United States – Origin Marking Requirement

(DS597)

RESPONSES OF THE UNITED STATES TO THE QUESTIONS FROM THE PANEL TO THE PARTIES AFTER THE SECOND SUBSTANTIVE MEETING

February 28, 2022

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Brazil – Desiccated Coconut (AB)	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Chile – Price Band System (Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
China – Audiovisual Products (AB)	Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, adopted 19 January 2010
China – Rare Earths (AB)	Appellate Body Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
China – Raw Materials (AB)	Appellate Body Reports, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
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Thailand – Cigarettes (AB)	Appellate Body Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/AB/R, adopted 15 July 2011
Thailand – Cigarettes (Article 21.5 – Philippines) (Panel)	Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines, WT/DS371/RW and Add.1, circulated 12 November 2018
US – Clove Cigarettes (AB)	Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, adopted 24 April 2012
US – Gasoline (AB)	Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996

INTRODUCTION

1. This submission provides written responses to the questions from the Panel to the parties after the second 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, consistent with the view it and other Members have shared since the inception of the GATT, 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).

2. Before proceeding with the substantive responses to the Panel's questions below, the United States observes that in its closing statement at the second videoconference, Hong Kong, China, asserted that it is not challenging the U.S. determination with respect to its lack of autonomy vis-à-vis the People's Republic of China.[1] The United States finds this assertion surprising, given that in its First Written Submission, ***all the claims*** made by Hong Kong, China, were with respect to the "sufficient autonomy condition." Specifically, Hong Kong, China, claimed that the "sufficient autonomy condition" is being discriminatorily applied to its products, in breach of the non-discrimination provisions under the GATT 1994, the *Agreement on Rules of Origin*, and the *Agreement on Technical Barriers to Trade* (TBT Agreement).[2] Hong Kong, China, maintained this position during the first videoconference with the Panel, and it was reflected in its written responses to the Panel's questions after the first videoconference as well as in its Second Written Submission.[3]

3. The United States will address this shift in position with respect to the claims by Hong Kong, China, where relevant in response to the questions from the Panel below. The United States observes as a general matter that this shift is irreconcilable with the previous position of Hong Kong, China, that the "sufficient autonomy condition" is being discriminatorily applied. It appears to be simply a reflection of the unwillingness by Hong Kong, China, to engage with the facts of the case, and its dismissal of U.S. essential security interests, in light of Hong Kong, China's apparent view of the lack of importance of democratic norms, human rights, and fundamental freedoms.

4. The United States proceeds with addressing the Panel questions below.

[1] Closing Statement of Hong Kong, China at the Second Substantive Meeting, para. 18.

[2] *See* First Written Submission of Hong Kong, China, paras. 21, 39, 40, 44-48, 58, 84.

[3] *See* Responses of Hong Kong, China, to Questions from the Panel, paras. 45, 46, 64, 70; Second Written Submission of Hong Kong, China, paras. 69, 122.

CLAIMS UNDER ANNEX 1A AGREEMENTS

AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT AGREEMENT)

Question 68.

To the United States: In paragraph 74 of its opening statement at the second meeting of the Panel, the United States observes that "[b]eing required to use a particular mark of origin – here, 'China' – cannot, in itself, be evidence of detrimental impact…". Does the United States mean that if WTO Member A is required to put the name of WTO Member B on the origin mark, this does not, in itself, constitute evidence of detrimental impact? Does the United States' response differ depending on whether the WTO Member in question is a separate customs territory?

5. This question asks whether the requirement that products from Hong Kong, China, be marked as originating in China can constitute evidence of detrimental impact. As a general matter, any fact presented by a party in a WTO dispute potentially might "constitute evidence" of a proposition, though at the same time such evidence standing alone may not come close to *establishing* the proposition. The legal issue here is whether the U.S. marking requirement, standing alone, is sufficient to establish detrimental impact. This is the issue raised in the argument by Hong Kong, China, about *"de jure"* discrimination under Article 2.1 of the TBT Agreement, and this was the issue the United States was addressing in the above quotation from the U.S. opening statement.[4] And the answer to the question is no – the mere requirement to employ a certain country name in product marking is not sufficient to establish detrimental impact.

6. What Article 2.1 prohibits, by its terms, are measures that accord "less favorable treatment" to the concerned imported products as compared to other foreign like products based on origin. For the element of "less favorable treatment" to be established, there must be detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and that detrimental impact is based on the administration of an origin-based discrimination. It is not sufficient to assume that less favorable treatment exists, and a complainant cannot demonstrate less favorable treatment simply by conclusory statements. Hong Kong, China, offers no basis in the text of Article 2.1 for its arguments to the contrary – because there is none.

7. And for purposes of this dispute, the fact that goods are marked with "China" simply reflects the fact that all imports must be marked using the terminology determined by the United States. As elaborated below, this by itself does not constitute evidence of detrimental impact, much less "less favorable treatment", and the response would be no different depending on whether the Member in question is a separate customs territory.

8. To recall, during the second videoconference, the United States described three aspects to the measure that is being challenged. First, there is the requirement that goods have marks of

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[4] *See* Second Written Submission of Hong Kong, China, para. 103.

origin; second, there is the determination of the terminology (or name) used for marking purposes; and third, what Hong Kong, China, has called the "sufficient autonomy condition."

9. The operation of the marking requirement and determination of the terminology reflect differences with respect to origin; that is generally the function of marks of origin. They are requirements and determinations that are necessarily different depending on where imports are coming from – that is a function of them being related to marks of origin, not because of discrimination.

10. U.S. statute 19 U.S.C. 1304 generally requires that a good be marked with its origin, and U.S. Customs and Border Protection (CBP) determines what "English name" is permissible as a mark.[5] All countries are subject to the same requirements under both these aspects; that is, imports from all countries are required to be marked, and imports from all sources must be marked with terminology that CBP considers permissible. As the United States explained in its response to Question 5, 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. As the United States has explained, none of the provisions of the covered agreements at issue require a Member to permit use of a specific name for origin marking purposes. Use of a name other than that specific name does not itself establish detrimental impact.

11. Hence, the claim of discrimination is essentially with respect to the third aspect – the consideration of autonomy. Hong Kong, China, has claimed that it is subject to this condition while others are not – that is, that the United States is discriminatorily applying this condition to Hong Kong, China.[6] Although Hong Kong, China, claimed in the second videoconference that the U.S. determination with respect to its autonomy is not at issue in this dispute, this assertion is belied by the fact that its claim of "*de jure*" discrimination now appears to be that U.S. imports must be marked with the name of the country of "manufacture, production, or growth", except for goods from Hong Kong, China.[7] This is simply a restatement of the claims by Hong Kong, China, throughout these proceedings that "autonomy" is a condition other than manufacturing or processing that is discriminatorily applied to determine origin, and again reflects the disagreement by Hong Kong, China, with the name that the United States has chosen for marking purposes, in light of China's interference with the autonomy of Hong Kong, China.

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[5] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304 (US-10).

[6] First Written Submission of Hong Kong, China, para. 58 ("[T]he United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members).").

[7] Closing Statement of Hong Kong, China, at the Second Videoconference, para. 3.

12. To recall, the purpose and overall concern of the marking requirement at issue is not origin-based. The determination with respect to the autonomy of Hong Kong, China, stems from the global U.S. concern for fundamental freedoms, human rights, and integrity of democratic institutions.[8] Indeed, as discussed in response to Question 119 below, what Hong Kong, China, snidely dismisses as "the United States' professed global concerns about democratic norms and fundamental freedoms"[9] have been expressed in declarations of emergencies regarding human rights, slavery, denial of religious freedom, political repression, public corruption, and the undermining of democratic processes over decades.[10] With respect to Hong Kong, China, support for democratization is expressly spelled out as a "fundamental principle of U.S. foreign policy" in the U.S.-Hong Kong Policy Act.[11] The United States has already pointed to significant other evidence concerning such interests with respect to Hong Kong, China.[12]

13. Executive Order 13936 suspended differential treatment vis-à-vis the People's Republic of China for marking purposes in light of the determination that, following a series of actions by the People's Republic of China, Hong Kong, China, "is no longer sufficiently autonomous to justify differential treatment". Hong Kong, China, challenges these measures as "*de jure*" discriminatory and thus concludes that they are inherently discriminatory and there is inherently detrimental impact, such that there is no need to take into account even terms that are on the face of the measure, in addition to the surrounding facts and circumstances.[13] As further explained in Question 69, such an interpretation is wrong under the plain text of Article 2.1.

Question 69.

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

14. "Origin-based distinction" is the differentiated treatment of a product based on its source. The term "*de jure* discrimination" is not a phrase that the United States recognizes in the context of Article 2.1, and therefore the United States cannot speak for what Hong Kong, China, means

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[8] U.S. Second Written Submission, para. 5.

[9] Closing Statement of Hong Kong, China, at the Second Videoconference, para. 8.

[10] *See infra* Response to Panel Question 119.

[11] *See* Hong Kong Policy Act of 1992, sec. 2(5) (US-3) ("Support for democratization is a fundamental principle of United States foreign policy. As such, it naturally applies to United States policy toward Hong Kong. This will remain equally true after June 30, 1997.").

[12] *See* Exhibits US-119 to US-133, US-197 to 200, US-209 to 210.

[13] Response of Hong Kong, China, to Panel Questions, para. 53 ("In cases where there is a *de jure* origin-based distinction, the fact that there is discrimination against imported products is evident on the face of the measure, and so there is ***no need for additional analysis***." (emphasis added)).

exactly by "*de jure* discrimination". But if "origin-based distinction", as explained here, is in fact what Hong Kong, China, means by "*de jure* discrimination", then that alone does not amount to "less favorable treatment" of Article 2.1.

15. As the United States has explained, formally different treatment of like products from different sources does not mean there is "less favorable treatment."[14] There must still be detrimental impact to the conditions of competition. However, the type of "*de jure* discrimination" that Hong Kong, China, refers to appears to suggest that that an origin-based *distinction* is by itself a detrimental impact. The plain text of Article 2.1 does not support such an interpretation.

16. As for the relationship between these terms and "legitimate regulatory distinction" or "origin-neutral" factors or objectives, the latter terms are explanations for detrimental impact that may be associated with the operation of the measure. For the United States, the "less favorable treatment" analysis is a holistic examination that includes an overall assessment of the facts and circumstances, including the regulatory objectives. Hence, a measure can include an "origin-based distinction", but nonetheless be motivated by origin-neutral objectives as illuminated by the surrounding facts and circumstances. That is, an inherently origin-based distinction, such as origin marking, may nonetheless have an origin-neutral basis or objective that can explain any alleged detrimental impact.

Question 70.

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

17. Question 70 is for Hong Kong, China.

Question 71.

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

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[14] U.S. Responses to First Set of Panel Questions, paras. 66, 87.

18. Question 71 is for Hong Kong, China.

Question 72.

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

19. Question 72 is for Hong Kong, China.

Question 73.

To Hong Kong, China: What is the basis for Hong Kong China's view, expressed during the second meeting of the Panel, that a level of justification would be available under the exceptions for *de jure* discriminations under, *inter alia*, Articles I and IX of the GATT 1994, but not under the TBT Agreement? Please point out what in the text of the two provisions would warrant such a difference of approach between the TBT Agreement and the GATT 1994? In your response, please also comment on the statement by the Appellate Body in paragraphs 96 and 101 in Appellate Body Report, *US – Clove Cigarettes*.

20. Question 73 is for Hong Kong, China.

Question 74.

To the United States: In its responses to Panel questions Nos. 14 and 15, the United States describes what it considers "the correct" approach under Article 2.1 of the TBT Agreement.

a. Under the "correct" approach described by the United States, would the assessment be the same whether the distinction resulting from the administration of the measure is expressed in origin-based or origin-neutral terms?

21. Yes, the assessment would be the same, because interpreting a measure and its impact, if any, must take into account not only the text of the measure, but also its regulatory objective and purpose. As the United States has explained, formally different treatment of like products from different sources does not mean there is "less favorable treatment."[15] The terms of a measure, such as an origin marking requirement, on their face may reflect requirements or determinations relating to the origin of the product, but the underlying purpose or effect might be origin-neutral. It would not be consistent with Article 2.1 not to take an origin-neutral purpose or effect into

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

consideration and simply assume that any measure that makes a distinction that has anything to do with origin by definition breaches Article 2.1, as Hong Kong, China, contends.

b. Please clarify whether the United States sees the examination of whether "any detrimental impact is based on the administration of an origin-based discrimination" as a second step of the analysis of less favourable treatment under Article 2.1, after the panel has found that there is detrimental impact. Please also clarify the United States' statement, in paragraph 57 of its response to Panel question No. 14, that "a panel would evaluate this as part of the overall assessment of whether a measure modified the conditions of competition".

22. The United States does not suggest that there is a set order of analysis, as the finding as to whether the "less favorable treatment" element of an Article 2.1 claim has been established should be based on an overall evaluation of the facts and circumstances. To be clear, both of these separate elements – existence of detrimental impact to conditions of competition and origin-based discrimination – must be established. But the elements can be analyzed in any way a panel sees fit.

23. The phrase that the question quotes was made in the context of the evaluation of whether there are non-origin-based discrimination (or origin-neutral) factors, such as extraneous factors or an origin-neutral regulatory objective, that can explain or contribute to the detrimental impact to conditions of competition (if such impact has been established). Any such attribution may be an indication of non-discrimination. This is the U.S. approach to the examination of the "less favorable treatment" element of Article 2.1, which is different than the Appellate Body's approach. As the Panel is aware, the United States considers that the Appellate Body's approach does not account for factors, even significant ones, apart from the "legitimate regulatory distinction" in explaining possible detrimental impact; rather, it appears to suggest that any detrimental impact must "stem exclusively from" a legitimate regulatory distinction.

c. Please clarify what the United States means by an "origin-neutral regulatory purpose", and in what respect this concept differs from the concept of "legitimate regulatory distinction" used by the Appellate Body under the approach that the United States considers "flawed". In this regard, please indicate whether and if so, how, "essential security interests" measures expressly limited to imports from one Member can be origin-neutral?

24. The United States does not consider the term "legitimate regulatory distinction" itself as inherently flawed. Instead, the United States takes issue with the suggestion that any detrimental impact must "stem exclusively" from a "legitimate regulatory distinction." The text of Article 2.1 does not support such a requirement.

25. As to the difference between origin-neutral regulatory purpose and legitimate regulatory distinction, both concepts are similar in that they can be used to explain whether the purpose and objective of the measure have a non-origin discriminatory basis. However, the use of the term "origin-neutral" is not limited to explaining regulatory purpose. It may also apply to facts and circumstances that illuminate the origin-neutral nature of a regulatory objective. That is, in light

of the relevant circumstances, the regulation or distinction that is claimed to be discriminatory could be found to be rationally or reasonably related to an origin-neutral governmental objective based on the facts and circumstances surrounding the objective.

26. As to the second part of the question, the United States' position is clear: essential security measures are unreviewable regardless of whether they are origin-neutral. However, to be responsive to the Panel and notwithstanding the unreviewable nature of measures for the protection of a Member's "essential security interests", the United States will proceed with answering this question as it applies to this dispute.

27. As the United States explained in Question 74(a), the terms of a measure, such as an origin marking requirement, on their face may have requirements or determinations relating to the origin of the product, but the underlying purpose or effect might be origin-neutral. As explained in Question 68, the aspect of the measure that is being challenged as discriminatory here is the sufficient autonomy condition. Hong Kong, China, has alleged that its goods may not be marked with the "full English name" because it is subject to this discriminatory condition.[16] To recall, the underlying basis for that autonomy determination is the U.S. concern for fundamental freedoms, human rights, and the integrity of democratic institutions globally – in Hong Kong, China, as well as elsewhere. The specific implementation of mechanisms to address those origin-neutral concerns may be origin-specific, depending on the facts and circumstances.[17] With respect to Hong Kong, China, in light of the erosion of its autonomy, one of those available policies is the suspension of differential treatment vis-à-vis the People's Republic of China under various U.S. laws, one of which includes marks of origin. Because Hong Kong, China, has been determined to be no longer sufficiently autonomous from the People's Republic of China, products coming from Hong Kong, China, are now marked as originating from "China".

d. Please elaborate on the exact test that is applied to assess the measure against the origin-neutral regulatory purpose. More specifically, please elaborate on the following:

i. the United States' statement in paragraph 58 of its response to Panel question No. 14 that "if the regulatory purpose invoked bears a *rational*

[16] First Written Submission of Hong Kong, China, para. 84 ("[T]he United States has denied Hong Kong, China enterprises the advantage of marking their products with the English name of the actual country of origin on the grounds that, in the view of the United States, Hong Kong, China lacks "sufficient autonomy" from the People's Republic of China. The "sufficient autonomy" condition is a condition relating to the country of origin of products that the United States has invoked as the basis for denying goods of Hong Kong, China origin the same advantages in respect of origin marking requirements that the United States extends to like products originating in other Members (and non-Members)); *see also* Second Written Submission of Hong Kong, China, para. 102.

