member as to whether the circumstances described in the subparagraphs are present.

212. With respect to the suggestion by Hong Kong, China, that the subparagraphs of Article XXI(b) are somehow redundant, in that the provision would have the same meaning without the subparagraphs,<sup>117</sup> the United States does not agree that a treaty provision that provides guidance for parties to the treaty is ineffective. The WTO agreements themselves include other provisions that guide a Member's discretion, as explained in response to Question 51. The WTO agreements also include provisions that are technically redundant, such that it does not make sense to seek to adopt interpretations that provide results-driven determinative meanings for each redundancy.<sup>118</sup>

213. With respect to the suggestion by Hong Kong, China, that, absent review by a panel as to the basis for a Member's invocation of Article XXI(b), Members will abuse the provision (for example, by claiming "*anything* can be a 'fissionable material'"), the United States notes that the existence of farfetched hypotheticals does not mean that the Panel should ignore the customary rules of treaty interpretation in order to make such a claim reviewable in WTO dispute settlement. The principle of effectiveness, properly understood, does not require or permit an outcome-driven result.

214. Moreover, as explained in the U.S. First Written Submission, the drafting history of Article XXI(b) confirms the interpretation that the subparagraphs are self-judging. Negotiators of the text of what became Article XXI addressed the issue of abuse. During the July 1947 meeting of the ITO negotiating committee, the delegate from the Netherlands requested clarification on the meaning of a Member's "essential security interests", and suggested that this reference could represent a "very big loophole" in the ITO Charter.<sup>119</sup> The Chairman made a statement "in defence of the text", and recalled the context of the essential security exception as part of the ITO Charter.<sup>120</sup> As the Chairman observed, when the ITO was in operation "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind" raised by the Netherlands delegate.<sup>121</sup> That is, the parties would serve to police each other's use of the essential security exception, through a culture of self-restraint and through responsive, reciprocal

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<sup>117</sup> Opening Statement of Hong Kong, China, para. 37.

<sup>118</sup> See U.S. Opening Statement, para. 60 (noting overlap with respect to Article X of the GATT 1994 and Article 12 of the Customs Valuation Agreement as an example).

<sup>119</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 19 (US-30).

<sup>120</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30).

<sup>121</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30).

actions taken outside the context of dispute settlement where such restraint is not possible, as we have seen throughout the history of the GATT and the WTO.

215. The drafters recognized that Article XXI(b), given its self-judging nature, could be perceived by another Member to be unwarranted (abused) in a given situation and understood that the “culture” of the organization as “the only efficient guarantee” against abuses of the provision. Such limitation was part of the bargain struck by the Members, and is reflected in the text of Article XXI(b). The principle of effectiveness does not require the Panel to reach a different result.

216. Finally, as the United States explained in its oral statement and at the first videoconference with the Panel, to the extent that Members were concerned with potential abuses of Article XXI(b), they provided for non-violation nullification or impairment claims as an avenue to address such perceived abuses. In pursuing a non-violation nullification or impairment claim, the complaining Member would not need to make a showing of breach. A successful claim would result in authorization to take countermeasures, as explained further in response to Questions 65 and 65. As the United States discussed in its First Written Submission, negotiators understood that a panel could review not whether an essential security measure “complies” with Article XXI, but whether a Member’s benefits have been nullified or impaired by an essential security measure and assess the level of any such nullification or impairment.<sup>122</sup>

#### QUESTION 47

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

217. Yes. As a general matter, the effectiveness of a treaty provision does not depend on whether it is subject to review by a dispute settlement panel. This is equally true in the context of the WTO covered agreements.

218. The VCLT provides for rules governing the conclusion and adoption of treaties between states.<sup>123</sup> However, the VCLT does not suggest that whether a party enters into binding treaty obligations is dependent on that party agreeing to formal dispute settlement. In fact, many – if not most – international obligations are undertaken without being subject to review by an arbitral

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<sup>122</sup> See U.S. First Written Submission, paras. 91-106.

<sup>123</sup> Several articles in the VCLT address treaty formation: Article 9 (Adoption of the text); Article 11 (Means of expressing consent to be bound by a treaty); Article 12 (Consent to be bound by a treaty expressed by signature); Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty); Article 14 (Consent to be bound by a treaty expressed by ratification, acceptance or approval); Article 15 (Consent to be bound by a treaty expressed by accession); Article 16 (Exchange or deposit of instruments of ratification, acceptance or accession); Article 17 (Consent to be bound by part of a treaty and choice of differing provisions); and Article 24 (Entry into force) (US-176).

body.<sup>124</sup> The question of whether a state consents to undertake a particular obligation in international law is simply separate from whether a state consents to dispute settlement in respect of that obligation.

219. This point is confirmed in *Brownlie's Principles of Public International Law*, which states that “[t]he judicial settlement of international disputes is only one facet of the enormous problem of the maintenance of international peace and security.”<sup>125</sup> Formal dispute settlement in international law – such as WTO panel procedures as established in the DSU – are consensual in character, and “there is no obligation in general international law to *settle* disputes.”<sup>126</sup> Furthermore, even when dispute settlement mechanisms are created, the underlying treaty terms still determine whether such mechanisms have authority over particular disputes.<sup>127</sup>

220. Therefore, the fact that the terms of a particular provision are drafted to be self-judging, such that a panel may not second-guess or determine for itself whether the circumstances identified have occurred, does not somehow render that provision moot or no longer binding. If a State consents to a provision, it must abide by that provision. But it does not follow that each provision imposes an obligation, or conditions for the exercise of a right, that is reviewable under a dispute settlement mechanism.