[17] For example, the United States does not understand the relationship between Guinea and Guinea-Bissau, or between Canada and the United States, to be analogous to the relationship between Hong Kong, China, and the People's Republic of China, as Hong Kong, China suggests. First Written Submission of Hong Kong, China, para. 31; Second Written Submission of Hong Kong, China, para. 61.

relationship to the measure at issue, this would be indicative of non-discrimination" (emphasis added);

ii. **the United States' statement in paragraph 58 of its response to Panel question No. 14 that "if the measure is _apt to_ advance the regulatory purpose identified by the regulating Member, this too would be indicative of non-discrimination" (emphasis added);**

iii. **the United States' statement in paragraph 64 of its response to Panel question No. 15 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" (emphasis added); and**

iv. **the United States' statement in paragraph 182 of its second written submission that "the question is whether alleged detrimental impact, if any, can be explained by origin-neutral factors _and_ such that the impact is rationally related to an origin-neutral regulatory purpose." (emphasis added).**

28. The United States addresses Question 74(d)(i) through (iv) together.

29. The quoted statements in each of the subparts of the Panel's question all appear to concern the United States' approach of assessing an Article 2.1 claim. To be clear, the verbal formulations cited in the subpart questions are non-mutually-exclusive ways to address the question of whether there is origin-based discrimination.

30. Assessment under Article 2.1 is a holistic examination of all the facts and circumstances, including finding a rational linkage between and among the detrimental impact, the regulatory purpose, or facts and circumstances that may provide an origin-neutral explanation. As for what the United States means by rational linkage or relationship as it pertains to the measure, the meaning is twofold: one, whether the regulatory distinction is apt to advance the origin-neutral purpose (here, the United States determined that Hong Kong, China, lacks sufficient autonomy vis-à-vis the People's Republic of China, and therefore differential treatment was suspended); two, whether detrimental impact naturally flows from the origin-neutral regulatory distinction.

31. As the United States highlighted in our oral statement at the second videoconference, the alleged detrimental impact by Hong Kong is anecdotal and unsupported.[18] But assuming that the Panel does somehow agree with Hong Kong, China, that there is detrimental impact, then the Panel should consider whether the measure at issue and its detrimental impact bear a rational

[18] Opening Statement of the United States of America at the Second Videoconference with the Panel, paras. 73-76.

relationship to the invoked regulatory purpose in light of the relevant facts and circumstances. The United States has, since its First Written Submission, provided evidence of the facts and circumstances that formed the basis for the challenged measures.[19]

32. Hong Kong, China, has thus far refused to engage with the regulatory objective, even as reflected on the face of the measure, and insists that there is "no need for additional" analysis because the "sufficient autonomy condition" applies only to Hong Kong, China. Indeed, in an apparent attempt to avoid any "further additional analysis", Hong Kong, China, has changed theories and asserts that it is no longer concerned with autonomy. This approach by Hong Kong, China – in which a panel evaluating a measure under the TBT Agreement must simply ignore regulatory purpose altogether – has no basis in the text of Article 2.1. To the extent that the Panel decides to consider the merits of the claims by Hong Kong, China, the Panel should make an objective and holistic assessment of all the facts and circumstances at hand in examining whether the alleged discrimination relates to an origin-neutral purpose (in addition to examining detrimental impact).

e. Please elaborate on what is the basis for the "reasonable" connection or linkage that the United States referred to in its response to question d) above during the second substantive meeting.

33. The basis for identifying such linkages is an understanding that "less favorable treatment" for imported products under Article 2.1 relates to origin-based discrimination. Thus, if a detrimental impact to imports can be "rationally" or "reasonably" linked to a regulatory distinction that serves an origin-neutral regulatory objective, that would be indicative of non-discrimination. This is consistent with a correct interpretation of the same language in Article III:4 of the GATT 1994.[20] Thus, examination of a claim under these Articles should be a holistic assessment and examination of all the facts and circumstances, as opposed to simply finding there is discrimination unless any detrimental impact "stems exclusively" from a legitimate regulatory distinction.

34. Without prejudice to the U.S. view that the Panel should not review the merits of the claims by Hong Kong, China, in light of the U.S. invocation of Article XXI(b), for completeness the United States explains the factual basis for the linkage as follows. As the United States has explained, the origin-neutral regulatory purpose and objective of the measure being challenged, specifically the sufficient autonomy condition, is to address the concern for human rights,

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

[20] U.S. Responses to First Set of Panel Questions, para. 56 and n.20; U.S. Second Written Submission, para. 140.

fundamental freedoms, and democratic norms.[21] The implementation of such objective would vary by country depending on the facts and circumstances. With respect to Hong Kong, China, as articulated throughout the U.S.-Hong Kong Policy Act, the United States has an interest in the maintenance of human rights and freedoms of Hong Kongers, and the autonomy of the city is of importance to such maintenance.[22] In light of the various promises made by the People's Republic of China in the Sino-British Joint Declaration, the U.S.-Hong Kong Policy Act provides for the continued application of U.S. laws to Hong Kong, China, in the same manner as applied prior to July 1, 1997, i.e., differential treatment vis-à-vis the People's Republic of China. However, Hong Kong, China, must remain sufficiently autonomous to "justify" such differential treatment.[23]

35. In light of a series of events, in particular the implementation of the National Security Law, in Executive Order 13936 the U.S. President determined that Hong Kong, China, is no longer sufficiently autonomous from the People's Republic of China, and differential treatment, including for purposes of the marking statute, was suspended. The President further determined that "the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States" and "declare[d] a national emergency with respect to that threat."[24]

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[21] *See e.g.,* U.S. Responses to First Set of Panel Questions, paras. 60, 66, 71; U.S. Second Written Submission, paras. 5, 180.

[22] "Hong Kong plays an important role in today's regional and world economy. This role is reflected in strong economic, cultural, and other ties with the United States that give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong." Hong Kong Policy Act of 1992, sec. 2(4) (US-3). "The human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong. A fully successful transition in the exercise of sovereignty over Hong Kong must safeguard human rights in and of themselves. Human rights also serve as a basis for Hong Kong's continued economic prosperity." Hong Kong Policy Act of 1992, sec. 2(6) (US-3).

[23] *See* Hong Kong Policy Act of 1992, sec. 201-202; *see also* section 3(D) ("Hong Kong must remain sufficiently autonomous from the People's Republic of China to '***justify treatment*** under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China'." (emphasis added)). *See also* Executive Order 13936 on Hong Kong Normalization of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2) ("[O]n May 27, 2020, the Secretary of State announced that the PRC had fundamentally undermined Hong Kong's autonomy and certified and reported to the Congress . . . that Hong Kong no longer warrants treatment under United States law in the same manner as United States laws were applied to Hong Kong before July 1, 1997. On May 29, 2020, I directed the heads of executive departments and agencies (agencies) to begin the ***process of eliminating policy exemptions*** under United States law that give Hong Kong differential treatment in relation to China." (emphasis added)). *See also* U.S. First Written Submission, paras. 16-22 (explaining in detail various bases for the suspension of differential treatment).

[24] Executive Order 13936 on Hong Kong Normalization of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

36. Although the theory of less favorable treatment by Hong Kong, China, has shifted during the course of these proceedings, Hong Kong, China, still has not established how the marking requirement at issue accords less favorable treatment.

37. Hong Kong, China, has not shown under its various theories either that the United States determines country of origin for Hong Kong, China, in a manner different than for any other WTO Member; that the United States determines the "actual" country of origin for marking purposes differently; or that "China" may not be the "English name" for marking purposes. Again, the United States questions what purpose a mark of origin that is contrary to a Member's determination regarding the autonomy or territory of a country would serve.[25] The U.S. determination with respect to lack of autonomy in Hong Kong, China, ***clearly establishes*** why Hong Kong, China, is not entitled to treatment distinct from treatment of the People's Republic of China for purposes of marking, such that "China" is not "mislabeling".[26] Hong Kong, China, is simply dissatisfied with the U.S. determination that it is no longer sufficiently autonomous from the People's Republic of China for purposes of U.S. law.

Question 75.

To the United States: In paragraph 61 of its opening statement at the second meeting of the Panel, the United States further elaborated on what it considers the "correct approach" under Article 2.1 of the TBT Agreement. The United States points out that to establish its claim under Article 2.1 of the TBT Agreement, Hong Kong, China needs to establish four elements of the test, the fourth being to take into account the existence of any origin-neutral factors, including the factual circumstances as well as the regulatory objective. Similar statements are made in paragraphs 67 and 68 of the United States' opening statement.

a. Is the Panel correct in understanding the United States' view that an origin-based distinction that results in detrimental impact is not enough to show less favourable treatment, but elements three and four of this test also need to be shown?

b. Regarding these two additional steps, could the United States elaborate on the issue of attributability and the difference between "origin-neutral factors, including the factual circumstances" and the "regulatory objective"?

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[25] U.S. Responses to First Set Panel Questions, para. 41; U.S. Response to Question 18; U.S. Second Written Submission, paras. 195-199. *See also* Exhibit HKG-17 ("The reference to Hong Kong under the current policy [pursuant to the Executive Order] may mislead or deceive the ultimate purchaser as to the actual country of origin of the article and, therefore, is not acceptable for purposes of 19 U.S.C. § 1304").

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

38. The United States responds to Questions 75(a) and (b) together.

39. To clarify, the United States did not indicate these elements as steps but rather as aspects in the arguments by Hong Kong, China, that are deficient. As the United States explained in responses to Question 74(a), the U.S. approach to Article 2.1 is straightforward – assessment of whether there is "less favorable treatment" is a holistic examination requiring assessment of all the facts and circumstances, including the terms of the measures, its regulatory objectives, as well as the facts and circumstances illuminating such objectives and purposes. If any detrimental impact can be explained by origin-neutral factors, then that is indicative of non-discrimination.

40. Attribution depends on what type of detrimental impact is being asserted. In its First Written Submission, prior to its first shift in legal theory of claiming "*de jure*" discrimination, Hong Kong, China, made factual assertions of detrimental impact to the conditions of competition in certain respects.[27] As the United States has explained, Hong Kong, China, has failed to make a showing of detrimental impact, and the evidence it has submitted is anecdotal and unsupported.[28] However, even if the Panel were to find detrimental impact to conditions of competition based on the assertions by Hong Kong, China, under the U.S. holistic approach, if that detrimental impact is attributable to origin-neutral factors, then it would be indicative of non-discrimination. An example of an origin-neutral factor other than a regulatory objective can be exogenous factors, such as the pandemic. As the United States explained in its oral statement, the effective date of the disputed measure and the date on which Hong Kong, China, filed its evidence in this dispute occurred just before, and in the early stages of the pandemic, when overall trade was severely impacted.[29] Such an example is an instance of an alleged detrimental impact that is not attributable to the U.S. measure.

41. Origin-neutral factual circumstances can also relate to the regulatory objective. Since its First Written Submission, the United States has provided evidence regarding the various concerning developments within Hong Kong, China, as it relates to the fundamental freedoms, human rights, and democratic participation of Hong Kongers.[30] Such factual circumstances confirm the validity of the U.S. concerns and underscore the regulatory objective. Thus, origin-neutral factual circumstances can also be used to illuminate a regulatory objective.

42. Attribution of detrimental impact to an origin-neutral regulatory objective may result when that detrimental impact may stem naturally (but not necessarily exclusively as the Appellate Body suggests) from a regulatory distinction that is based on an origin-neutral objective. Here, the United States has made itself clear – it has global concerns with respect to fundamental freedoms, human rights, and democratic norms, and in light of these concerns the

[27] *See* First Written Submission of Hong Kong, China, paras. 61-63.

[28] Opening Statement of the United States of America at the Second Videoconference with the Panel, paras. 73-76.

[29] U.S. Opening Statement at the Second Videoconference with the Panel, para. 75.

[30] *See* Exhibits US-119 to US-133, US-197 to 200, US-209 to 210.

United States has determined Hong Kong, China, to be insufficiently autonomous from and thus suspended differential treatment vis-à-vis the People's Republic of China. The regulatory distinction here is the lack of sufficient autonomy, which is reflected in the origin marking requirement for products from Hong Kong, China, and the origin-neutral objective is the U.S. global concern for fundamental freedoms, human rights, and democratic norms.

c. If the concept of "less favourable treatment" in Article 2.1 TBT Agreement requires this assessment, as the United States suggests, does it also require the same test under Article IX (and Article III) in the GATT 1994? If not, why not?

43. Although the language of Article 2.1 of the TBT Agreement and Article IX:1 (and Article III) of the GATT 1994 is similar and shares the phrase "less favorable treatment", interpretation of provisions should be based on the ordinary meaning of the terms in their context and in light of the objective and purpose. Therefore, the element of "less favorable treatment" should be analyzed in light of the respective contexts provided under Article 2.1 of the TBT Agreement and Article IX of the GATT 1994.

44. All three of these provisions (Articles III and IX of the GATT 1994 and Article 2.1 of the TBT Agreement) prohibit "less favorable treatment" for imports as compared to domestic goods, or among imports, and therefore, the concern of all three provisions is discrimination based on origin. Specifically, under these provisions, the fact that a measure may provide for different treatment does not necessarily mean that it provides for "less favorable treatment."[31] This should be a consistent principle applicable to both Article 2.1 of the TBT Agreement and Article IX of the GATT 1994. Therefore, for there to be a finding of "less favorable treatment" under either provision, there must similarly be two elements: a detrimental impact and an origin-based discrimination. And to make an assessment as to these elements, the examination invariably would have to take into consideration all of the facts and circumstances, including those that may or may not indicate discrimination. The consideration of all the facts and circumstances is part of a panel's function under Article 11 of the DSU, which provides that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ."

d. Given that, in the United States' view, Hong Kong, China has the burden of proof in respect of all these elements, does Hong Kong, China have to demonstrate that the application of the sufficient autonomy condition is not origin-neutral?

45. Yes. As discussed in the U.S. response to Question 16(a), it is a complaining party's burden to make its affirmative case, and what the complaining party would need to show to meet that burden would depend on a case-by-case basis. Hong Kong, China, has the burden to

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[31] U.S. Response to First Set of Panel Questions, paras. 66, 87. *See also 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.

establish that the condition provides less favourable treatment to products from Hong Kong, China. It cannot discharge its burden by simply asserting that this condition is "inherently" discriminatory and that there is "no need for additional analysis". In response to arguments by Hong Kong, China, the United States submitted substantial evidence and argumentation explaining the regulatory basis and origin-neutrality of the treatment challenged by Hong, Kong, China. The U.S. rebuttal having been made, it is incumbent on Hong Kong, China to demonstrate – if it can – that the U.S. arguments do not undermine its case. In other words, it was, and still is, the burden of Hong Kong, China, to show that the treatment provided by the U.S. measure is less favourable than that provided to other WTO Members. Hong Kong, China, has not met this burden, simply ignoring or characterizing as "specious",[32] these U.S. rebuttals.

Question 76.

To the United States: With reference to paragraph 62 of the United States' response to Panel question 14, could you elaborate on the argument that, under the Appellate Body's "flawed" approach, "any detrimental impact could constitute a breach of Article 2.1 […] because the measure was not designed to eliminate all detrimental impact not exclusively related to the regulatory distinction"?

46. The United States considers that the approach used in certain Appellate Body reports, namely that detrimental impact ***stem exclusively*** from a legitimate regulatory distinction, does not reflect the text of Article 2.1. To recall, the *United States – Clove Cigarettes (Appellate Body)* report stated: "[A] panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[33]

47. This statement implies that if a measure were not designed to eliminate, or in other words avoid, ***all*** detrimental impact that is not exclusively related to the regulatory distinction, then that measure would be found in breach. The United States does not see how this standard is based in the terms of Article 2.1, and the Appellate Body's approach would appear to prevent a holistic assessment of all facts and circumstances that may be relevant to finding that there is origin-based discrimination.

48. The Appellate Body's approach in certain reports effectively invites a panel to assess the trade restrictiveness of the measure under Article 2.1, instead of whether the measure has led to detrimental impact as a result of an origin-based distinction. Article 2.2 may be the more appropriate provision for such an analysis, but there is no claim under Article 2.2 in this dispute.

49. Although there is no claimed breach of Article 2.2 here, Article 2.2 may still serve as immediate context to Article 2.1 in that the regulatory objective can serve as one factor in

[32] Closing Statement of Hong Kong, China at the Second Substantive Meeting with the Parties, para. 7.

[33] *US – Clove Cigarettes* (AB), para. 182.

assessing whether a measure has a genuinely origin-neutral basis. That is, Article 2.2 can still serve as a reference as to any regulatory purpose being invoked by the respondent.

Question 77.

To both parties: Do you consider that in assessing whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction", prior panels and the Appellate Body, have incorporated into the analysis under Article 2.1 of the TBT Agreement concepts that are mostly associated with the test under Article XX of the GATT 1994? If so, what would be the rationale behind using concepts associated with Article XX for the purpose of an examination under Article 2.1 and what is the role of the sixth recital in that regard?

50. The United States does not see the relevance of using concepts associated with Article XX in the context of this dispute. Moreover, the United States has invoked Article XXI(b) in this dispute. That said, the United States observes that past Appellate Body reports perceived a parallel between the sixth preamble and Article 2.1 of the TBT Agreement on one hand, and Article XX and the national treatment obligations under the GATT on the other. Because of those parallels, the Appellate Body read concepts, such as "arbitrary or unjustifiable" – which are terms not within Article 2 – into the analysis under Article 2.1.[34]

Question 78.

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

51. Question 78 is for Hong Kong, China.

Question 79.

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

52. There is a difference between "national security requirement" and "essential security interest". As the United States explained in its prior written submissions, the word "essential" means something that is of the "absolute or highest sense" and "affecting the essence anything;

[34] *See US – Clove Cigarettes* (AB), paras. 95-96, 174.

significant important."[35] And the words "its essential security interest" as mentioned in the preamble of the TBT Agreement, as supported by negotiating history, reflect the interests that are recognized in Article XXI.[36] That is, the term essential security interest in the context of the TBT Agreement has the same meaning as that term as used in Article XXI. An invocation of Article XXI(b) means that the Member considers the measure to be an action necessary to protect its "essential security interests".

53. In contrast, the term "national security requirements" is used in Article 2.2 of the TBT Agreement, which provides the immediate context for those terms. In the context of Article 2.2, it must be shown that the "national security requirement" is a "legitimate objective" within the meaning of that provision. And such "legitimate objectives" are subject to scrutiny under that provision. However, just because a national security requirement might be subject to some level of review in the context of an Article 2.1 or 2.2 analysis, does not mean that a consideration of action necessary to the protection of a Member's essential security interests within the meaning of Article XXI is subject to review. Again, if a Member has invoked Article XXI(b), the operation of that provision renders a claim under Article 2.1 unreviewable.

54. That is not to say that a "national security requirement" or even a measure reflecting another "legitimate objective" identified in Article 2.2 could never be a measure that a Member considers necessary for the protection of "its essential security interests". As the United States has maintained, under the terms of Article XXI(b), whether a matter implicates a Member's "essential security interests" is for the judgment of the Member taking the measure. Just because "national security requirement" and "essential security interest" may overlap in scope in some instances, it does not mean that the terms are the same. Furthermore, there are many instances in which a measure is notified to the TBT Committee as a "national security requirement" but as to which Article XXI is not invoked,[37] suggesting that the notifying Member may not consider the measure as implicating "essential security interests" within the meaning of Article XXI(b).

Question 80.

To the United States: In paragraph 184 of its second written submission, the United States describes a hypothetical situation where security interests are involved, but the Member adopting the measure at issue does not invoke Article XXI and submits that in those circumstances "security interests" would be taken into account in applying Article 2.1 of the TBT Agreement.

a. Please clarify what "invocation" means. Does this refer to using the terms "essential security interests" as a justification for a measure or does it additionally require a specific reference to Article XXI of the GATT 1994?

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[35] U.S. First Written Submission, para. 39.

[36] U.S. First Written Submission, paras. 299-302, 310-318.

[37] *See infra* U.S. Response to Panel Question 81.

b. **Please elaborate on why it would be appropriate to review "essential security interests" under Article 2.1 of the TBT Agreement when a Member does not invoke Article XXI(b) of the GATT 1994 to justify its measure, rather than when it does.**

c. **Please indicate whether that distinction derives from the United States' view on the self-judging nature of Article XXI(b)(iii) alone or from other arguments.**

d. **If a measure pertaining to a Member's essential security interests is to be reviewed under Article 2.1 of the TBT Agreement, would the seventh recital constitute relevant context, and would it be for a panel to review what the Member has put forward as essential security interests?**

55. The United States responds to Questions 80 (a) through (d) together.

56. The hypothetical situation that the United States described deals with "security interests" such as those falling under the legitimate objectives of "national security requirements" under Article 2.2, but not circumstances in which a Member has invoked Article XXI. The invocation of "essential security interests" means that the disputed measure is one that is provided for under Article XXI(b) (i.e., such measures are actions the invoking Member considers necessary to protect its essential security interests). There is no specific formula for an Article XXI(b) invocation. However, Members have generally invoked Article XXI(b) when another WTO Member (or in the past a GATT contracting party) challenged it before the WTO (either through a committee[38] or the dispute settlement mechanism). As noted, in the context of the TBT Agreement, the reference to GATT 1994 Articles XXII and XXIII in Article 14 provides the additional contextual support to the availability of the invocation of Article XXI for challenges made under the TBT Agreement.

57. The United States does not view the invocation of essential security interest under Article XXI as a "justification" for the measure because the analysis would never reach that point. Rather, the invocation means that because such measure, as a matter of self-judgment, is an action necessary to protect essential security interest, it is not subject to review. This is regardless of whether the measure actually breaches a provision of the WTO agreement—the

[38] *See e.g.,* 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); U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-211), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-212), WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-213), U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018), at 3 (US-214), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-215).

exception is not an affirmative defense and there need not be a breach to invoke the exception;[39] rather, a measure as to which Article XXI(b) is invoked cannot be found to be inconsistent with a WTO provision. A panel may not review a measure as to which Article XXI(b) is invoked under Article 2.1. In the U.S. view, the text and structure of the WTO Agreement, the seventh recital to the TBT Agreement preamble, the application of GATT 1994 dispute settlement provisions to the TBT Agreement, as supplemented by negotiating history, supports this interpretation.[40] Because such measures are not subject to review, there is no "standard of review" with respect to a Member's invocation of its essential security interests.

58. Here, the United States has invoked Article XXI as it relates to the Article 2.1 claim, and as such the measure at issue may not be reviewed, and the United States need not articulate any arguments to justify an invocation of Article XXI. However, should the Panel nonetheless review the merits of the Article 2.1 claim by Hong Kong, China, the United States has provided copious and uncontested evidence regarding the basis of the measures at issue that would be relevant under any interpretive approach to Article 2.1 of the TBT Agreement.

Question 81.

To the United States: Under what circumstances would a Member decide not to invoke Article XXI in respect of a measure taken to protect national security interests that also implicates that Member's essential security interests? Could you provide examples in that respect?

59. As discussed in response to Question 79, the concept of "national security" and "essential security interests" are not the same or mutually inclusive. The circumstances in which a WTO Member decides to not invoke Article XXI would be those in which the Member does not consider the measure an action that is necessary to protect its essential security interest. That does not necessarily mean that the Member considers that the measure does not implicate "national security". The consideration of whether an action is necessary to protect essential security interests is a self-judging matter.

60. In the present circumstances, the United States considers issues such as fundamental freedoms, human rights, and democratic norms as a matter of its essential security interests. Certain WTO Members, such as the United States,[41] may consider these matters as a matter of essential security, while other WTO Members, such as Hong Kong, China, may not. This is why

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[39] *See* U.S. Response to Panel Question 1.

[40] *See* U.S. First Written Submission, paras. 298-318.

[41] While the United States does not purport to define security interests of other Members, the United States observes that other Members appears to share the U.S. concerns. *See Media Freedom Coalition Statement on Closure of Media Outlets in Hong Kong*, Office of the Spokesperson, U.S. Department of State (February 9, 2022) (US-210); Third Party Written Submission of the European Union, para. 16, 40.

Article XXI(b) does not purport to define a single set of essential security interests for all WTO Members, and highlights the self-judging nature of the measures invoked under Article XXI.

61. In the context of the TBT Agreement, "national security requirements" is one of the illustrative "legitimate objectives" that may be pursued through technical regulations, but the implementation of such technical regulations does not necessarily mean that any of the circumstances in Article XXI(b) have arisen. For example, in April 2016, the People's Republic of China notified for comment to the TBT Committee a cybersecurity-related measure drafted by the China Insurance Regulatory Commission addressing requirements on the maintenance of information security systems in the insurance industry.[42] The only stated objective for the document is that it is a national security requirement.[43] Specific Trade Concerns were raised by several countries, including Australia, Canada, the EU, Japan, and Mexico,[44] but the People's Republic of China did not articulate whether those specific cybersecurity regulations implicate "essential security interests" (presumably because such circumstances have not arisen) even though the measure appears to implicate what China defines as national security in its own law.[45]

62. However, cybersecurity is an interest that a Member may consider "essential" within the meaning of Article XXI. Specifically, the United States' National Security Strategy discusses cybersecurity extensively, including in the section titled "Keep America Safe in the Cyber Era" under "Pillar 1: Protect the American People, the Homeland, and the American Way of Life," along with discussions about threats from weapons of mass destruction, biothreats and terrorism.[46] The United States' National Cyber Strategy, which builds on its National Security Strategy, recognizes that "challenges to United States security and economic interests, from nation states and other groups, which have long existed in the offline world are now increasingly

[42] *See* G/TBT/N/CHN/1172 (US-216).

[43] *See* G/TBT/N/CHN/1172 Regular Notification, Technical Barriers to Trade Information Management System, *available at* http://tbtims.wto.org/en/RegularNotifications/View/89788?FromAllNotifications=True (indicating that "National security requirements" as the only "Notification objective") (US-217).

[44] *See e.g., Co*mmittee on Technical Barriers to Trade, Minutes of the Meeting of 12-15 November 2019 (G/TBT/M/79), paras. 2.73-2.74 ("The EU's main concern was that the rules would have the effect of mandating insurance institutions in China to progressively phase out non-domestic cryptographic products, which would be tantamount to a ban on procuring foreign cryptography products compared to domestic products.") (US-218).

[45] China's National Security Law provides that China "improves network and information security protection capability" and "maintains the state's cyberspace sovereignty," among other things. National Security Law of the People's Republic of China (2015), art. 25 (US-219). National security concerns also permeate China's Cybersecurity Law, which was formulated in order to "ensure cybersecurity, safeguard cyberspace sovereignty and national security," among other things. The law includes specific provisions governing the operations of "critical information infrastructure," and creates a "national security review" for "critical information infrastructure operators purchasing network products and services that might impact national security." Cybersecurity Law of the People's Republic of China (2017), art. 35 (US-220).

[46] National Security Strategy of the United States of America (Dec. 2017), at 7-14 (US-221).

occurring in cyberspace," and states that "cyberspace will no longer be treated as a separate category of policy or activity disjointed from other elements of power."[47]

63. Therefore, whether a "national security requirement", as understood under the TBT Agreement, is an "essential security interest", as understood under Article XXI(b), would depend on the judgment of the Member adopting the measure.

Question 82.

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

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

b. **In paragraphs 108 and 109 of its second written submission, Hong Kong, China refers to the United States' statement in paragraph 71 of its response to Panel question No. 16, quoting paragraph 5 of the United States' opening statement at the first meeting of the Panel, that the United States has articulated certain of its essential security interests in its submissions and oral statements to the Panel. Hong Kong, China submits that the United States has "broadly described" its essential security interests and that the United States only "claims" that it has articulated its essential security interests. Please elaborate. Please comment also on paragraphs 2 and 5 of the United States' second written submission.**

64. Question 82 is for Hong Kong, China.

GATT 1994

Question 83.

To the United States: Please comment on Hong Kong, China's view in paragraph 117 of its second written submission and paragraph 35 of its opening statement at the second meeting of the Panel, that by "its terms, there are two steps to assessing whether a measure is inconsistent with [Article IX:1]: (1) identifying the baseline 'treatment with regard to

[47] National Cyber Strategy of the United States of America (Sept. 2018), at 3 & 13 (" This National Cyber Strategy outlines how we will (1) defend the homeland by protecting networks, systems, functions, and data; (2) promote American prosperity by nurturing a secure, thriving digital economy and fostering strong domestic innovation; (3) preserve peace and security by strengthening the United States' ability — in concert with allies and partners — to deter and if necessary punish those who use cyber tools for malicious purposes; and (4) expand American influence abroad to extend the key tenets of an open, interoperable, reliable, and secure Internet.") (US-222).

marking requirements' that the responding Member accords to the like products of any third country; and then (2) evaluating whether the 'treatment with regard to marking requirements' accorded to goods of the complaining Member is 'less favourable' than the baseline treatment".

65. 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.

66. The United States observes that the two steps that Hong Kong, China, proposes involve first identifying what is the "treatment with regard to marking requirement" that is accorded to other products (i.e., the "baseline") of "any third country", and a second step of evaluating whether the treatment accorded to the disputed products are accorded "less favorable treatment." The concept of a "baseline" is not reflected in the text of Article IX:1, nor is it a useful concept. As the United States explained in response to Question 68, a measure disciplined under Article IX – that is, marks of origin – by its nature makes distinctions on the basis of origin. What is relevant for purposes of Article IX:1 is whether there is "less favorable treatment" with respect to marking requirements, and that is what a complaining Member must show to establish a claim. Defining "treatment" for purposes of Article IX:1 as simply a relationship to a purported "baseline", without context, has no basis in the text of that provision, and makes little sense as an analytical matter.

67. As the United States has explained, Hong Kong, China, fails to establish different treatment, much less "less favorable" treatment, for purposes of Article IX:1.[48] Through its Second Written Submission, Hong Kong, China, submitted that the "baseline treatment encompasses ***both*** the method of determining the country of origin [(i.e., the "sufficient autonomy condition"] and the required terminology to indicate that country of origin."[49] As the United States explained, among other flaws with the argument by Hong Kong, China, 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, and Article IX:1 does 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.[50]

68. In its closing statement at the second videoconference with the Panel, Hong Kong, China, asserted that it is no longer concerned with the issue of autonomy. The Article IX claim by

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[48] U.S. Second Written Submission, paras. 191-200.

[49] Second Written Submission of Hong Kong, China, para. 119 (emphasis added); *see also* First Written Submission of Hong Kong, China, para. 72.

[50] *See* U.S. Second Written Submission, paras. 191-200.

Hong Kong, China, is still baseless and confusing nonetheless. To the extent that the treatment Hong Kong, China, considers "less favorable" is consideration of the "country of manufacture, production, or growth,"[51] that is simply a restatement of the claim by Hong Kong, China, throughout these proceedings that autonomy is a condition unrelated to manufacture or production that is applied discriminatorily to Hong Kong, China (and that determination of the name of a geographic area is the same as a country of origin determination). To the extent that what Hong Kong, China, considers "less favorable" treatment no longer includes a determination that is based on autonomy, the new supposedly less favorable treatment appears to be simply the requirement that goods be marked with the "full English name" as determined under U.S. law.[52]

69. As the United States has explained, however, the requirement that products have marks of origin and the determination of terminology by their nature make a distinction based on origin. As the United States has also explained, Article IX does not prohibit Members from requiring the "full English name" as so determined by the Member requiring the mark of origin.[53] That is, the United States requires "goods [from Hong Kong, China,] be marked with the 'full English name' of their country of origin as determined under U.S. law" just as the United States requires "those goods [from other sources] be marked with the 'full English name' of their country of origin as determined under U.S. law." Hong Kong, China, has not shown to the contrary. Although Hong Kong, China, initially claimed that the "full English name" was determined differently due to the consideration of its autonomy, it has apparently abandoned that claim. Thus, what is left is simply the disagreement by Hong Kong, China, that "China" is appropriate marking. Hong Kong, China, has identified nothing in the WTO agreements or U.S. law that establishes that the United States is not permitted to require that term as the mark.

THE EXCEPTION UNDER ARTICLE XXI OF THE GATT 1994

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

Question 84.

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

[51] Closing Statement of Hong Kong, China at the Second Videoconference, para. 3.

[52] *See* Opening Statement of Hong Kong China at the Second Substantive Hearing, para. 37.

[53] *See* U.S. Second Written Submission, para. 197.

70. Question 84 is for Hong Kong, China.

Question 85.

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

71. Question 85 is for Hong Kong, China.

Question 86.

To Hong Kong, China: In paragraph 141 of its second written submission, Hong Kong, China argues that "the United States ignores the fact that each of the Annex 1A agreements is a distinct agreement, representing its own balance of rights and obligations in respect of the subject matter of that agreement". Could Hong Kong, China please:

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

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

72. Question 86 is for Hong Kong, China.

Question 87.