221. As relevant in this dispute, the text of Article XXI(b) establishes that it is for each Member to determine what action it considers necessary for the protection of its essential security interests relating to the items set forth in subparagraph endings (i) and (ii), or in time of war or other emergency in international relations as set forth in subparagraph ending (iii). This

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<sup>124</sup> See e.g., U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (US-177); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (US-178); U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (US-179); U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3 (US-180); Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 (US-181); U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163 (US-182); U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 (US-183); Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15 (US-184); U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (US-185); Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 1511 U.N.T.S. 3 (US-186); International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203 (US-187); U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (US-188); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (US-189).

<sup>125</sup> James Crawford, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* at 718 (8th ed. 2012) (US-190).

<sup>126</sup> James Crawford, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* at 718 (8th ed. 2012) (US-190) (emphasis in original).

<sup>127</sup> See U.S. First Written Submission, paras. 321-327; U.S. Opening Statement, paras. 69-78; and response to Question 53, for discussion of the authority of the WTO dispute settlement mechanism to make findings and recommendations in essential security disputes.

interpretation is established by the ordinary meaning of Article XXI(b) consistent with the customary rules of interpretation. As explained, this interpretation is, in turn, consistent with the principle of effectiveness.

222. In contrast, the argument that the principle of effective interpretation *requires* the Panel to review the Member's judgment under Article XXI(b) despite the self-judging language of the provision is an attempt to read into Article XXI(b) meaning not reflected in the text of the provision. It is contrary to the general rules of interpretation and an attempt to extend the meaning of treaty provisions illegitimately—precisely the type of misuse the ILC commentary warned against.<sup>128</sup>

223. Moreover, this argument ignores the fact that other provisions of the covered agreements likewise reserve judgment to Members, as discussed in response to Question 51.

#### QUESTION 48

**To the United States: In paragraph 45 of its first written submission, the United States submits, with regard to the terms "taken in time of" in subparagraph (iii), that "it is actions that are 'taken', not interests", and that "[t]hus, the temporal circumstance in subparagraph (iii) modifies the word 'action' rather than the phrase 'essential security interests'. Accordingly, Article XXI(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations."<sup>129</sup> When that action is *not* taken in time of war or other emergency in international relations, would it still be covered by Article XXI(b)?**

224. Under Article XXI(b)(iii), the Member's "necessity" assessment takes place in the context of a temporal circumstance—"in time of war or other emergency in international relations." The Member's assessment therefore cannot take place in isolation from the Member's appreciation of whether there is a "war or other emergency in international relations."

225. In Article XXI(b), the relative clause<sup>130</sup> that follows the word "action" describes the situation which the Member "considers" to be present when it takes such an "action." The clause begins with "which it considers necessary" and ends at the end of each subparagraph. Because the relative clause describing the action begins "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action.

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<sup>128</sup> See U.S. Opening Statement, paras. 53-54.

<sup>129</sup> Emphasis original.

<sup>130</sup> ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) ("Relative clauses postmodify nouns ('the house that I own'), pronouns ('those who trust me'), and nominal adjectives ('the elderly who are sick).") (US-191); THE CLASSIC GUIDE TO BETTER WRITING 69 (Rudolf Flesch & A. H. Lass, HarperPerennial, 1996) ("Who and which are called relative pronouns and introduce relative clauses... The point is that by using who or which you have made an independent clause into a relative or dependent clause—a group of words that can't stand by itself.") (emphasis in the original) (US-192).

226. With respect to subparagraph (iii), the relative clause that follows the word “action” begins with “which it considers” and ends with “taken in time of war or other emergency in international relations.” There are no words before subparagraph ending (iii) to indicate a break in the single relative clause or to introduce a separate condition. Thus, the relevant question is whether the Member considers the action to be “taken in time of war or other emergency in international relations.” To find otherwise would ignore the provision’s grammatical construction and read into the beginning of subparagraph ending (iii) the phrase “and which is,” introducing a new clause. By adding those words that do not currently appear in the text, the provision would read, in relevant parts, “any action which it considers necessary for the protection of its essential security interests *and which is* taken in time of war or other emergency in international relations.” But that phrase is not part of the text of the subparagraph ending (iii).

227. The term “emergency” in subparagraph ending (iii) supports this interpretation. The term “emergency” can be defined as “a serious, unexpected, and often dangerous situation requiring action,”<sup>131</sup> and whether there is an emergency is a subjective determination by nature. Just as a Panel cannot determine for itself which are the essential security interests of a Member, a Panel cannot determine for itself whether a Member considers its action to be taking place “in time of war or other emergency in international relations.” Furthermore, it is not clear how a panel could determine the existence of such a state of affairs unless the Member whose measure is at issue provided information regarding the details of the situation and the nature of its essential security concerns – information that is not required to be provided, pursuant to Article XXI(a).

228. If a Member considers in its own judgment that an action taken by another Member was not “taken in time of war or other emergency in international relations”, then it may avail itself of a non-violation nullification or impairment claim. Or, the Member may choose to take reciprocal action itself under a similar understanding of its inherent right to take action it considers necessary for the protection of its essential security interests.

229. Taking essential security actions is a basic function of government. It is not the case that, in the course of the more than 70 years of the GATT’s and the WTO’s existence, Members only recently started taking measures they considered necessary to protect their essential security interests. Unfortunately, the panel in *Russia – Traffic in Transit* erroneously opened the door to using the WTO as a forum to address those measures. As the United States has explained, the WTO is not the appropriate forum for these types of issues, and the credibility of the trading system is not served by seeking to convert it to one.