To United States: Please elaborate on the United States' position in paragraph 115 of the United States' second written submission that the "inclusion of the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement in a single annex is therefore a *legal structure*" **(emphasis original) and in paragraph 31 of the United States' opening statement**

at the second meeting of the Panel. In your response, please refer to the relevant legal basis for this conclusion.

73. The basis for considering the legal structure of a treaty is the customary rules of treaty interpretation, which calls for interpretation of the text, in its context and in light of the treaty's object and purpose. The structure of the treaty is context in this exercise.

74. The WTO Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking as laid out in Article II.[54] Article II:2 provides "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members." Within Annex 1, Annex 1B and Annex 1C include the General Agreement on Trade in Services and the Agreement on Trade-Related Intellectual Property Rights, and each annex includes an essential security exception, with respect to trade in services and trade-related intellectual property rights, respectively. Annex 1A includes the multilateral agreements related to trade in goods, and includes an exceptional security provision in the first agreement in the annex, the GATT 1994. The general interpretative note to Annex 1A, which informs how the structure of the Annex is to be interpreted, provides that unless there is a direct conflict of provisions, the GATT 1994 provision applies.

75. The interpretative approach by Hong Kong, China, with respect to the applicability of Article XXI(b) to the claims at issue reads the annexed agreements in a vacuum, stating each of these agreements reflects its "own balance of rights and obligations." Such a proposition ignores the legal structure of the WTO Agreement, as provided by Article II, as reflected in its annexes, and as informed by general interpretative note.

Question 88.

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

76. Question 88 is for Hong Kong, China.

Question 89.

To the United States: With respect to the United States' statement in paragraph 116 of its second written submission that "[s]ome commentary has even noted that the 'systemic structure of a treaty is … of equal importance to the ordinary linguistic meaning of the words used …", could the United States illustrate how that interpretative tenet has been applied in the context of WTO dispute settlement or in the context of other international adjudicative mechanisms?

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

77. The United States responds to Questions 89 and 90 together.

Question 90.

To the United States: In paragraph 118 of its second written submission, the United States submits that the "structure of the WTO Agreement – and logic – suggest that the GATT 1947/1994 essential security exception likewise applies to the new agreements on trade in goods contained in Article [sic] 1A". Could you please clarify how "logic" plays a role in treaty interpretation pursuant to the customary rules of interpretation of public international law?

78. The United States responds to Questions 89 and 90 together.

79. The United States does not submit that some sort of hypothetical logical exercise is an independent interpretative tool. Rather, basic logic and sound reasoning are – quite obviously – necessary for applying the customary rules of treaty interpretation. To not apply logic would run directly contrary to Article 31 of the *Vienna Convention of the Law of Treaties*, which provides for a treaty to be interpreted "in good faith" in accordance with its text. It is only through logic and reasoning that, for example, a treaty interpreter can analyze what is the "ordinary meaning" of a treaty term or how any particular element of context can affect the interpretation of a particular treaty provision. And conversely, treaty interpretation is not supposed to produce absurd results and interpretations.[55]

80. As illustrated in previous U.S. submissions, it would be absurd to conclude that the negotiators considered that the essential security exception applied to the fundamental trade-in-goods disciplines in the GATT 1994 in Annex 1A, the disciplines on services in the GATS in Annex 1B, and the disciplines on intellectual property rights in the TRIPS in Annex 1C, but only to some elaborations upon goods disciplines in other agreements in Annex 1A.[56] As explained in response to Question 87, in the context of this dispute, examination of the structure of the WTO Agreement yields a logical result: the essential security exception applies.

81. While the structure of the WTO Agreement serves as relevant context to all the Annex 1A agreements, the question of applicability of specific GATT provisions to other agreements should be answered on a case-by-case basis.[57] Thus, how the legal structure serves as

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[55] Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984), at 120 (US-20).

[56] *See* U.S. First Written Submission, para. 278; Opening Statement of the United States of America at the First Videoconference with the Panel, para. 48; Opening Statement of the United States of America at the Second Videoconference with the Panel, para. 36.

[57] *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.

interpretative context depends on the interpretative issue at hand.[58] For example, the *Brazil – Desiccated Coconut (AB)* report concluded that "as a result of the integrated nature of the WTO Agreement and the specific language in Articles 10 and 32.1 of the SCM Agreement, the provisions of the SCM Agreement relating to countervailing duty investigations are not separable from the rights and obligations of the GATT 1994 or the WTO Agreement taken as a whole."[59] The report found that "[i]f Article 32.3 is read in conjunction with Articles 10 and 32.1 of the SCM Agreement, it becomes clear that the term 'this Agreement' in Article 32.3 means 'this Agreement and Article VI of the GATT 1994'".[60] The report also expressed agreement with the panel report "that the applicability of Article VI of the GATT 1994 to the . . . subject of this dispute, also determines the applicability of Articles I and II of the GATT 1994 to that investigation. In the same manner as the Panel found that 'the measures are neither 'consistent' nor 'inconsistent' with Article VI of GATT 1994; rather, they are simply not subject to that Article', we believe that the measures here are neither 'consistent' nor 'inconsistent' with Articles I and II of the GATT 1994, because those Articles are also not applicable law for the purposes of this dispute".[61]

82. The United States has explained that the context provided by the legal structure of the WTO Agreement confirms the interpretation that Article XXI(b) applies to the provisions at issue under the *Agreement on Rules of Origin* and the TBT Agreement. The structure of the WTO Agreement indicates that, when the parties decided to extend disciplines to new areas – services and intellectual property – the new agreements contain the essential security exception, and in turn suggests that the existing security exception for trade in goods would apply to the new agreements on trade in goods contained in Annex 1A.

Question 91.

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

83. Question 91 is for Hong Kong, China.

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[58] Outside of the WTO context, see, for example *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, para. 97 (noting that the "provisions containing assurances, including those that impose obligations on the Applicant to change its conduct — appears elsewhere in the treaty" than in Article 11, paragraph 1, and finding that "In light of the structure and the object and purpose of the treaty, it appears to the Court that the Parties would not have imposed a significant new constraint on the Applicant — that is, to constrain its consistent practice of calling itself by its constitutional name — by mere implication in Article 11, paragraph 1.").

[59] *Brazil – Desiccated Coconut (AB)* at 21.

[60] *Brazil – Desiccated Coconut (AB)* at 17.

[61] *Brazil – Desiccated Coconut (AB)* at 21.

Question 92.

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

84. Question 92 is for Hong Kong, China.

Question 93.

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

85. As the United States has explained, the exception provided in Article XXI(b) of the GATT 1994 applies to the claims at issue under the non-GATT agreements in Annex 1A, particularly given that those claims are brought under substantively similar provisions of the GATT 1994 and other Annex 1A agreements. This is not a function of an assumption, but rather the result of interpretation consistent with the customary rules of treaty interpretation. The United States has invoked Article XXI(b) with respect to all of Hong Kong, China's claims, and the terms of Article XXI(b) do not require the United States to provide further justification for the disputed measure.

86. Under the arguments by Hong Kong, China, a claim of less favorable treatment with respect to a marking requirement would be subject to a higher level of justification – in the sense that a Member seeking to protect its essential security interests with respect to such a requirement would have no recourse to an essential security exception – if that marking requirement were also a rule of origin or a measure disciplined by the TBT Agreement, because Hong Kong, China, considers that Article XXI(b) does not apply to any claims under those agreements even if those claims are virtually the same.[62] This would diminish a Member's right to act to protect its essential security interests and to invoke Article XXI(b) with respect to marking requirements (including with respect to substantively the same claims of origin-based discrimination) – even though they are specifically recognized by and disciplined by the GATT 1994.

[62] Hong Kong, China, itself has characterized its claims under the GATT 1994, *Agreement on Rules of Origin*, and the TBT Agreement are "essentially the same." First Written Submission of Hong Kong, China, para. 66.

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

Question 94.

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

87. Yes. Fundamentally, Article XXI(b) is about a Member taking "any action which it considers necessary." The relative clause 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" and ends at the end of each subparagraph.

88. 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. Specifically, because the operative language is "it considers," Article XXI(b) reserves for the Member to decide what action it considers "necessary for" the protection of its essential security interests and which circumstances are present. In that sense, the phrase "which it considers" "qualifies" all of the elements in the relative clause, including the subparagraph ending.

89. The legal effect is that the provision is self-judging in its entirety. In other words, the text of Article XXI(b) reserves for the Member the determination of what it considers necessary for the protection of its essential security interests in the circumstances set forth.

Question 95.

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

90. The word "action" does relate to each of the three subparagraphs as they each form part of a single relative clause "which it considers" modifying "action". Subparagraph (iii) is "covered by the discretion granted to the Member through the words 'which it considers'" because subparagraph (iii) is an integral part of that relative clause. This is so regardless of whether, as the United States has explained, subparagraphs (i) and (ii) (beginning with "relating to") modify "interests" (intérêts) while subparagraph (iii) refers back to "action" ("mesures"), based on the English text (and consistent with the French version).

91. The United States has identified certain differences between the Spanish text of Article XXI(b) of the GATT 1994, on the one hand, and the English and French texts, on the other hand. In particular, compared to the English and French versions, the Spanish version includes the word "relativas" that is preceded by a comma at the end of the chapeau, and the words "a las" are included in subparagraph (iii). The United States explained, with respect to the Spanish text, that, because the word "relativas" appears in a feminine plural construction, it cannot modify the

masculine plural noun "intereses" but must modify the feminine plural noun "medidas" – the word corresponding to "action" in the English text and "mesures" in the French text.[63]

92. However, the three texts can be reconciled as provided under Article 33 of the VCLT.[64] The most appropriate way to reconcile the textual differences between the English and French subparagraph texts on the one hand, and the Spanish subparagraph text on the other – specifically the different relationship between the subparagraph endings and the chapeau terms – is to interpret Article XXI(b) such that all three subparagraph endings refer back to "any action which it considers".[65] This reading is consistent with the Spanish text; and also – while less in line with rules of grammar and conventions – is a reading permitted by the English and French texts.

93. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase "which it considers" modifies the entirety of the chapeau and the subparagraph endings.

Question 96.

To the United States: If discretion depends on the words "it considers" what grammatical rule allows for the word "considers" to relate both to "necessary" and to "taken" without there being any connector between those words? In your response, please cover all three of the authentic WTO languages, namely English, French and Spanish.

94. The English text of Article XXI(b)(iii) includes a single relative clause beginning with "which it considers", which modifies the noun phrase "any action". The relative clause that begins with "which it considers" ends at the end of each subparagraph ending.

95. Within the relative clause, "it" is the subject, and "considers" is the verb. This operative language ("it considers") qualifies the rest of the terms in the clause. The clause "which it considers necessary to protect its essential security interests . . . taken in time of war or other emergency in international relations" does not include any break in the clause or language to introduce a separate condition, such as "and which" or "provided that". The drafters did add such language in other provisions, such as Article XX(i) and Article XX(j). The lack of such language in Article XXI(b) indicates that the text should be read as a single clause.

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[63] U.S. First Written Submission, para. 165. Hong Kong, China, acknowledges that this interpretation of the English and French texts is plausible.

[64] U.S. First Written Submission, paras. 166-167, 180-187.

[65] U.S. First Written Submission, paras. 178-188.

96. Each subparagraph ending has the same grammatical function – a participial phrase/clause that modifies a noun. As the United States has explained,[66] under English grammar rules, a participial phrase, which functions as an adjective, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.[67] As such, because subparagraph endings (i) and (ii) of Article XXI(b) both begin with the phrase "relating to" and directly follow the phrase "essential security interests", the most natural reading of this construction is that subparagraph endings (i) and (ii) modify the phrase "essential security interests".

97. 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."

98. The text and structure of the French version of Article XXI(b) are consistent with the English version. Specifically, the chapeau ends with "intérêts essentiels de sa sécurité" and the subparagraph endings (i) and (ii) each begin with "se rapportant". The most natural and ordinary reading of this construction is that the phrase "se rapportant" – and therefore the subject matters in subparagraph endings (i) and (ii) – modifies "intérêts essentiels de sa sécurité". The subparagraph ending (iii) begins with the phrase "appliquées en temps", which, as is clear from use of the feminine plural adjective "appliquées" refers back to the feminine plural noun "mesures".

99. As the United States has explained, the Spanish text differs from the English and the French texts, in that it includes "relativas" preceded by a comma at the end of the chapeau, and the words "a las" in subparagraph (iii). Because in the Spanish text of Article XXI(b), the word "relativas" appears in a feminine plural construction, it cannot modify the masculine plural noun "intereses esenciales de su seguridad." Under the ordinary meaning of the Spanish text of Article XXI(b), the subparagraph endings relate back to "medidas" – the word corresponding to "action" in the English text and "mesures" in the French text.

100. However, the English, French, and Spanish texts can be reconciled, as called for under Article 33 of the VCLT. The most appropriate way to reconcile the textual differences between the texts – specifically the different relationship between the subparagraph endings and the chapeau terms – is to interpret Article XXI(b) such that all three subparagraph endings refer back to "any action which it considers". Thus, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one "which

[66] U.S. Responses to First Set of Panel Questions, para 262.

[67] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-194); HARPER'S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-195).

it considers necessary for the protection of its essential security interests". Second, the action is one "which it considers" relates to the subject matters in subparagraph endings (i) or (ii) or "taken in time of war or other emergency in international relations" as set forth in subparagraph ending (iii).

101. The United States has not identified any rule that would prevent the word "considers" in Article XXI(b) from relating to both the phrases beginning with "necessary" and "taken" without there being a connector between those phrases in either English, French, or Spanish.[68] To the contrary, the absence of a connector between the three (logically separate) subparagraph endings strongly suggests parallelism between those endings – that is, that each subparagraph ending completes the relative phrase ("which it considers") that precedes it.

102. Moreover, the addition of a coordinator – such as "and", "et", or "y" – would arguably change the meaning of Article XXI(b) as drafted, and could suggest that what follows the coordinator is not part of the relative clause beginning with "which". In Article XXI(b), the clause beginning "which it considers necessary" is a restrictive clause in that it is not any action that a Member is not prohibited from taking, but rather one "which it considers necessary to protect its essential security interests . . . ."[69] To revise this sentence with a connector would suggest that the language in the subparagraphs is not part of that clause.

103. With a connector, Article XXI(b) would read as follows in the table below. Although the Panel's question relates only to subparagraph (iii), the addition of a connector only in front of subparagraph (iii) (or in front of each subparagraph) would suggest that the subparagraphs are cumulative, that is, that the circumstances described in all three subparagraphs would need to be present in order for a Member to invoke the provision (reflected in green in the text below). The placement of the coordinator would therefore need to be at the end of the chapeau (reflected in blue) – which would also mean that subparagraphs (i) and (ii) would modify "action", not

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[68] In English, a coordinator may be implied between grammatical units of equivalent status. *See* The Oxford English Grammar, Oxford University Press, S. Greenbaum ed. (1996) at 86-87 (US-223) ("Units may be co-ordinated without a co-ordinator being present. In [the following sentence] dingy and stagnant are considered to be co-ordinated because the co-ordinator and is implied: They only thrive in dingy <,> stagnant areas where the oxygen levels are fairly low. . . . The co-ordinated phrases must be identical in function, but they need not be identical in type of phrase." In the sentence example, "<,> equals a short pause. *Id.* at xiv.

[69] "Integrated relative [clause]s are so called because they are integrated into the construction containing them, both prosodically and in terms of their informational content". The Cambridge Grammar of the English Language, R. Huddleston and G. Pullum, eds. (Cambridge University Press 2002) (US-224) at 1034-35. In contrast, a supplementary relative clause provides information that is "not needed to delimit the set denoted by the antecedent" and would normally be set off by commas. Id. at 1035, 1058. *See also* A New Reference Grammar of Modern Spanish, J. Butt and C. Benjamin, eds., 5th edn. (Hachette 2011) at 503 ("Restrictive clauses limit the scope of what they refer to: *dejamos las manzanas que estaban verdes* 'we left the applies that were unripe'. This refers only to the unripe apples and therefore implies that some of them were ripe. . . .In writing non-restrictive clauses are typically marked in both languages [Spanish and English] by a comma, and in speech by a pause.") (US-225); Advanced French Grammar, M. L'Huillier ed. (Cambridge University Press 1999) (US-226) at 44 (distinguishing between attached and detached relative clauses).

"interests" – with a disjunctive added at the end of subparagraphs (i) and (ii) to clarify that they are not cumulative.