#### QUESTION 49

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

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<sup>131</sup> The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-193)

#### QUESTION 50

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

#### QUESTION 51

**To Hong Kong, China: In paragraph 52 of its first written submission, the United States argues that "the phrase 'which it considers necessary' is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase 'which it considers' in Article XXI(b), and not reduce these words to inutility." Please comment.**

#### QUESTION 52

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

230. Questions 49 through 52 are for Hong Kong, China.

#### QUESTION 53

**To both parties: Please comment on the relevance of the DSU provisions referred to in certain third-party submissions<sup>26</sup>, specifically Articles 3.2, 3.3, 7.2, 11, 23.1, and 23.2(a) of the DSU, as context in interpreting Article XXI(b) of the GATT 1994.**

<sup>26</sup> See Brazil's third-party submission, para. 7 (concerning Article 7.2 of the DSU); China's third-party submission, para. 16 (concerning Article 3.2 of the DSU); Exhibit EU-5, paras. 39-45 (concerning Articles 3.2, 7.1, 7.2, 11, and 23 of the DSU); Switzerland's third-party submission, paras. 40-48 (concerning Articles 3.3, 11, 23.1, and 23.2(a) of the DSU); and Ukraine's third-party submission, paras. 7-8 (concerning Articles 3.2, 3.3, 7.2, and 11).

231. In the submissions cited in this question from the Panel, certain third parties assert that the U.S. interpretation of Article XXI would undermine the integrity or "predictability and stability" of the dispute settlement procedures under the multilateral trading system (citing Articles 3.2 and 3.3), that it would disregard the purpose and function of a dispute panel (citing Articles 7.2 and 11), and that it would deprive a Member's right to seek recourse (citing Article 23). These assertions are incorrect, straining to read meaning into DSU provisions that do not alter the proper interpretation of Article XXI as it should be understood by the Panel acting under its terms of reference.



232. To reiterate, the ordinary meaning of the terms in Article XXI(b) provide that it is for each Member to determine what it considers necessary for the protection of its essential security interests and to take action accordingly. Under these terms, the only fact for a panel to review is whether the Member has invoked Article XXI(b). If it has, there is nothing left under Article XXI(b) for a panel to review.

233. As the United States has explained, in light of the self-judging nature of GATT 1994 Article XXI(b), the sole finding that the Panel may make consistent with its terms of reference under DSU Article 7.1 is to note the U.S. invocation of Article XXI. In other words, consistent with the DSU, the proper resolution of a dispute in which a complaining party alleges the breach of an obligation, and the responding party invokes Article XXI, is for the panel to examine the matter, find that Article XXI has been invoked, and in light of the text of that provision, report to the DSB that the invocation was made and no finding of breach or recommendation may be made.

234. Such a finding is consistent with Articles 7.2 and 11 of the DSU. As noted, Article XXI(b) is self-judging by its terms. Nothing in either DSU provision calls for ignoring the plain language of Article XXI(b), or indicates that every term of every WTO provision must be subject to panel review. Rather, for purposes of Article 11, a panel makes an “objective assessment” of the facts of the case and the applicability of and conformity with the covered agreements by interpreting Article XXI(b) in accordance with the customary rules of interpretation and – because those rules establish that Article XXI(b) is self-judging – finding that Article XXI(b) applies. Similarly, for purposes of Article 7.2, a panel “addresses” the relevant provisions in the covered agreement or agreements cited by the parties to a dispute by finding that Article XXI(b) has been invoked.<sup>132</sup>

235. Articles 3.2 and 3.3 of the DSU also do not undermine the self-judging nature of Article XXI(b), which, again, is established by its terms. And, finding that Article XXI(b) is self-judging, and in turn that the only finding a panel may make in a dispute in which it has been invoked is to note that invocation, neither undermines the “security and predictability” of the system, as referenced in Article 3.2 of the DSU, nor the relationship between disputes and “the effective functioning of the WTO”, as contemplated by Article 3.3. The self-judging nature of Article XXI(b) is established in the text of the provision itself, and reflects the balance between rights and obligations that negotiators struck. They recognized – correctly – that neither the “security and predictability” nor the “effective functioning” of the trading system would be well served by turning it into a forum for political debate over security issues.

236. Rather, what Members agreed to in Article 3.2 was that recommendations of the dispute settlement body may not “diminish the rights and obligations provided in the covered agreements” – including the right of Members to take action they consider necessary to protect

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<sup>132</sup> See U.S. Opening Statement, para. 77 (explaining that to “address” an issue does not necessarily mean to “resolve” an issue); *see also, e.g., Canada – Autos (AB)*, para. 114 (“In discharging its functions under Articles 7 and 11 of the DSU, a panel is not, however, required to examine all legal claims made before it. A panel may exercise judicial economy”).)

their essential security interests. And with respect to “[t]he prompt settlement of situations in which a Member considers that any benefit accruing to it . . . under the covered agreements are being nullified or impaired”, Members agreed that they could have recourse to non-violation nullification or impairment claims with respect to another Member’s essential security actions.

237. The drafting history of Article XXI(b) is consistent with this understanding of Article XXI and reflects the balance struck in the GATT 1947 (which was incorporated verbatim into the GATT 1994). Members undertook commitments to substantially reduce tariffs and other barriers to trade and to apply agreed rules while retaining fundamental sovereign rights, including the ability to take action which a Member considers necessary for the protection of its essential security interests. In discussing the text that would become Article XXI, the negotiators addressed the issue of abuse directly. Specifically, during the July 1947 meeting of the ITO negotiating committee, the delegate from the Netherlands requested clarification on the meaning of a Member’s “essential security interests,” and suggested that this reference could represent “a very big loophole” in the ITO charter.<sup>133</sup> The U.S. delegate responded that the exception would not “permit anything under the sun,” but suggested that there must be some latitude for security measures.<sup>134</sup> The U.S. delegate further observed that in situations such as times of war, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war and to determine for itself—which I think we cannot deny—what its security interests are.”<sup>135</sup>

238. In those discussions, the Chairman made a statement “in defence of the text,” and recalled the context of the essential security exception as part of the ITO charter.<sup>136</sup> As the Chairman observed, when the ITO was in operation “the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind” raised by the Netherlands delegate.<sup>137</sup> That

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<sup>133</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 19 (US-30); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30).