English	French	Spanish[70]
Nothing in this Agreement shall be construed **. . .** **to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests [and]** **(i) [and] relating to fissionable materials or the materials from which they are derived; [or]** **(ii) [and] 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; [or]** **(iii) [and] taken in time of war or other emergency in international relations;**	**Aucune disposition du présent Accord ne sera interprétée** **. . .** **ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité [et]:** **(i) [et] se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication; [ou]** **(ii) [et] se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées; [ou]** **(iii) [et] appliquées en temps de guerre ou en cas de grave tension internationale;**	**No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:** **…** **impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad~~,~~ ~~relativas~~[y]:** **(i) [y] relativas a las materias fisionables o a aquellas que sirvan para su fabricación; [o]** **(ii) [y] relativas al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; [o]** **(iii) [y] ~~a las~~ aplicadas en tiempos de guerra o en caso de grave tension internacional;**

104. In each of these rewrites, the use of a coordinator ("and", "et", or "y") requires additional redrafting of the text, and suggests a cumulative condition, that is, that the object of the verb "prevents" would be an action that, within the set of actions that a Member considers necessary to protect its essential security interests, is also relating to the matters in subparagraphs (i) or (ii) or taken in time of war or emergency in international relations. This is not what the text of Article XXI(b) provides.

Question 97.

To the United States: Regarding the authentic French version of Article XXI(b), can the word "estimer" be directly followed by a past participle such as the word "appliquées"?

[70] The additions and deletions, in red, in this column reflect the efforts to conform the structure of the Spanish text of the GATT 1994 Article XXI(b) to the structure of the essential security exception in the GATS and TRIPS.

105. The word "appliquées" is a past participle in the feminine plural form, used as the adjectival form of the verb "appliquer". The adjective is modifying the word "mesures" in the chapeau, a feminine plural noun. The construction "toutes mesures que'elle estimera appliquées en temps de guerre" can be correct, meaning "all measures that it considers applied in time of war".

106. In this reading, the verb "être" is implied (as "to be" is in English).[71] While this intended meaning could be expressed as "toutes mesures que'elle estimera être appliquées" ("any action which it considers to be taken"), it is not necessary.

Question 98.

To the United States: Regarding the authentic Spanish version of Article XXI(b), can the word "estimar" be directly followed by a relative pronoun such as "a las" or by a past participle such as "aplicadas"?

107. The word "aplicadas" is a past participle in the feminine plural form, used as the adjectival form of the verb "aplicar". The adjective is modifying the word "medidas" in the chapeau, a feminine plural noun. The construction "todas las medidas que [la parte contratante] estime aplicadas en tiempos de guerra" can be correct, meaning "all the measures that it considers applied in time of war".

108. In this reading, the verb "ser" is implied (as "to be" is in English). While this intended meaning could be expressed as "todas las medidas que estime ser aplicadas" ("any action which it considers to be taken"), it is not necessary.

109. The United States recalls that the word "a las" as a reference to another set of measures does not appear in either the English or the French texts of Article XXI(b)(iii), or in the Spanish texts of Article XIV*bis* of the GATS or Article 73 of the TRIPS. For the reasons explained in prior U.S. submissions, the Panel should not attach any significance to the inclusion of "a las" in the Spanish text of the GATT Article XXI(b)(iii).[72]

Question 99.

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

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[71] The verb "consider" in English is a complex-transitive verb that may take either a predicate complement or an infinitive complement. The Cambridge Grammar of the English Language, R. Huddleston and G. Pullum, eds. (Cambridge University Press 2002) (US-224) at 264-265. *See also* Advanced French Grammar, M. L'Huillier ed. (Cambridge University Press 1999) at 33 (noting that the verb "estimer" can take an object complement) (US-226).

[72] U.S. First Written Submission, paras. 162-177; U.S. Second Written Submission, paras. 44-48.

110. Question 99 is for Hong Kong, China.

Question 100.

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

111. The post-1947 revisions to the Havana Charter essential security provisions, including the modification at the end of the chapeau, were not adopted during the Uruguay Round, reflecting that negotiators did not intend to incorporate whatever subsequent changes might have gone into the ITO text into Article XXI(b) of the GATT.

112. The difference between the text of Article XXI(b) and the text of Article 99 of the Havana Charter – in particular, with respect to the quoted terms "where such action" – supports the interpretation that Article XXI(b), including its subparagraphs, is self-judging. The language of Article 99 includes a break in the clause that begins "which it considers", namely the text quoted in the Panel's question ", where such action". As the United States has explained, Article XXI(b) itself does not include any break in the clause beginning "which it considers".

113. At the same time, other provisions of the Havana Charter make clear that negotiators understood that it was important that the ITO not become a forum for security issues, notwithstanding the inclusion of the language ", where such action". In particular, Article 86(3) of the Havana Charter provides,

> "The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters. Accordingly, and in order to avoid conflict of responsibility between the United Nations and the Organization with respect to such matters, any measure taken by a Member directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter shall be deemed to fall within the scope of the United Nations, and shall not be subject to the provisions of this Charter".

114. Ad Note 1 to Article 86(3) confirms that certain issues were not within the competence of the ITO: "If any Member raises the question whether a measure is in fact taken directly in connection with a political matter brought before the United Nations in accordance with the provisions of Chapters IV or VI of the United Nations Charter, the responsibility for making a determination on the question shall rest with the Organization. *If, however, political issues beyond the competence of the Organization are involved in making such a determination, the*

question, shall be deemed to fall within the scope of the United Nations."[73] That is, Ad Note 1 specifically recognized that the ITO might lack competence even to determine whether a measure was "in fact" taken "in connection with a political matter".

115. In addition, Article 96 of the Havana Charter authorized the ITO to request legal opinions from the International Court of Justice, and provided that the ITO "shall consider itself bound by the opinion of the Court on any question referred by it to the Court".

116. Thus, even where the language of Article 99 itself did not reserve the determination of whether an action relates to the matters identified in subparagraph (i) or (ii), or is taken in the circumstances identified in subparagraph (iii), negotiators of the Havana Charter recognized that the ITO would not be the appropriate forum for certain matters. Similarly, the language of Article XXI(b) – which, in contrast, is self-judging in its entirety – reflects the understanding that the multilateral trading system is the proper forum for trade issues, not security issues, and would not be well-served by being converted into the latter.

Question 101.

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

117. Under DSU Article 3.2, the Panel should apply customary rules of interpretation of public international law in interpreting the relevant provisions of the covered agreements. Apart from this provision, the DSU does not limit the scope of materials that the Panel may take into account when making findings in a particular dispute. Articles 31 and 32 of the VCLT – which reflect the customary rules of interpretation of public international law – refer to a range of materials relevant to the interpretation of treaty terms, including supplementary means of interpretation.

118. As relevant here, under Article 32 recourse may be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31. The supplementary means of interpretation referred to in Article 32 are not limited to negotiating history. This is established directly by the text of Article 32, which states that "[r]ecourse may be had to supplementary means of interpretation, *including* the preparatory work of the treaty and the circumstances of its conclusion." By using the term "including", Article 32 does not limit supplementary means to preparatory work or circumstances of conclusion, but potentially brings in any other relevant material.

119. Furthermore, Article XVI:1 of the WTO Agreement states that – except as otherwise provided in the DSU – the WTO shall be guided by the decisions, procedures, and customary

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[73] Emphasis added.

practices followed by CONTRACTING PARTIES. The same would apply to WTO panels, which assist the DSB and serve as an integral part of the WTO.

120. As discussed in paragraphs 189 to 214 of the U.S. First Written Submission, the U.S. interpretation of Article XXI – based on the customary rules of interpretation – is supported by views repeatedly expressed by GATT Contracting Parties in connection with prior invocations of their essential security interests. As the United States has explained, every Member invoking Article XXI has taken its view that the provision is self-judging. The United States has also explained that its own interpretation of Article XXI(b) has been consistent for more than 70 years.

121. Such previously expressed views of Members do not have particular status under Articles 31 and 32 of the Vienna Convention on the law of treaties, however, nor are these views part of the GATT 1994 by virtue of paragraph (1)(b)(iv), or guidance pursuant to Article XVI:1 of the WTO Agreement. As noted above, the DSU calls on the Panel to apply customary rules of interpretation, but does not otherwise limit the scope of materials that the Panel may take into account when making findings in a particular dispute. Thus, such statements can inform or support the meaning of Article XXI as interpreted according to the customary rules of public international law and the Panel may find it instructive to consider such statements.

122. The United States observes that in the context of this dispute a number of Members have expressed views of Article XXI(b) that differ from their previous statements[74]. However, the

[74] For example, the European Union previously stated, among other things, that "[t]he exercise of these rights [in Article XXI] constituted a general exception, and required *neither notification, justification, nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement*." GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-86) (italics added). The European Union expressed these views in 1982 when it, along with Australia and Canada, invoked Article XXI to justify the application of certain measures against Argentina in light of Argentina's actions in the Falkland Islands. *See* 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). The European Union also made similar statements in 1985, after Nicaragua asked the GATT Council to condemn a U.S. embargo and to request that the United States revoke these measures immediately. *See* Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985), at 2, 13 (US-89).

Russia has taken a different view of Article XXI in this dispute than the one it asserted in 2018 in *Russia – Traffic in Transit*, in which it was the respondent and invoked Article XXI(b). There, Russia argued that this provision was "self-judging," meaning that only the acting Member could determine what action it considered necessary for the protection of its essential security interests. Russia's closing statement at the first meeting of the Panel, para. 11 (quoted in *Russia – Traffic in Transit*, para 7.29 and note 69). As Russia explained in this prior dispute: "[T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case." Russia's closing statement at the first meeting of the Panel, para. 13 (quoted in in *Russia – Traffic in Transit*, para. 7.28 & note 67). Russia also argued in that dispute that the Panel, and the WTO more generally, "being trade mechanisms are not in a position to determine whether sovereign states are at

text of Article XXI(b) has not changed since such statements were made. The meaning of Article XXI, as interpreted according to customary rules of interpretation of public international law, and the balance struck during the negotiation of the GATT 1947, have not changed. The changing interpretations expressed by various Members depending on their posture as complaining or responding party may itself be taken into account by the Panel.

123. With respect to the internal documents discussed at paragraphs 136 through 161 of the U.S. First Written Submission, as the United States has explained, the report in *Russia – Traffic in Transit* erred in considering those materials as part of the negotiating history of Article XXI(b).[75] Those documents were not in the public domain and were not accessible to other parties during the negotiations to which they relate. As such, they are not relevant to establishing the common intention of the parties to the treaty. As prior reports have recognized, to be relevant for consideration under Article 32 of the Vienna Convention, documents from individual members should be officially published and publicly available.[76] Nor do these documents provide historical context against which the treaty was negotiated, as the documents include only internal discussions. Accordingly, the documents do not provide evidence of the circumstances of the treaty's conclusion.

124. The United States also considers that it would not be instructive for the Panel to consider these internal documents because, as noted,[77] internal disagreements are the normal course of policy development within a government and do not undermine official public statements, which establish the common intention of the parties. But in any event, the internal documents at issue, when viewed as a whole and in context, confirm that Article XXI(b) was understood by the majority of the U.S. delegation to be self-judging as then currently drafted.[78] The final conclusion of an internal U.S. memorandum discussing competing views regarding the provision as it was currently drafted was that under the then-existing text "the U.S. can justify such security measures *as it may contemplate as 'relating to' one of the listed subjects*."[79]

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war. Similar logic applies to 'other emergency in international relations." Russia's opening statement at the second meeting of the Panel, para. 23 (quoted in *Russia – Traffic in Transit*, para. 7.29).

[75] U.S. First Written Submission, paras. 139-144; U.S. Second Written Submission, paras. 101-108.

[76] *EC – IT Products*, paras. 7.576-7.577; *EC – Chicken Cuts (AB)*, paras. 282-309; *see also Chile – Price Band System (Panel)*, footnote 596 ("We believe that Article 32 of the Vienna Convention allows us to use such documents, to which all GATT Contracting Parties had access before and during the negotiations of the Uruguay Round, as a supplementary means of interpretation.").

[77] U.S. Second Written Submission, paras. 102-108.

[78] U.S. First Written Submission, paras. 144-160; U.S. Second Written Submission, paras. 105-108.

[79] 2 U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1-3 (emphasis added) (US-70).

Introduction to Questions 102 through 126

125. By way of background for the specific matters dealt with in Questions 102 through 126, the United States notes[80] that the report in *Russia – Traffic in Transit* does not reflect an interpretation of Article XXI(b) consistent with the customary rules of treaty interpretation.

126. Application of the customary rules of treaty interpretation yields the interpretation that Article XXI(b), including its subparagraphs, is self-judging. The terms of the provision include a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" still modifies the entirety of the main text and the subparagraph endings. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances is committed to the judgment of that Member alone.

127. Although it acknowledged that the text of Article XXI(b) could be read so that "'which it considers' qualifies the determinations in the three enumerated subparagraphs," the *Russia – Traffic in Transit* panel gave this plain meaning no interpretive weight.[81] Instead, based on what it termed (without explanation) the "logical structure of the provision," the panel concluded that subparagraph endings (i) to (iii) qualify and limit Members' discretion to take essential security measures.[82] After reaching that conclusion, the panel conducted what it described as "a similar logical query", that is "whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective determination."[83] The panel indicated that it would "focus on" subparagraph (iii) and determined that "the existence of a war, as one characteristic example of a larger category of 'emergency in international relations', is clearly capable of objective determination."[84]

128. This approach does not reflect application of the customary rules of treaty interpretation. The meaning of words and grammatical structure are the text and context that should be examined under those rules – Article 31 of the VCLT provides for interpretation "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". There is no basis in those rules for rejecting the interpretation such an examination yields in favor of an inquiry into either the "logical structure" of a provision, or whether a provision is "capable of objective determination".

129. The *Russia – Traffic in Transit* report did not explain what it considered to comprise the "logical structure" of Article XXI, nor how, consistent with customary rules of interpretation, the

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[80] *See* U.S. First Written Submission, paras. 215-265.

[81] *Russia – Traffic in Transit*, para. 7.65.

[82] *Russia – Traffic in Transit*, para. 7.65; *see also* U.S. First Written Submission, paras. 220-222.

[83] *Russia – Traffic in Transit*, para. 7.66.

[84] *Russia – Traffic in Transit*, para. 7.71.

logical structure of a provision can operate to alter the ordinary meaning of the terms in that provision.

130. Likewise, in conducting what it described as "a similar logical query," that is "whether the subject-matter of each of the enumerated subparagraphs of Article XXI(b) lends itself to purely subjective discretionary determination,"[85] the report did not explain how an inquiry as to whether a provision is "capable of objective determination" has a basis in the customary rules of treaty interpretation, or examine the text or context of Article XXI in reaching this conclusion.

131. Under Article 3.2 of the DSU, the provisions of the GATT 1994 are to be interpreted "in accordance with the customary rules of interpretation of public international law," that is, according to the ordinary meaning of the terms in their context and in light of the agreement's object and purpose. The DSU, therefore, makes clear that it is the text of the relevant agreement(s) that determines how a panel should assess a Member's invocation of Article XXI(b). The fact that a matter is "subject" or "amenable" to objective determination does not empower a WTO panel to determine that matter. Instead, it is for WTO Members, through the text of their agreements, to specify whether a panel—or a Member, the Appellate Body, or a WTO Committee—is empowered to make such determinations.[86] The ordinary meaning of the terms of Article XXI, in their context, establishes that it is for a responding Member to determine what action it considers necessary for the protection of its essential security interests. That is, the self-judging nature of the provision is a function of the text of Article XXI(b) itself. Nothing in the customary rules of treaty interpretation, or the DSU, calls for a separate inquiry into whether those terms are "capable of objective determination".

132. The *Russia – Traffic in Transit* panel's evaluation of whether the content of the subparagraphs is "amenable to objective determination" is also not based on an analysis of the text of Article XXI(b) itself. Rather, the panel determined, based on prior Appellate Body reports interpreting Article XX(g), that the phrase "relating to" in subparagraphs (i) and (ii) requires a "'close and genuine relationship of ends and means' between the measure and the objective of the Member adopting the measure."[87] The panel concluded that "[t]his is an objective relationship between the ends and the means, subject to objective determination."[88] In so doing, the panel failed to acknowledge the textual and structural differences between Articles XX and XXI.[89]

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[85] *Russia – Traffic in Transit*, para. 7.66.

[86] *See also* U.S. Response to Panel Question 47.

[87] *Russia – Traffic in Transit*, para. 7.69 (quoting and citing *US – Shrimp (AB)*, para. 136; *China – Raw Materials (AB)*, para. 355; *China – Rare Earths (AB)*, para. 5.90)).

[88] *Russia – Traffic in Transit*, para. 7.69.