<sup>134</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-30); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30).

<sup>135</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-30); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30).

<sup>136</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30).

<sup>137</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30); Second Session of the Preparatory Committee of

is, the parties would serve to police each other's use of the essential security exception, through a culture of self-restraint and through responsive, reciprocal actions taken outside the context of dispute settlement where such restraint is not possible, as we have seen throughout the history of the GATT and the WTO.

239. With respect to DSU Articles 23.1 and 23.2(a), nothing in the terms of those provisions prevents a Member from exercising its rights under Article XXI(b) of the GATT 1994. Article 23.1 provides that “[w]hen Members seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding”. DSU Article 23.2(a) states that “Members shall . . . not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of the understanding”. That is, Article 23.2(a) prohibits determinations that another WTO Member has, *inter alia*, breached its WTO obligations unless DSU rules and procedures have been followed. These provisions do not address a Member's exercise of its rights under Article XXI(b), or any other WTO provision not addressed to seeking redress for a violation or other nullification or impairment.

#### QUESTION 54

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

#### QUESTION 55

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

#### QUESTION 56

**To Hong Kong, China: With respect to the 1949 GATT Council Decision in *United States - Export Measures* referenced by the United States in its first written submission<sup>21</sup>:**

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

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

- b. To what extent does this decision express an agreement between Members on the interpretation of the GATT 1994 or the application of its provisions?**
- c. If this decision does constitute a "subsequent agreement", to what extent does this decision establish the self-judging nature of Article XXI?**

<sup>21</sup> United States' first written submission, paras. 68-78.

240. Questions 54 through 56 are for Hong Kong, China.

#### QUESTION 57

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

- a. whether the GATT/ITO negotiating history would constitute "the preparatory work of the treaty" and/or "the circumstances of the conclusion" of the GATT 1994, as part of WTO Agreement; and**
- b. whether it would be appropriate for the Panel to seek recourse to the GATT/ITO negotiating history in the light of Article 32 of the Vienna Convention.**

241. As explained in paragraph 80 of the U.S. First Written Submission, not all preparatory materials may be correctly considered part of a treaty's negotiating history, or *travaux préparatoires*, and therefore appropriate for recourse as a supplementary means of interpretation. Instead, for materials to be so considered, they should be in the public domain, or at least "in the hands of all the parties."<sup>138</sup> The United States considers ITO documents constitute part of the negotiating history or the "preparatory work of the treaty" with respect to the GATT 1994.

242. Article 32 provides for recourse to supplementary means of interpretation "in order to confirm the meaning resulting from application of article 31, or to determine the meaning when the interpretation of article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable". As explained in the U.S. First Written Submission, ITO documents confirm the meaning of Article XXI(b) of the GATT 1994 resulting

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<sup>138</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 223 (US-12) (noting that the Commission did not define *travaux préparatoires* and suggesting that unpublished *travaux préparatoires* could be relevant to the interpretation of bilateral treaties because such documents "will usually be in the hands of the all the parties"); Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edition (1984), at 144 (US-20) ("The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them."); *EC – IT Products*, paras. 7.573-7.581 (declining to consider as *travaux préparatoires* documentation which was only reviewed by a subset of participants in treaty negotiations and were not circulated prior to the dispute).

from an interpretation based on its text, in its context and in light of the object and purpose of the agreement.<sup>139</sup>

243. With regard to the “appropriateness” of seeking recourse to such documents, the United States notes that numerous WTO panels and the Appellate Body have consulted the negotiating history of the ITO charter in prior disputes.<sup>140</sup> To recall, the text of Article XXI was retained – unchanged and in its entirety – when incorporated into the GATT 1994; moreover, statements by the original negotiators of Article XXI were publicly available for decades before the Uruguay Round negotiators made the specific decision to retain Article XXI in the GATT 1994.

244. Additionally, with knowledge of the statements by the original negotiators of the terms of Article XXI, Uruguay Round negotiators also decided to incorporate security exceptions with the same self-judging terms in GATS and TRIPS, as discussed in the U.S. First Written Submission.<sup>141</sup> That is, in addition to retaining this language in the GATT 1994, all of which remained unchanged, Uruguay Round negotiators also chose to retain the original GATT 1947 language in new covered agreements, the language of which was drafted at that time. Had Uruguay Round negotiators disagreed with their predecessors regarding the proper interpretation of this language, it seems surprising that they would have repeated that language verbatim in two other agreements concluded during that round. In addition, Uruguay Round negotiators of the DSU also discussed the reviewability of Article XXI, and decided not to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.<sup>142</sup>

245. These decisions by the Uruguay Round negotiators are striking, particularly considering that, as discussed in the U.S. First Written Submission,<sup>143</sup> some trade agreements negotiated between 1947 and the Uruguay Round, including agreements negotiated by GATT contracting parties, had in fact developed security exceptions that differed in important ways from the GATT 1947, such as by expressly providing for judicial review. That Uruguay Round negotiators also decided not to follow the approach of these intervening trade agreements, however – neither in the GATT 1994, nor in GATS or TRIPS, nor in the DSU – reflects that the Uruguay Round negotiators, by retaining the unchanged text of Article XXI, did not intend to depart from their predecessors regarding the interpretation of Article XXI. These intentions of the drafters – including the Uruguay Round drafters – must be given effect in this dispute.