[89] U.S. First Written Submission, paras. 53-57, 228-230; U.S. Responses to First Set of Panel Questions, paras. 113-114.

Question 102.

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

133. With respect to subparagraph (iii), without analyzing the full text, the *Russia – Traffic Transit (Panel)* report states that "the existence of a war, as one characteristic example of a larger category of 'emergency in international relations', is clearly capable of objective determination."[90] Although it acknowledged some lack of clarity in "the confines of an 'emergency in international relations'" under Article XXI(b)(iii), the panel nevertheless concluded that this phrase "can only be understood," in the context of the situations addressed in Article XXI(b)(i) and (ii), "as belonging to the same category of objective facts that are amenable to objective determination."[91]

134. Only after reaching these conclusions does the panel identify definitions of the term "war" (as well as "international relations"). However, the panel does not rely on those definitions. Rather, the panel concludes that the matters addressed by Articles XXI(b)(i), (ii), and (iii) "are all defence and military interests, as well as maintenance of law and public order interests".[92]

135. With respect to the specific definition that the panel offers of "war", the United States considers that a Member might consider the circumstances in the panel definition to be a war, but not necessarily only those circumstances. Article XXI(b) reserves to the judgment of a Member taking action to protect its essential security interests the question of whether the circumstances in subparagraph (iii) exist. As the United States has explained, the *Russia – Traffic in Transit* panel erred in finding that the existence of the circumstances in the subparagraphs is subject to review by a panel. In reaching this finding, the panel discounted its own conclusion that the meaning of the words and the grammatical structure supported the interpretation that Article XXI(b) is self-judging in its entirety, and instead conducted an inquiry into whether the subject matter of the subparagraphs is *capable* of objective determination – an inquiry that is not called for under the customary rules of treaty interpretation.

Question 103.

To both parties: Please comment on the definition "emergency in international relations" offered by the panel in *Russia – Traffic in Transit* in paragraph 7.76 of its report (refers

[90] *Russia – Traffic in Transit*, para. 7.71.

[91] *Russia – Traffic in Transit*, para. 7.71.

[92] *Russia – Traffic in Transit*, para. 7.74.

"generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or *surrounding* a state").

136. The ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. Definitions of "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention."[93] A broad understanding of the term "emergency" in Article XXI(b)(iii) is supported by the context provided by other provisions of the GATT 1994 and other covered agreements, which enumerate certain items on a list and thereafter refer to "similar" items.[94] Article XXI(b)(iii), in contrast, does not refer to "war or other *similar* emergency in international relations".

137. The ordinary meaning of the phrase "international relations" confirms that it can be understood as referring to a broad range of matters. The term "relations" can be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another,"[95] while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations."[96] With these definitions in mind, an "other emergency in international relations" can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.

138. As noted in the introduction to the responses to Questions 102 through 126 and in the U.S. First Written Submission, to arrive at its understanding of Article XXI(b), the panel in *Russia – Traffic in Transit* ignored the ordinary meaning of Article XXI(b) and read into Article XXI(b)(iii) the terms of the security exceptions of other treaties. Although it acknowledged that the text of Article XXI(b) could be read so that "'which it considers' qualifies the determinations in the three enumerated subparagraphs," the *Russia – Traffic in Transit* panel gave this plain meaning no interpretive weight.[97] Again, instead, based on what it termed (without explanation) the "logical structure of the provision," the panel concluded that subparagraph endings (i) to (iii)

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

[94] *See* GATT 1994 Article XII (providing that Members applying restrictions for the balance of payments undertake "not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copy right, or similar procedures"); Article 11.1(b) of the Agreement on Safeguards (referring to "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side"); Article 4.2 and footnote 1 of the Agreement on Agriculture (placing limits on "any measures of the kind which have been required to be converted into ordinary customs duties", and providing that "[t]hese measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties").

[95] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 2534 (US-227).

[96] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 1397 (US-227).

[97] *Russia – Traffic in Transit*, para. 7.65.

qualify and limit Members' discretion to take essential security measures, and that, "for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[98]

139. As noted, the *Russia – Traffic in Transit* panel concluded that the matters addressed by Articles XXI(b)(i), (ii), and (iii) "are all defence and military interests, as well as maintenance of law and public order interests".[99] Rather than relying on the ordinary meaning of "its essential security interests" and "in time of war or other emergency in international relations" in Article XXI(b)(iii), the panel effectively read into that text references to "the event of serious internal disturbances affecting the maintenance of law and order" and "war or serious international tension constituting a threat of war" – language that appears in the *Treaty on the Functioning of the European Union* (TFEU)[100] and *Agreement on the European Economic Area* (EEA)[101] but not in the GATT 1994. For example, without textual analysis, the panel stated that "essential security interests" generally refers to "the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[102] The panel further suggested that a situation would not constitute an "emergency in international relations" unless it "give[s] rise to defence and military interests, or maintenance of law and public order interests."[103] The panel also appeared to rely on a provision in the Covenant of League of Nations that refers to "[a]ny war or threat of war".[104] Based on this view, the panel concluded that "emergency in international relations" refers "to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[105]

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[98] *Russia – Traffic in Transit*, paras. 7.65 and 7.82.

[99] *Russia – Traffic in Transit*, para. 7.74.

[100] "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of *serious internal disturbances affecting the maintenance of law and order*, in the event of war, *serious international tension constituting a threat of war*, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security." Treaty on the Functioning of the European Union, Art. 347 (emphases added) (US-67).

[101] "Nothing in this Agreement shall prevent a Contracting Party from taking any measures . . . which it considers essential to its own security in the event of *serious internal disturbances affecting the maintenance of law and order*, in time of war *or serious international tension constituting threat of war* or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security." Agreement on the European Economic Area, Art. 123 (emphases added) (US-68).

[102] *Russia – Traffic in Transit*, para. 7.130

[103] *Russia – Traffic in Transit*, para. 7.75.

[104] *Russia – Traffic in Transit*, para. 7.76 and note 153.

[105] *Russia – Traffic in Transit*, para. 7.76.

140. Such language, however, is not part of the text of Article XXI(b)(iii), and such a narrow construction of Article XXI(b)(iii) is not consistent with the ordinary meaning of the terms of that provision. Contrary to statements by the panel in *Russia – Traffic in Transit*, nothing in the text somehow limits an "other emergency in international relations" under Article XXI(b)(iii) to an emergency similar to "war",[106] or to situations "giv[ing] rise to defence and military interests, or maintenance of law and public order interests."[107]

141. Likewise, nothing in the text of Article XXI(b)(iii) limits an "emergency in international relations" to a specific territorial area, that is, one "engulfing or surrounding a state". This erroneous understanding is similar to that panel's view of "essential security interests" as referring to "the protection of *its territory* and its population from external threats".[108] By imposing such a non-textual, contiguous territory reading of Article XXI, the panel in *Russia – Traffic in Transit* would, for example, appear to consider that the United States could *not* validly consider events in Europe or the Indo-Pacific to be relevant emergencies in international relations or part of U.S. essential security interests. These non-textual and subjective beliefs of the panel in *Russia – Traffic in Transit* should be rejected by this Panel.

Question 104.

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

142. In light of the self-judging nature of Article XXI(b), whether the circumstances described by Canada and the EU constitute an "emergency in international relations" would be determined by the Member who takes action to protect its essential security interests. As the United States has explained, the ordinary meaning of "emergency" confirms this interpretation. The question of whether a situation is "serious, unexpected, and often dangerous" and "requires action" is inherently subjective.

143. That said, the United States considers that a Member would be within its rights to consider the types of circumstances described by Canada and the EU – that is, deterioration of

[106] The United States observes that, during the Uruguay Round, Nicaragua made a proposal to modify Article XXI in a manner that would have limited Members' discretion when taking action under that provision, including an interpretative note that would interpret "emergency in international relations" to "*refer only to situations which in the opinion of the CONTRACTING PARTIES threaten international peace and security* and which the party invoking the Article has first sought to resolve by appealing to the appropriate body of the United Nations or other appropriate inter-governmental organization that deals with peace and security issues."[106] *See* Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-44) (emphasis added). As discussed in the U.S. First Written Submission (at paragraphs 107-108) negotiators discussed that proposal and rejected it, confirming that they did not intend to alter the self-judging nature of Article XXI(b).

[107] *Russia – Traffic in Transit*, para. 7.75.

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

human rights or democracy, or cyberattacks, respectively – to constitute an emergency. The United States likewise agrees with the statement by Canada that Article XXI(b) does not limit a Member to responding only to an "emergency" within its own territory or immediate surroundings, as erroneously suggested by the *Russia – Traffic in Transit* report.

Question 105.

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

144. In light of the self-judging nature of Article XXI(b), whether a situation implicates "international relations" would be determined by the Member who takes action to protect its essential security interests.

145. The ordinary meaning of the phrase "international relations" confirms that it can be understood as referring to a broad range of matters. The term "relations" can be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another,"[109] while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations."[110] With these definitions in mind, an "other emergency in international relations" can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.

Question 106.

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

146. As the United States has explained, Article XXI(b) reserves judgment as to the existence of an emergency in international relations that requires an action to protect its essential security interests. Article XXI(b) makes clear that Members are not limited to taking action only in a particular type of emergency in international relations.

147. That said, the French and Spanish texts confirm that the term "emergency in international relations" can be understood broadly. The ordinary meaning of the term "grave" in Spanish is

[109] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 2534 (US-227).

[110] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 1397 (US-227).

"[g]rande, de mucha entidad o importancia"[111] or, as defined in English, "serious".[112] The ordinary meaning of the term "tension" can be understood as "estado de oposición u hostilidad latente entre personas o grupos humanos, como naciones, clases, razas, etc."[113] or, as defined in English, "tension".[114] The ordinary meaning of "internacional" can be understood as "[p]erteneciente o relativo a dos o más naciones; [p]erteneciente o relativo a países distintos del proprio; [q]ue trasciende o ha trascendido las fronteras de su país"[115] or, as defined in English, "international".[116]

148. The ordinary meaning of the term "grave" in French is "[s]usceptible de conséquences sérieuses, de suites fâcheuses, dangereuses"[117] or, as defined in English, "serious"[118]. The ordinary meaning of the term "tension" is "[é]tat de ce qui menace de rompre"[119] or, as defined in English, "tension".[120]. The ordinary meaning of the term "international" is "[q]ui a lieu, qui se fait de nation à nation, entre plusieurs nations; qui concerne les rapports des nations entre elles",[121] or, as defined, in English "international".[122]

149. The ordinary meaning of the French and Spanish texts, "en cas de grave tension international" and "en caso de grave tensión internacional", can therefore be understood consistently with the understanding of the English text of "other emergency in international relations", that is, as referring to a situation of danger or conflict ("[é]tat de ce qui menace de rompre" or "estado de oposición u hostilidad"), concerning political or economic contact occurring between nations ("[q]ui a lieu, qui se fait de nation à nation, entre plusieurs nations; qui concerne les rapports des nations entre elles" or "[p]erteneciente o relativo a dos o más

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[111] Real Academia Española, Diccionairo de la Lengua Española, 2d edn. (2001), vol. I (US-228), at 1156.

[112] The Oxford Spanish Dictionary, 2d edn, B. Galimberti Jarman and R. Russell, eds. (Oxford University Press, 2001) (US-229) at 368.

[113] Real Academia Española, Diccionairo de la Lengua Española, 2d edn. (2001), vol. II (US-228), at 2156.

[114] The Oxford Spanish Dictionary, 2d edn, B. Galimberti Jarman and R. Russell, eds. (Oxford University Press, 2001) (US-229) at 716.

[115] Real Academia Española, Diccionairo de la Lengua Española, 2d edn. (2001), vol. II (US-228), at 1292.

[116] The Oxford Spanish Dictionary, 2d edn, B. Galimberti Jarman and R. Russell, eds. (Oxford University Press, 2001) (US-229) at 418.

[117] Le Petit Robert, Dictionnaire de la Langue Française (1993) (US-230) at 1043.

[118] Le Grand Dictionnaire Hachette-Oxford, J. Ormal-Grenon and N. Rollin, eds., 4th edn. (Oxford University Press, 2007) (US-231), at 409.

[119] Le Petit Robert, Dictionnaire de la Langue Française (1993) (US-230) at 2231.

[120] Le Grand Dictionnaire Hachette-Oxford, J. Ormal-Grenon and N. Rollin, eds., 4th edn. (Oxford University Press, 2007) (US-231).

[121] Le Petit Robert, Dictionnaire de la Langue Française (1993) (US-230) at 1197.

[122] Le Grand Dictionnaire Hachette-Oxford, J. Ormal-Grenon and N. Rollin, eds., 4th edn. (Oxford University Press, 2007 (US-231), at 459.

naciones; [p]erteneciente o relative a países distintos del proprio; [q]ue trasciende o ha trascendido las fronteras de su país") which arises unexpectedly and requires urgent attention ("[s]usceptible de conséquences sérieuses, de suites fâcheuses, dangereuses" or "[g]rande, de mucha entidad o importancia"). Nothing in the ordinary meaning of the English, French, or Spanish texts suggest that Article XXI(b) is available only in certain types of emergencies in international relations.

150. The ordinary meaning of the French and Spanish texts also confirms the interpretation that Article XXI(b) is self-judging as to the existence of the circumstances in the subparagraphs, including whether there is an emergency in international relations. That is, Article XXI(b) does not task a dispute settlement panel for substituting its own judgment with that of a Member as to whether a situation is an emergency in international relations – that is, whether it refers to a situation of danger or conflict, concerning contact between nations, which arises unexpectedly and requires urgent attention.

Question 107.

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

151. In light of the self-judging nature of Article XXI(b), a panel is not tasked with assessing the "gravity of the situation" for purposes of determining whether it constitutes an "emergency in international relations". Rather, Article XXI(b)(iii) reserves the assessment of whether circumstances constitute an "emergency in international relations" to the Member taking action to protect its essential security interests in those circumstances. The suggestion that a panel assess the "gravity of the situation" only confirms that this assessment can only be undertaken by a particular Member. For example, the current situation in Europe is considered by some Members to be of the utmost gravity while other Members feel they can abstain from expressing any view.

Question 108.

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

152. By its terms, Article XXI(b)(iii) reserves the assessment of whether circumstances constitute an "emergency in international relations" to the Member taking action to protect its essential security interests in those circumstances. Article XXI(b)(iii) does not prescribe particular criteria that a Member must consider, or is precluded from considering, in making that assessment. The United States does not seek to substitute its judgment for that of another Member in terms of what constitutes an emergency in international relations. The United States expects that a Member would make such an assessment based on its own consideration of the

political and security relationships and geopolitical situation involved, and other issues, in light of its essential security interests.

Question 109.

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

153. Article XXI(b)(iii) reserves the assessment of whether circumstances constitute an "emergency in international relations" to the Member taking action to protect its essential security interests in those circumstances. The United States would not expect a Member to consider every situation of concern in international relations to be an "emergency in international relations" such that it would need to act to protect its essential security interests. This is evidenced by the fact that for the past 70 years Members (formerly Contracting Parties) have sought to resolve certain *trade* concerns through both the monitoring and dispute settlement functions of the multilateral trading system, and essential security interests have not been invoked in every dispute.

Question 110.

To both parties: In paragraph 3 of its opening statement at the second meeting of the Panel, the United States referred to a joint statement issued by the United States and 20 other countries (Exhibit US-210). What is the relevance of this statement for the panel's assessment of the existence of an emergency in international relations?

154. Because Article XXI(b) is self-judging, the Panel need not, and should not, assess the existence of an emergency in international relations. As the United States has explained previously in this dispute, once a Member invokes Article XXI, this invocation is sufficient to establish the application of this provision. A panel may not second guess a Member's consideration of its own essential security interests.

155. To the extent that the Panel nonetheless chooses to assess the merits of the U.S. invocation, as noted in response to Question 101, apart from Article 3.2, which calls for the Panel to apply the customary rules of treaty interpretation in interpreting provisions of the covered agreements, the DSU does not limit the scope of materials that the Panel may take into account when making findings in a particular dispute.

156. The United States has submitted extensive evidence into record that supports the U.S. invocation of Article XXI(b), as well as the existence of an emergency in international relations, including the statement provided as Exhibit US-210, which states,

> Since the enactment of the National Security Law in June 2020, authorities have targeted and suppressed independent media in the Special Administrative Region. This has eroded the protected rights and freedoms set out in the Basic Law and undermines China's obligations in the Sino-British Declaration. . . . These

> ongoing actions further undermine confidence in Hong Kong's international reputation through the suppression of human rights, freedom of speech and free flow and exchange of opinions and information. A stable and prosperous Hong Kong in which human rights and fundamental freedoms are protected should be in everybody's interest.