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<sup>139</sup> U.S. First Written Submission, paras. 79-106.

<sup>140</sup> See, e.g. *Japan – Alcoholic Beverages II (AB)*, para. 51 and note 52; *Canada – Periodicals (AB)*, at 34; *United States – Welded Carbon Quality Line Pipe (AB)*, para. 175 & note 171; *EC – Commercial Vessels (Panel)*, para. 7.67 & note 205; *EU – Poultry Meat (China) (Panel)*, para. 7.357; *Indonesia – Autos (Panel)*, para. 5.164.

<sup>141</sup> U.S. First Written Submission, paras. 109-117.

<sup>142</sup> U.S. First Written Submission, paras. 118-122.

<sup>143</sup> U.S. First Written Submission, paras. 123-135.

**QUESTION 58**

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

**QUESTION 59**

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

- a. whether the internal documents constitute "supplementary means of interpretation" in the meaning of Article 32 of the Vienna Convention, for example, as the "preparatory works of the treaty" or "circumstances of the conclusion" of the treaty;**
- b. whether, as argued by the European Union in paragraph 106 of Exhibit EU-5, a panel has discretion to rely on publicly available facts and evidence, especially to confirm or support a conclusion on the interpretation of Article XXI(b) of the GATT 1994 that could be reached independently of those facts and evidence; and**
- c. whether it is possible to draw any firm conclusions from the internal documents about the self-judging nature of Article XXI.**

**QUESTION 60**

**To Hong Kong, China: Please comment on: (a) the relevance of the statements of GATT contracting parties referenced by the United States<sup>22</sup> under the Vienna Convention, and (b) whether these statements reflect a consensus position that invocations of Article XXI(b) of the GATT 1994 are not meant to be subject to review by a dispute settlement panel.**

<sup>22</sup> United States' first written submission, paras. 191-210.

246. Questions 58 through 60 are for Hong Kong, China.

**QUESTION 61**

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

- a. Does this decision constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention?**
- b. If this decision does constitute a "subsequent agreement", to what extent does this decision establish the self-judging nature of Article XXI?**

- c. To what extent does this decision express an agreement between Members on the interpretation of the GATT 1994 or the application of its provisions?**
- d. If this decision does not constitute a "subsequent agreement", should the Panel give it any legal weight under any other provision (such as Article 1(b) of the GATT 1994 or Article XVI:1 of the WTO Agreement)?**

247. The United States answers Question 61(a) through (d) together.

248. Article 31(3)(a) of the Vienna Convention states: "There shall be taken into account, together with the context: Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision."

249. The United States considers that the Decision Concerning Article XXI of The General Agreement (the 1982 Decision), adopted by the Contracting Parties in 1982 is a "decision" within the meaning of paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement. However, it does not constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention.

250. In 1982, the European Communities (EC) and its member states, Canada, and Australia invoked Article XXI to justify their application of certain measures against Argentina in light of Argentina's actions in the Falkland Islands.<sup>144</sup> The matter was discussed in two GATT Council meetings, and the Contracting Parties ultimately adopted a decision concerning Article XXI in connection with these discussions.<sup>145</sup>

251. That decision calls for the Contracting Parties to inform each other "to the fullest extent possible" of measures taken under Article XXI and states that when such measures are taken, all contracting parties affected by such action retain their full rights under the GATT.<sup>146</sup>

252. Notably, the preamble to this decision twice acknowledges the self-judging nature of Article XXI. First, using language that mirrors the pivotal self-judging phrase of Article XXI, the text emphasizes Article XXI's importance in safeguarding contracting parties' rights "when they consider" that security issues are involved.<sup>147</sup> Second, the decision recognizes that "in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected." With this phrasing, the Contracting Parties acknowledged that the decision of whether

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<sup>144</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982) (US-86); Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-87).

<sup>145</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-52).

<sup>146</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-52).

<sup>147</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-52).

to take essential security measures, and what measures to take, is within the authority of each contracting party.

253. The United States identified the decision by the GATT contracting parties pursuant to *United States Export Measures* dispute between the United States and Czechoslovakia as a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention.<sup>148</sup> However, unlike the 1982 Decision, the Czechoslovakia decision pertains to an actual application of Article XXI. As the United States explained in its First Written Submission, the application of Article XXI, along with Article XXIII, resulted in an “agreement” among the parties that the United States had not failed to carry out its obligations under the GATT.<sup>149</sup>

254. The 1982 Decision, on the other hand, is neither an agreement among the parties regarding the interpretation of the treaty (the GATT 1994), nor regarding application of its provisions. Indeed, there is no binding language in the 1982 Decision; rather, it provides “procedural guidelines” that “should” apply (inform of trade measures taken under Article XXI) and reaffirms that contracting parties affected by Article XXI retain their rights under the GATT 1947. The decision does not reflect agreement among the parties that the provisions of the GATT were to be interpreted in a specific way, or as to the application of a specific provision. Indeed, the preamble of the decision itself states, “[t]hat until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its applications.” In this way, the decision itself acknowledges that it is not an actual agreement on the application of the provisions, as contemplated under Article 31(3)(a) of the Vienna Convention.

255. Therefore, as to the legal weight of this specific decision, because it is not a “subsequent agreement” under Article 31(3)(a) of the Vienna Convention, the Panel is not required to take it into account as context in the interpretative exercise. However, as a decision under Article 1(b) of the GATT 1994 or Article XVI:1 of the WTO Agreement, the Panel may take it into account to the extent relevant to this dispute.

## QUESTION 62

**To Hong Kong, China: Please comment on the relevance of the textual differences in the three linguistic versions of Article XXI(b) of the GATT 1994 for purposes of interpreting the provision. In your responses, please discuss, *inter alia*, that the Spanish-language version of Article XXI(b) of the GATT 1994: (a) places the word "relativas" (relating) in the introductory clause to Article XXI(b) as opposed to at the beginning of subparagraphs (i) and (ii); (b) places a comma before the word "relativas"; (c) uses the phrase "a las aplicadas"**

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<sup>148</sup> See U.S. First Written Submission, paras. 68-78.

<sup>149</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).



**(to those applied/taken) at the beginning of subparagraph (iii); and (d) uses a colon at the end of the introductory clause, like the French text.**

256. Question 62 is for Hong Kong, China.

### QUESTION 63

**To the United States: In paragraph 39 of its opening statement, Hong Kong, China argues that a Member invoking Article XXI(b) "must first demonstrate the *prima facie* subject matter applicability of one or more of the subparagraphs. Only then does it become necessary for a panel to evaluate the conformity of the measure with the requirements of the chapeau." Similar comments were made in the oral statements of China (third-party statement, paragraph 7), Norway (third-party statement, paragraph 6), the Russian Federation (third-party statement, paragraphs 17-18), and Switzerland (third-party submission, paragraph 53). Please comment.**

257. The United States understands Hong Kong, China, as well as certain third parties, to argue that the United States bears the burden of proof to establish a *prima facie* case that the circumstances of one of the subparagraphs in Article XXI(b) are met. However, Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member's right to take any action which it considers necessary for the protection of its essential security interests, nor does the text require the invoking Member to establish the *prima facie* applicability of the subparagraphs. Based on the plain text of Article XXI(b), what is required of the Member exercising its right under Article XXI is set forth in the terms of Article XXI itself – that the Member consider one or more of the circumstances set forth in Article XXI(b) to be present. The invoking Member's burden is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination that it "considers" actions is necessary.

258. As explained in the U.S. First Written Submission, the terms of Article XXI(b) form a single relative clause that begins in the chapeau and ends with each subparagraph. That is, the single relative clause in Article XXI(b) that follows "action" begins with the phrase "which it considers necessary" and ends at the end of each subparagraph, and describes the situation which the Member "considers" to be present when it takes such an "action". Because the relative clause describing the action begins with "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action. That is, the Member need not establish the "prima facie subject matter applicability of one or more of the subparagraphs."

259. To recall, the United States' interpretation that Article XXI is self-judging through its use of a single relative clause is supported by the text of the provision. In Article XXI(b), the phrase "which it considers necessary" is followed by the word "for". The relevant question is not simply whether a Member considers any action "necessary", but whether a Member considers the action "necessary for" a purpose – namely, the protection of its essential security interests relating to subject matters in subparagraphs endings (i) and (ii), or for the protection of its essential security interests in the circumstances provided for in subparagraph ending (iii). And it is "its" essential security interests – those of the Member in question – that the action is taken for

the protection of. The language of Article XXI(b) does not contemplate that there must be a single set of essential security interests common to all Members. If that were so, such interests could have been identified.

260. Hong Kong, China, and certain third parties, are trying to read into Article XXI(b) the clause “and which relates to” before subparagraphs (i) and (ii), and “and which is taken in time of” before subparagraph (iii). But there are no words before any of the subparagraphs to indicate a break in the single relative clause or to introduce a separate condition. The drafters could have added an introductory clause before the subparagraph endings to indicate that these were intended to be conditions separate from the “which it considers” clause. Indeed, the drafters *did* add such a clause in other provisions, such as Article XX(i) and Article XX(j), which use the phrase “provided that.” Such a clause is absent from Article XXI(b), however, indicating that the text should be read as a single clause, and not as introducing separate conditions.

261. The lack of any conjunction to separate the three subparagraph endings also supports this interpretation. The subparagraphs are not separated by the coordinating conjunction “or”, to demonstrate alternatives, or the conjunction “and”, to suggest cumulative situations. Accordingly, each subparagraph must be considered separately for its relation to the chapeau of Article XXI(b).

262. Subparagraph endings (i) and (ii) of Article XXI(b) both begin with the phrase “relating to” and directly follow the phrase “essential security interests” in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraph endings (i) and (ii) modify the phrase “essential security interests”. This is because, under English grammar rules, a participial phrase, which functions as an adjective<sup>150</sup>, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.<sup>151</sup>

263. The first two subparagraph endings, therefore, each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken.<sup>152</sup> Given the phrase “relating to” connecting the subject matters in the subparagraph

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<sup>150</sup> MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) (“A participial phrase includes a participle and functions as an adjective.”) (US-194).

<sup>151</sup> The Merriam-Webster’s Guide to Punctuation and Style provides that “[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies” and “[u]sage problems with phrases occur most often when a modifying phrase is not placed close enough to the word or words that it modifies.” MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-194). The Harper’s English Grammar also provides that “adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify.” HARPER’S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-195).

<sup>152</sup> Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived,” and its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in

endings (i) and (ii) and the term “essential security interests,” the relevant question is whether the Member considers such a connection to exist. That is, it is a Member that considers those interests to be “essential security interests”.

264. The final subparagraph provides that a Member may take any action which it considers necessary for the protection of its essential security interests “taken in time of war or other emergency in international relations.” It does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. Although an adjective phrase normally follows the word it modifies, it is “actions”—not “interests”—that are taken. Given this text, it is the Member that considers the action to be “taken in time of war or other emergency in international relations.”