157. The statement of policy in the U.S.-Hong Kong Policy Act of 1992 that "[t]he human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong" is consistent with this statement.[123]

158. This statement further echoes the language of Executive Order 13936:

> China has. . . followed through on its threat to impose national security legislation on Hong Kong. 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.[124]

159. The United States provided other evidence from third-party sources documenting concerns with freedoms and human rights in Hong Kong, China, in its First Written Submission, as well as in subsequent submissions.[125]

160. Were the Panel to review whether the circumstances at issue constitute an "emergency in international relations", the views of other countries regarding the situation with respect to Hong Kong, China, could support a finding that there is such an emergency.[126] The fact that multiple countries share the U.S. concerns also shows the baselessness of the accusations by Hong Kong, China, during the second videoconference that those concerns are not sincere.

Question 111.

To the United States: In its response to questions on Day 2 of the substantive meeting with the Panel, the United States stated that the concept of "emergency in international relations"

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[123] United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-5732 (US-3).

[124] Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

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

[126] *E.g.,* EU Third Party Submission, paras. 11-16; Canada's Third Party Oral Statement, paras. 3, 19.

is "inherently subjective". Given this, why would the view of other countries be relevant in determining whether a situation is an "emergency in international relations"?

161. Because Article XXI(b) is self-judging by its terms, under the customary rules of treaty interpretation, a panel may not review the merits of a Member's invocation of that provision. That is, the determination of whether a situation constitutes an "emergency in international relations" is for the Member taking action to protect its essential security interests to make. That Member may (but is not required to) take the views of other countries into account in making that assessment; in some circumstances, Members may share a perception that specific circumstances constitute an emergency in international relations. However, by its terms, Article XXI(b) does not call for a panel to determine for itself whether a particular situation is an "emergency in international relations", whether by reference to the views of other countries or other evidence.

162. That said, the United States is aware that the *Russia – Traffic in Transit* report found that a panel is tasked with determining whether a situation is an "emergency in international relations". The United States further understands that the Panel has asked a number of questions regarding the term "emergency in international relations". And the United States understands Hong Kong, China, to have called into question the veracity and sincerity of the U.S. invocation of Article XXI(b).

163. The United States recalls that, since its First Written Submission, it has provided evidence regarding the circumstances that gave rise to the measures at issue – in particular, the erosion of autonomy of Hong Kong, China, and in turn the freedoms and rights provided its people. As noted above in response to Question 110, the DSU calls on the Panel to apply customary rules of interpretation, but does not otherwise limit the scope of materials that the Panel may take into account when making findings in a particular dispute. Were the Panel to review whether the circumstances at issue constitute an "emergency in international relations", the views of other countries regarding the situation with respect to Hong Kong, China, could support a finding that there is such an emergency.

Question 112.

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

164. Invocation of Article XXI(b) means that an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement. It would diminish a Member's "right" to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to find such an action inconsistent with

Article XXI(b).[127] In that sense, evaluation of a measure as to which Article XXI(b) is invoked differs from evaluation of a measure as to which it is not; with respect to the former, because of the plain meaning of Article XXI(b), a panel is not tasked with evaluating the merits of a claim of breach or of the invocation of Article XXI(b).

165. However, what the *Russia – Traffic in Transit* report refers to as "a fundamental change in circumstances" does not inform the interpretation of "emergency in international relations" in the sense that Article XXI(b), including the term "emergency in international relations," should be interpreted other than in accordance with the customary rules of treaty interpretation. Application of those rules establishes that Article XXI(b) reserves the judgment as to whether a measure is necessary to protect its essential security interests, and in what circumstances, is to the Member taking action.

Question 113.

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

166. The United States agrees that "States must retain a certain level of flexibility to determine, for themselves, what constitutes an emergency in international relations serious enough to warrant taking measure(s) in response". Indeed, Article XXI(b) reflects this right, by reserving to a Member taking action the judgment as to what constitutes such an emergency.

167. As such, Article XXI(b) does not impose a "requirement" for a Member taking such an action to demonstrate that circumstances constituting an emergency "objectively exist" and that there is a "sufficient connection" between the action and those circumstances.

168. Because of the ordinary meaning of the words in the phrase "which it considers," Article XXI(b) does not require any explanation or production of evidence in dispute settlement proceedings, including as to how or why the invoking Member considers a particular element of Article XXI(b) to apply. The ordinary meaning of "considers" is "[r]egard in a certain light or aspect; look upon as" or "think or take to be."[128] Under Article XXI(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the

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[127] U.S. First Written Submission, Section III.E.

[128] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-11).

action as having the aspect of being necessary for the protection of that Member's essential security interests.

169. The text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence. The text does not indicate the Member must notify the circumstances underlying the invocation, explain the action, or provide advance notice – as exists in other parts of the WTO Agreement.[129]

170. Instead, Article XXI(a) provides that "Nothing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." Imposing a requirement for a Member invoking Article XXI(b) to explain its action it considers necessary for the protection of its essential security interests would be inconsistent with its right under Article XXI(a) and contrary to the text of Article XXI(b).

Question 114.

To both parties: Please comment:

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

b. **on Canada's statement in paragraph 26 of its third-party submission that "a panel's assessment of whether the requirements of Article XXI(b) (iii) have been**

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[129] *See, e.g.*, Article XIX:2 of the GATT 1994 ("Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action."); Article 2.5 of the TBT Agreement ("A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4."); Article XVIII:7(a) of the GATT 1994 ("If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein."); Article XII:4(a) of the GATT 1994 ("Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.").

met must include a determination of whether there is a 'sufficient nexus' between the measure adopted by the invoking Member and the circumstances set out in subparagraph (iii)".

171. The United States responds to subparts (a) and (b) of Question 114 together.

172. By its terms, Article XXI(b) does not require demonstration of a "sufficient nexus" between the measures as to which Article XXI(b) is invoked and the circumstances in subparagraph (iii). As the United States has explained, in the text of Article XXI(b), the clause beginning "which it considers" includes everything that follows, including the text of each subparagraph. That is, there is no break in the clause. Rather, in Article XXI(b), the phrase "which it considers necessary" is followed by the word "for". As such, the relevant inquiry is not simply whether a Member considers any action "necessary". Instead, it is whether a Member considers the action "necessary for" a purpose – namely, the protection of its essential security interests relating to subject matters in subparagraph endings (i) and (ii), or for the protection of its essential security interests in the temporal circumstance provided for in subparagraph ending (iii). Artificially separating the words "which it considers necessary" from the language that immediately follows and continues the clause would erroneously interpret certain terms of Article XXI(b) in isolation.

173. The ordinary meaning of "its essential security interests" also undermines the suggested requirement to demonstrate a "sufficient nexus" between the measures at issue and the circumstances in subparagraph (iii). Essential security interests are those things involving the "potential detriment or advantage" to the "essence" of a Member's safety or "being protected from danger".[130] And the essential security interests that are relevant are "its" – that is, the Member's in question – essential security interests. As such, what is required is that a Member "considers" that the circumstances identified in one or more of the subparagraphs exist; and that the Member "considers" its action to be necessary for the protection of its essential security interests.

174. In addition, it is entirely unclear what is meant by a "sufficient" nexus. Nothing in the text of Article XXI(b) requires a panel (or another Member) to substitute its judgment as to whether a Member's action is necessary for the protection of its essential security interests relating to the matters in subparagraphs (i) and (ii), or in the circumstances provided for in subparagraph (iii). What is "sufficient", for purposes of Article XXI(b), is that the Member taking action considers it so necessary.

175. Notwithstanding that Article XXI(b) does not require the United States to make such a showing, the United States has explained the connection between the measures at issue and the circumstances with respect to Hong Kong, China. From its First Written Submission,[131] the United States has explained that, in Executive Order 13936, citing the Secretary of State's 2020

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

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

Hong Kong Policy Act Report as well as the National Security Legislation imposed by China on Hong Kong, China, the President determined that Hong Kong, China, "is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" for purposes of a number of U.S. laws, including the marking statute. The Executive Order further determined "that the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States" and declared a national emergency with respect to that threat.

Question 115.

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

176. In the statement quoted in the Panel's question, the U.S. delegate identified measures that the United States might have assessed as being "in time of other emergency in international relations, relating to its essential security interests". Indeed, the statement makes clear that it was the United States who made the assessment regarding its measures: "we were required, for own protection, to take many measures". The text of Article XXI(b) does not limit an "emergency to international relations" such as those described by the delegate, however. And as the Chairman continued, "In defence of the text, we might remember that it is a paragraph of the Charter of the ITO and when the ITO is in operation I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention".

177. The statement included in the Panel's question further highlights the errors in the analysis by the *Russia – Traffic in Transit* report regarding what constitutes an emergency in international relations, and whether that judgment is reserved to the Member taking action. For example, the United States observes that, prior to 1941, the "war going on for two years in Europe" would not have been "engulfing or surrounding" the United States, contrary to the definition of "emergency in international relations" suggested by the panel in *Russia – Traffic in Transit* and endorsed by Hong Kong, China.

Question 116.

To the United States: Please comment on the definition of "essential security interests" offered by the panel in *Russia – Traffic in Transit* (at paragraph 7.139 of its report) in light of the observations the United States made in paragraph 40 of its first written submission on how a Member invoking Article XXI(b) is to determine its essential security interests?

178. As the United States has explained in its First Written Submission, the phrase "its essential security interests" could encompass a broad range of security interests considered by the invoking Member to be "essential."[132] The term "security" refers to "[t]he condition of being protected from or not exposed to danger; safety."[133] As this definition indicates, the term "security" is broad and could encompass many types of security interests that are critical to a Member. The term "essential" refers to significant or important, in the absolute or highest sense. The term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.[134]

179. Importantly, it is "its" essential security interests – those of the acting Member – that the action is taken for the protection of. With this language, Article XXI(b) acknowledges that the essential security interests at issue are those as determined by the acting Member, and reflects that these interests might change over time and across Members.

180. Rather than relying on the ordinary meaning of "its essential security interests", the *Russia – Traffic in Transit* report considered that "essential security interests. . . may generally be understood to refer to those interests relating to quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally,"[135] and that a Member's definition of "its essential security interests" is subject to a good faith obligation that applies equally to the connection between those interests and the measure at issue.[136] The report further found that the panel was obligated to review whether the measures at issue were "so remote from, or unrelated to" the emergency "that it is implausible" that Russia had implemented them for the protection of its essential security interests.[137]

181. As discussed in the U.S. First Written Submission, this approach is not consistent with the customary rules of treaty interpretation. As noted, the ordinary meaning of the term "its essential security interests" establishes that the phrase "its essential security interests" could

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[132] U.S. First Written Submission, paras. 39-40.

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

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

[135] *Russia – Traffic in Transit*, para. 7.130.

[136] *Russia – Traffic in Transit*, para. 7.138.

[137] *Russia – Traffic in Transit*, para. 7.139.

encompass a broad range of security interests considered by the invoking Member to be "essential." Notably, nothing in those terms limits what a Member may consider to be "its essential security interests" to "defence or military interests, or maintenance of law and public order interests", as suggested by the panel in *Russia – Traffic in Transit*.[138] Indeed, as discussed further in response to Question 117, while the United States does not purport to define the security interests of other Members, the United States understands that a number of WTO Members appear to include other considerations in their own assessment of their security interests for purposes of domestic law and policy, and do not clearly distinguish between "types" of security interests.

182. In the context of this dispute, the measures at issue indicate why the United States determined that the circumstances with respect to Hong Kong, China, implicate its "security" interests (not being exposed to danger), and that the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. As the United States has explained, Executive Order 13936 reflects the determination that, in light of "a series of actions that have increasingly denied autonomy and freedoms that China promised to the people of Hong Kong under the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration)," Hong Kong, China, "is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" for purposes of U.S. laws, and "the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States."[139] As the Executive Order states:

> Under this law [the national security legislation], 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 antigovernment 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.[140]

183. As the United States has also explained, the U.S.-Hong Kong Policy Act of 1992 reflects that "[s]upport for democratization is a fundamental principle of United States foreign policy" that "naturally applies to United States policy toward Hong Kong", and that "[t]his will remain

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[138] *Russia – Traffic in Transit*, para. 7.135.

[139] Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

[140] Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

equally true after June 30, 1997".[141] It further reflects that "[t]he human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong. A fully successful transition in the exercise of sovereignty over Hong Kong must safeguard human rights in and of themselves."[142] The Hong Kong Human Rights Act of 2019 reaffirms the principles and objectives set forth in the U.S.-Hong Kong Policy Act, including that Hong Kong, China, must remain sufficiently autonomous to warrant treatment under U.S. law different than that accorded China.[143] The Hong Kong Human Rights Act further provides that it is the policy of the United States, among other things, to support the autonomy, and fundamental freedoms of the people of Hong Kong, as provided for in certain instruments, as well as the democratic aspirations of the people of Hong Kong; and to protect U.S. citizens and long-term permanent residents living in Hong Kong, China, and those visiting and transiting through the territory.[144]

184. Put simply, it is clear why the United States has assessed the circumstances with respect to Hong Kong, China, to implicate its essential security interests. There is no basis in the text of Article XXI(b) for a panel, or Hong Kong, China, to replace the U.S. assessment of "its" essential security interests with its own. The *Russia – Traffic in Transit* report erred in finding to the contrary.

185. In addition, as discussed in more detail in response to Questions 118 and 119 below, there is no basis in the customary rules of treaty interpretation for reading a good faith obligation into Article XXI(b), including with respect to a Member's consideration of its essential security interests.

Question 117.

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

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[141] United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-5732 (US-3); *see also* U.S. Opening Statement at the First Videoconference, para. 20.

[142] United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-5732 (US-3).

[143] *See* U.S. First Written Submission, para. 17.

[144] *See* Section 3 of the HK Human Rights Act (US-4).

186. Article XXI(b) does not limit the scope of "essential security interests" to "defence and military interests" and "maintenance of law and public order interests". Although such interests could be implicated by one or more of the subparagraphs, by its terms Article XXI(b) does not limit the scope of essential security interests to only those interests. The *Russia – Traffic in Transit* report erred in concluding to the contrary.

187. The ordinary meaning of the terms of Article XXI(b) establishes that "essential security interests" are not limited to "defense and military interests, as well as maintenance of law and public order interests". The term "security" refers to "[t]he condition of being protected from or not exposed to danger; safety."[145] As this definition indicates, the term "security" is broad and could encompass many types of security interests that are critical to a Member. The term "essential" refers to significant or important, in the absolute or highest sense.[146] This term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.

188. Subparagraphs (i) and (ii) 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 other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment." In this way, the subparagraph endings (i) and (ii) indicate the particular types of essential security interests a Member considers to be implicated by the action taken.

189. By contrast, the subparagraph ending (iii) does not speak to the nature of the security interests at all, but provides a temporal limitation related to the action taken. Subparagraph (iii) 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." Subparagraph (iii) contains no limitation on the type or nature of the essential security interests involved. This reflects an understanding that there may be a wide range of interests that become essential to a Member's security when it considers a war or other emergency in international relations exists.

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

191. Limiting the scope of interests for which a security action may be taken under subparagraph (iii) – as the *Russia – Traffic in Transit* report does in error – also would not reflect the scope of interests identified by WTO Members and the United Nations as having a significant relationship to national and international security more generally. That these interests

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

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

might change over time and across Members supports an interpretation that it is for the Member itself to determine whether the circumstances in which it acts give rise to an emergency in international relations.

192. Consistent with this understanding of what may constitute "essential security interests" under Article XXI(b), a number of WTO Members appear to include considerations beyond "defense or military interests" or "maintenance of law and public order" in their own assessment of their security interests for purposes of domestic law and policy, and do not clearly distinguish between "types" of security.

- For example, the definition of "national security" provided in China's National Security Law of 2015 includes economic issues. As that definition states "'[n]ational security' means a state in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally, and there is the ability to ensure that a state of security is maintained."[147]

- In its 2018 Defence Policy Statement, New Zealand describes national security broadly, as "the condition that permits New Zealand citizens to go about their daily business confidently, free from fear and able to make the most of opportunities to advance their way of life."[148] In this document, New Zealand also includes "[s]ustaining economic prosperity" and "[m]aintaining democratic institutions and national values: Preventing activities aimed at undermining or overturning Government institutions, principles and values that underpin New Zealand society" among its "seven overarching national security objectives."[149]

- The United Kingdom's 2021 Policy Paper *Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy* states, "The Union is also bound by shared values that are fundamental to our national identity, democracy and way of life. These include a commitment to universal human rights, the rule of law, free speech and fairness and equality. The same essential values will continue to guide all aspects of our national security and international policy in the decade ahead, especially in the face of rising authoritarianism and the persistence of extremist ideologies. . . . In most cases, the UK's interests and values are closely aligned. A world in which democratic societies flourish and fundamental human rights are protected is one that is more conducive to our sovereignty, security and prosperity as a nation."[150]

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[147] National Security Law of the People's Republic of China (2015), art. 2 (US-138).