265. The United States acknowledged in its First Written Submission<sup>153</sup> that whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term “interests” in the chapeau while the temporal limitation in subparagraph (iii) relates to “action”, the Spanish text of the three subparagraphs – in particular, use of the feminine plural “relativas” – indicates that they must be read to modify the term “action” in the chapeau of Article XXI(b). However, as the United States explained, the three texts can be reconciled under customary rules of interpretation, as reflected in Article 33 of the VCLT. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms “any action which it considers” in the chapeau, because this reading is consistent with the Spanish text, and also –while less in line with rules of grammar and conventions – permitted by the English and French texts. The fundamental meaning of Article XXI(b) is the same. The relative clause<sup>154</sup> that follows the word “action” describes the situation which the Member “considers” to be present when it takes such an “action.” The clause begins with “which it considers necessary” and ends at the end of each subparagraph. Because the relative clause describing the action begins “which it considers”, the other elements of this clause are committed to the judgment of the Member taking the action.

266. The subparagraph endings thus form an integral part of the provision in that they complete the sentence begun in the chapeau, establishing three circumstances in which a Member may act: (1) when a Member takes action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived”; (2) when a Member takes action it considers necessary for the protection of its essential security interests “relating to the traffic in arms, ammunition and implements of war

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other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment.”

<sup>153</sup> U.S. First Written Submission, paras. 162-188.

<sup>154</sup> ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (“Relative clauses postmodify nouns (‘the house that I own’), pronouns (‘those who trust me’), and nominal adjectives (‘the elderly who are sick.’) (US-195); THE CLASSIC GUIDE TO BETTER WRITING 69 (Ruldolf Flesch & A. H. Lass, HarperPerrenial, 1996) (“Who and which are called relative pronouns and introduce relative clauses... The point is that by using who or which you have made an independent clause into a relative or dependent clause—a group of words that can’t stand by itself.”) (emphasis in the original) (US-192).

and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”; and (3) when a Member takes action it considers necessary for its essential security interests taken in time of war or other emergency in international relations.

267. Therefore, the text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify or establish a *prima facie* case of applicability of the relevant subparagraph ending to that provision that an invoking Member may consider most relevant. Furthermore, nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive. By invoking Article XXI(b), the Member is indicating that one or more of the subparagraphs is applicable.

268. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked. This understanding is supported by the text of Article XXI(a), which confirms that Members are not required “to furnish any information the disclosure of which it considers contrary to its essential security interests.” It may be that a Member invoking Article XXI(b) nonetheless chooses to make information available to other Members. And while publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), for example, the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.

#### QUESTION 64

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

269. The availability of a non-violation nullification or impairment claim is relevant to the question of whether the essential security exception in Article XXI(b) is self-judging because this is the balance negotiators struck in the text. That is, the text of Article XXI(b) establishes that the provision reserves to the invoking Member the judgment as to whether the circumstances for invoking the exception are met, such that a panel may not substitute its judgment for that of the invoking Member. And the negotiating history of Article XXI confirms that negotiators understood that, while essential security measures could not be challenged as violating treaty provisions, and in turn could not be found to violate those provisions, a panel could review whether a Member’s benefits have been nullified or impaired by the essential security measure and assess the level of any such nullification or impairment.<sup>155</sup> The language of Article XXIII:1 of the GATT 1994 and Article 26.1 of the DSU provides that recourse is available by a non-violation nullification or impairment claim, however.

270. The availability of a non-violation nullification or impairment claim preserves the balance struck by negotiators in the text of both Article XXI(b) and the DSU: while it affords recourse to a Member aggrieved by another Member’s essential security action, the Dispute

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<sup>155</sup> See U.S. First Written Submission, paras. 91-106.

Settlement Body – as a result of the self-judging nature of Article XXI(b) established by the terms of that provision – may not find that a Member is wrong in considering an action necessary to protect its essential security interests, and recommend that the Member bring that measure into conformity with a covered agreement. To make such a recommendation would diminish a Member's "right" to take action it considers necessary to protect its essential security interests, contrary to Articles 3.2 and 19.2 of the DSU. By recognizing that the system is focused on trade issues, and not security issues, the availability of a non-violation nullification or impairment claim helps maintain the credibility of the dispute settlement system, and the multilateral trading system as a whole.<sup>156</sup>

271. The United States has acknowledged the consequences of invoking Article XXI, including that other Members may take reciprocal actions or seek other actions under the DSU, including a non-violation claim. These consequences provide recourse to affected Members, but without adjudicating essential security issues in dispute settlement. This approach properly respects the balance of rights and obligations agreed to by the Members, and reflects the text of Article XXI(b) as interpreted in accordance with the customary rules of treaty interpretation.

#### QUESTION 65

**To the United States: In paragraph 12 of its closing statement the United States submits that non-violation nullification and impairment claims "permit a Member who takes action to protect its essential security interests to be held accountable for that action...". With reference to Article 26.1 of the DSU could you please elaborate on the conditions under which a Member would be held accountable? In your response, please also elaborate on the legal basis, in the DSU, that would allow the affected Member to be "authorized by the DSB to take countermeasures" as stated in the United States' opening statement at paragraph 67.**

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<sup>156</sup> As explained in the U.S. First Written Submission, in response to a question whether the drafters of the ITO charter "should not provide for any possibility of redress", the U.S. delegate observed that such actions "could not be challenged in the sense that it could not be claimed that the Member was violating the Charter", but acknowledged that a member affected by such actions "would have the right to redress of some kind" under Article 35(2) of the ITO Charter. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26-27 and 29 (US-30). Similarly, the United States observed during a GATT Council discussion in 1982 regarding the application by certain Contracting Parties against Argentina in light of the situation in the Falkland Islands, "[T]he GATT had never been the forum for resolution of any disputes whose essence was security and not trade, and that for good reasons, such disputes had seldom been discussed in that GATT, which had no power to resolve political or security disputes. . . . GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests". GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-86). As the United States again noted at a meeting in 1986 in connection with the *United States – Measures Affecting Nicaragua* dispute, "GATT was not a forum for examining or judging national security disputes. When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations". Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 8 (US-93).

272. As indicated by its opening clause, the four provisos at (a) to (d) of Article 26.1, second sentence, apply to a situation in which claims under GATT 1994 Article XXIII(1)(b) are asserted, namely, “[w]here and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement.” In such a non-violation circumstance, “the procedures in this [Dispute Settlement] Understanding shall apply, subject to the following provisos.”

273. Under GATT’s customary practice, “[i]f a contracting party bringing an Article XXIII case claim[ed] that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification.”<sup>157</sup> This GATT customary practice is repeated in subparagraph (a) of DSU Article 26.1, second sentence, which requires a detailed justification in support of a non-violation complaint.

274. Article 26.1(b) provides, “[W]here a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body *shall recommend* that the Member concerned *make a mutually satisfactory adjustment*”.<sup>158</sup> Article 26.1(c) contemplates that the arbitration on the reasonable period of time under Article 21.3 “may include a determination of the *level of benefits which have been nullified or impaired*” (italics added). And Article 26.1(d) links the non-violation procedure to Article 22.1: “notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.”

275. Article 26.1 therefore sets out that the DSU “shall apply” to non-violation claims, subject to four adjusted procedures. Because the DSU applies, Article 22 on “Compensation and the Suspension of Concessions” apply to such claims. Article 22.2 of the DSU confirms that a panel’s recommendation to make a mutually satisfactory adjustment (as required by Article 26.1(b)), could, in turn, potentially lead to authorization to take countermeasures. Article 22.2 provides, “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith *or otherwise comply with the recommendations and rulings* within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. *If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization* from the DSB

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<sup>157</sup> Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, L/4907, para. 5 (US-196).

<sup>158</sup> Emphasis added.

to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”<sup>159</sup>

276. Thus, Article 22.2 would permit a Member having prevailed on a non-violation nullification or impairment claim to request authorization from the DSB to impose countermeasures. The trigger for such a request would be a failure to agree on satisfactory compensation if “the Member concerned fails to ... otherwise comply with the recommendations ... within the reasonable period of time”. Article 26.1(b) directs a panel finding a measure “to nullify or impair benefits under ... the relevant covered agreement with violation thereof” to “recommend that the Member concerned make a mutually satisfactory adjustment.” In this way, the ability of an affected Member to bring a non-violation claim and potentially impose countermeasures permits a Member to be held accountable for actions it takes to protect its essential security interests.

#### QUESTION 66

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

277. The Panel should analyze the text of GATT 1994 Article XXI(b) consistent with customary rules of interpretation, as set forth in Article 31 of the Vienna Convention on the Law of Treaties. That is, Article XXI(b) must be interpreted according to the ordinary meaning of its terms, in context, in the light of the object and purpose of the Agreement. That meaning may be confirmed by recourse to supplementary means of interpretation, such as the negotiating history of the provision.

278. The KORUS FTA is not context for interpretation of the GATT 1994 or any other covered agreement, nor would it appear to be relevant supplementary means of interpretation (for example, entering into force more than 17 years after the WTO). That said, because the EU has already presented erroneous arguments in relation to this material, for completeness the United States notes the inclusion of the referenced footnote suggests the exact opposite of the conclusion drawn by the EU. The inclusion of footnote 2 in Chapter 23 of the KORUS FTA confirms that the United States and Korea, the parties to the KORUS FTA, understand that essential security provision just as the United States has explained the meaning of Article XXI(b).

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<sup>159</sup> Emphasis added.

279. Footnote 2 states that “[f]or greater certainty, if a Party invokes” the essential security provision, “the tribunal or panel hearing the matter shall find that the exception applies.”<sup>160</sup> Parties use the words “for greater certainty” in its international trade agreements to introduce statements that confirm the meaning of other text in the agreement.<sup>161</sup> That is, the phrase “for greater certainty” signals that the statements that follow reflect the understanding of the treaty parties regarding what the provisions of the agreement would mean *even if the sentence were absent*. In other words, footnote 2 confirms that Article 23.2 itself means that “if a Party invokes Article 23.2 in an arbitral proceeding . . . the tribunal or panel hearing the matter shall find that the exception applies”. That is, the text of Article 23.2 itself establishes that its essential security exception is self-judging. It does this through the same operative words – which it considers necessary for – as Article XXI(b): “Nothing in this Agreement shall be construed . . . (b) to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.”

#### QUESTION 67

**To Hong Kong, China: In paragraph 123 of its first written submission, the United States notes that the Treaty of Rome and the Agreement on the European Economic Area reflect significant deviations from the text of Article XXI of the GATT 1994, including by omitting the "which it considers necessary" language, by expressly providing for the review of measures taken by a government for essential security purposes, and by using language that goes beyond that contained in subparagraph (iii). What meaning do you attribute to these differences in language in the above-mentioned treaties as to whether the security exception of Article XXI(b) is self-judging?**

280. Question 67 is for Hong Kong, China.

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<sup>160</sup> Emphasis added.

<sup>161</sup> The European Union is well aware of this practice. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States appears to have some 79 uses of the phrase “for greater certainty”.