[148] New Zealand Government, Strategic Defence Policy Statement 2018, at 10 (US-232).

[149] New Zealand Government, Strategic Defence Policy Statement 2018, at 10 (US-232).

[150] Policy Paper, Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy (July 2, 2021) (US-233).

193. The United States does not purport to identify or define the scope of these Members' security interests. Rather, the United States observes that the security interests of WTO Members appear to encompass what could be described as going beyond "defense or military interests" or "maintenance of law and public order interests", and that Members do not necessarily have a shared set of essential security interests. The *Russia – Traffic in Transit* report erred in limiting the scope of what a Member may consider to be its essential security interests for which a security action may be taken under subparagraph (iii) of Article XXI(b), contrary to the text.

Question 118.

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

194. The conclusion of the *Russia – Traffic in Transit* report that Article XXI(b) is subject to a good faith obligation is not based in the customary rules of treaty interpretation.

195. To be clear, the U.S. concerns with the panel's approach do not relate to whether Members are to implement their obligations in "good faith" under international law. The United States understands that they are – indeed, the United States understands further that Members are presumed to act in good faith.

196. However, under the DSU, the WTO dispute settlement system has a limited mandate, which is to determine conformity with the "covered agreements," and not international law more generally. In other words, there is no basis in the DSU for examining the consistency of a Member's action with Article 26 of the VCLT, or with a principle of good faith more generally. These are not provisions of the "covered agreements".

197. Rather, what the DSU calls for, in Article 3.2, is interpretation of the covered agreements in accordance with customary rules of interpretation, which are reflected in Articles 31 through 33 of the VCLT – that is, they must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Nothing in the DSU otherwise provides for the application by a panel of a "principle of good faith".[151]

198. The *Russia – Traffic in Transit* report read a good faith obligation into the text of Article XXI(b) based on concerns that "Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994".[152] But these concerns are not a basis on

[151] The United States observes that the ICJ has also stated that while "the principle of good faith is . . . 'one of the basic principles governing the creation and performance of legal obligations' . . . it is not in itself a source of obligation where none would otherwise exist." *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69, para. 94.

[152] *Russia – Traffic in Transit*, para. 7.133.

which to ignore the text that is there, and read into it text that is not. Indeed, doing so is contrary to the customary rules of treaty interpretation that, pursuant to the DSU, are to be applied in interpreting the covered agreements.

199. And, as the United States explained, negotiators of what became Article XXI(b) discussed the issue of potential abuse. The text reflects the balance they struck – Article XXI(b) is self-judging. If a Member were concerned about abuse, that Member has recourse to non-violation nullification or impairment claims under the DSU. This preserves the role of the WTO as a forum for trade issues, not for evaluating whether a Member really thinks there is an emergency, or really considers a measure necessary to protect its essential security interests.

200. The United States recalls that there was a proposal made during the Uruguay Round for an interpretative note to Article XXI that would have interpreted "which it considers" to require that "[a]ny invocation of this provision must be in good faith".[153] This proposal was not adopted.

201. In addition, as explained in the U.S. Second Written Submission, the suggestion that the principle of "good faith" requires a Panel to review whether a Member has acted in good faith in invoking Article XXI would rewrite Article XXI(b) to insert the text, and impose the requirements, of the chapeau of Article XX.[154] The chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs – that a measure shall not be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade," both of which concepts aim to address applying a measure inconsistently with good faith.[155] Reading into Article XXI text that is not there is inconsistent with the customary rules of interpretation.

202. The result of the analysis of the *Russia – Traffic in Transit* report is that Article XXI justifies not an action that a Member considers necessary for the protection of its essential security interests, but an action that a dispute settlement panel so considers necessary pursuant to

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[153] *See* Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-44); U.S. First Written Submission, paras. 107-108.

[154] U.S. Second Written Submission, para. 29.

[155] *See US – Gasoline (AB)*, p. 25 ("'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.").

its own judgment. As the United States has explained, this is not an appropriate task for a panel, and is contrary to the text of the treaty.

Question 119.

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

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

203. As noted in response to the Question 117, the panel report in *Russia – Traffic in Transit* erred in reading a "good faith" obligation into the text of Article XXI(b). In turn, the panel erred in finding that this requires a Member invoking Article XXI(b) to articulate "its essential security interests sufficiently enough to demonstrate their veracity".

204. First, as the United States has explained, the text of Article XXI(b) does not require a Member to make such an articulation. Because of the ordinary meaning of the words in the phrase "which it considers," Article XXI(b) does not require any explanation or production of evidence in dispute settlement proceedings, including as to how/why the invoking Member considers a particular element of Article XXI(b) to apply. The ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the action as having the aspect of being necessary for the protection of that Member's essential security interests. The panel failed to accord meaning to the text "which it considers" in concluding that this clause is subject to a good faith obligation.

205. The text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence. The text does not indicate the Member must notify the circumstances underlying the invocation, explain the action, or provide advance notice – as exists in other parts of the WTO Agreement.[156]

206. Instead, Article XXI(a) provides that "Nothing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." Imposing a requirement for a Member invoking Article XXI(b) to explain its action it considers necessary for the protection of its essential security interests would be inconsistent with its right under Article XXI(a) and contrary to the text of Article XXI(b). While these circumstances might not arise in every case, the panel in *Russia – Traffic in Transit* erred in reading an obligation into XXI(b) that could undermine XXI(a).

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[156] *See* Response to Question 113 above.

207. Second, the suggestion that a panel should question the "veracity" of a Member's consideration of "its" essential security interests ignores the fact that it is "its", that is, the Member in question's, essential security interests at stake. It is clear that "its" refers back to the Member taking the action at issue. Article XXI(b) does not refer simply to "essential security interests". This reflects the fact that a Member's security interests may change over time, and there is not a single set of security interests for all Members.

208. The premise of the inquiry into the "veracity" of a Member's consideration of "its essential security interests", as articulated by the *Russia – Traffic in Transit* report and as advocated by Hong Kong, China, appears to be that Members do *not* act in good faith in taking essential security actions. The United States does not agree with this premise.

209. And in the context of this dispute, the allegation by Hong Kong, China, that the United States has not acted in good faith with respect to the measures at issue is baseless. As the United States has explained since its First Written Submission, the very measures that Hong Kong, China, chose to challenge explain the interests: starting from statement of U.S. policy with respect to Hong Kong, China, in our 1992 legislation through the recent Executive Order and Federal Register notice. And they explain the circumstances that gave rise to those measures: the erosion of the autonomy of Hong Kong, China, its democratic institutions, and the human rights and freedoms of its people.[157]

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[157] Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2) (noting that the National Security Law is "China's latest salvo in a series of actions that have increasingly denied autonomy and freedoms that China promised to the people of Hong Kong under the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, and that "[u]nder this law [the National Security 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.); *see also* 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5) (noting, "In 2014, Beijing effectively ruled out universal suffrage as a means to elect the territory's leader. Dissidents were spirited out of Hong Kong into mainland China and forced to 'confess' alleged crimes. . . . Beijing announced the expulsion of U.S. journalists working from mainland China, and said it would prohibit them from reporting from Hong Kong as well. . . .On April 17, 2020, the Chinese government's Central Government Liaison Office (CGLO) in Hong Kong issued a statement claiming that CGLO and the central government's Hong Kong and Macau Affairs Office in Beijing are not bound by a provision of the Basic Law which states that 'no department of the Central People's Government . . . may interfere in the affairs' of Hong Kong. . . . On May 22, 2020, the PRC announced a proposal at the National People's Congress (NPC) to unilaterally and arbitrarily impose national security legislation on Hong Kong, a procedural step which contradicts the spirit and practice of the Sino-British Joint Declaration and the One Country, Two Systems framework.")

210. U.S. concerns regarding democracy, human rights, and freedom, are not unique to Hong Kong, China; nor is action related to those concerns. As publicly reported by the Congressional Research Service:

> "[U.S.] Presidents have increasingly declared national emergencies, in part, to respond to human and civil rights abuses, slavery, denial of religious freedom, political repression, public corruption, and the undermining of democratic processes. While the first reference to human rights violations as a rationale for a declaration of national emergency came in 1985, most of such references have come in the past twenty years."[158]

211. Hong Kong, China, clearly does not agree with the U.S. actions, and might not consider democratic principles or human rights to be relevant to its own security interests. That is why Article XXI(b) provides that it is the essential security interests of the Member at issue – here, the United States – that are relevant. Nothing in the text of Article XXI(b) calls for a panel to second guess the U.S. consideration of those interests. And the credibility of the multilateral trading system would not be well served if it were to become the arbiter of essential security issues and a Member's appreciation of them, including the issues at stake in this dispute.

b. **Please comment on the view that the obligation of good faith is "crystallized" in the application of Article XXI(b)(iii) in demanding that the measures at issue meet a "minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests" (Panel Report, *Russia – Traffic in Transit*, paragraph 7.138).**

212. As already noted, the *Russia – Traffic in Transit* report erred in reading a "good faith" obligation into the text of Article XXI(b). In turn, the panel erred in finding that this requires a Member invoking Article XXI(b) to demonstrate a "minimum requirement of plausibility".

213. The relationship between the measures at issue and the interests at issue is in the chapeau of Article XXI(b): that it be an action "which [the Member] considers necessary for the protection of its essential security interests". The phrase "necessary for the protection of its essential security interests" is preceded and qualified by the phrase "which it considers". The

[158] *See* Congressional Research Service, "The International Emergency Economic Powers Act: Origins, Evolution, and Use" (July 14, 2020) (US-234) at pp. 21-22 (citing Executive Order 12532, Prohibiting Trade and Certain Other Transactions Involving South Africa (September 9, 1985); Executive Order 13396, Blocking Property of Certain Persons Contributing to the Conflict in Cote d'Ivoire (February 7, 2006); Executive Order 13067, Blocking Sudanese Government Property and Prohibiting Transactions With Sudan (November 3, 1997); Executive Order 13692, Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela (March 8, 2015); Executive Order 13405, Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus (Jun. 16, 2006)).

panel's "minimum plausibility" standard ignores the plain meaning of the text, in particular "which it considers".

214. As noted, the panel appears to have read into the text of Article XXI(b) requirements similar to those found in Article XX. But as the United States has explained, the text and structure of Article XX is different than that of Article XXI.[159]

215. Although Article XXI(b) does not require the United States to make a showing as to the "plausibility" of the measures at issue with respect to the protection of its essential security interests, the United States recalls that Hong Kong, China, asserted at the second videoconference with the panel that any relationship between marking and essential security interests is "inconceivable". Again, the United States has identified language on the face of the measures and additional evidence that demonstrate the basis for the measures at issue. The United States has further raised the question of what purpose a mark of origin that is contrary to a Member's determination regarding the autonomy or territory of a country would serve.[160] The inability of Hong Kong, China, to conceive of a relationship between the marking requirement at issue and U.S. essential security interests appears to be due to its view that the use of the "China" mark is "mislabeling".[161] The U.S. determination with respect to lack of autonomy of Hong Kong, China, clearly establishes why Hong Kong, China, is not entitled to differential treatment for purposes of marking, such that the term "China" is not "mislabeling".[162]

Question 120.

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

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[159] U.S. First Written Submission, paras. 54-57; U.S. Responses to First Set of Panel Questions, paras. 112-113; U.S. Second Written Submission, para. 29.

[160] U.S. Responses to First Set Panel Questions, para. 41; U.S. Response to Question 18; U.S. Second Written Submission, paras. 195-199. *See also* Exhibit HKG-17 ("The reference to Hong Kong under the current policy [pursuant to the Executive Order] may mislead or deceive the ultimate purchaser as to the actual country of origin of the article and, therefore, is not acceptable for purposes of 19 U.S.C. § 1304").

[161] Opening Statement of Hong Kong, China, at the Second Videoconference, para. 8; Closing Statement, para. 16.

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

216. The observations in the *Russia – Traffic in Transit* report cited in the Panel's question are not based in the customary rules of treaty interpretation. That is, Article XXI(b) does not establish an obligation on the invoking Member to "articulate the essential security interests . . . sufficiently enough to demonstrate their veracity", nor require an invoking Member to make some greater showing in particular circumstances.[163] What is required of the party 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. Thus, a Member invoking Article XXI(b)(iii) would consider the measures "necessary for the protection of its essential security interests" and consider the measures "taken in time of war or other emergency in international relations."

217. The observations cited in the Panel's question illustrate why Members chose to reserve judgment regarding an action to protect a Member's essential security interests, and the circumstances in which the action is taken, to the Member taking the action. As the United States has explained, Article XXI(b) is fundamentally about an action that a Member considers necessary to protect its essential security interests. Taking such actions is a basic function of government. The observations cited by the Panel suggest that a panel should not only second-guess a Member's essential security actions, but also find that some Member's actions are subject to additional scrutiny – that is, that a particular essential security measure might be inherently less credible than others. This is not an appropriate exercise for the multilateral trading system.

218. That said, to be responsive to the Panel's question, with respect to the facts of this case, the United States observes that it has provided significant evidence that supports the U.S. invocation of Article XXI(b), including evidence regarding the U.S. essential security interests at stake and the circumstances that gave rise to the measures at issue, and indicated those circumstances could most naturally be understood to fit within subparagraph (iii).[164] For example, from the beginning of the proceedings the United States has explained that Executive Order 13936, which suspended differential treatment vis-à-vis the People's Republic of China for purposes of the marking statute, reflects the 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, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States."[165] The United States has also submitted as an exhibit the U.S. Department of State 2020 Hong Kong Policy Act Report, which explains how "[t]he erosion of liberties [in Hong Kong, China,] has happened gradually over a period of years," and details the People's

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[163] *See, e.g.*, U.S. First Written Submission, paras. 51, 238; U.S. Opening Statement at First Videoconference, paras. 73-74; U.S. Responses to First Set of Questions, para. 8; U.S. Second Written Submission, paras. 29-31, 58-61.

[164] U.S. Responses to First Set of Panel Questions, para. 268; U.S. Second Written Submission, para. 61.

[165] U.S. First Written Submission, paras. 7, 19-21; Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2); *see also* U.S. Opening Statement at the First Videoconference, para. 22.

Republic of China's decision "to unilaterally and arbitrarily impose national security legislation on Hong Kong, a procedural step which contradicts the spirit and practice of the Sino-British Joint Declaration and the One Country, Two Systems framework", as well as the reaction to protests of those actions – in particular, that "the Hong Kong government deployed tear gas and made mass arrests, including of peaceful demonstrators, while Beijing reportedly dispatched its People's Armed Police into Hong Kong, contrary to its promises under the Basic Law and the Sino-British Joint Declaration."[166] The United States also submitted multiple additional exhibits, including public reporting, on the circumstances in Hong Kong, China.[167]

219. Also from the beginning of this dispute, the United States has explained that the measures at issue indicate why the United States determined that the circumstances with respect to Hong Kong, China, implicate its "security" interests (not being exposed to danger), and that the interests at stake are "essential," that is, significant or important, in the absolute or highest sense.[168] For example, at the first videoconference with the Panel, the United States explained that the U.S.-Hong Policy Act of 1992 on its face recognizes that the "[s]upport for democratization is a fundamental principle of United States foreign policy," and that the "human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to the United States interests in Hong Kong."[169] As such, the special status under the Act – that U.S. laws were to be applied to Hong Kong in the same manner as they were applied prior to the city's handover, and this treatment may be different from that accorded to the PRC – is contingent on the premise that Hong Kong, China, "continue[s] to enjoy a high degree of autonomy" from the PRC government and continues to "retain its current lifestyle and legal, social, and economic systems until at least the year 2047."[170]

220. In *Russia – Traffic in Transit*, Russia invoked Article XXI(b)(iii) and the panel found there to be an emergency in international relations, noting that the situation was "recognized by the UN General Assembly as involving armed conflict."[171] Here, the United States has invoked Article XXI(b) after having taken action as an urgent response to an overseas crisis – which was (and is) a matter of public knowledge, as evidenced by the extensive publicly available evidence that the United States has submitted regarding the factual basis for the measures at issue and the

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[166] U.S. First Written Submission, paras. 8, 18; 2020 Hong Kong Policy Act Report (US-5).

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

[168] U.S. First Written Submission, paras. 16-17, 19-20; U.S. Opening Statement at the First Videoconference, paras. 19-22; United States-Hong Kong Policy Act of 1992 (US-3).

[169] U.S. First Written Submission, paras. 16-17, 19-20; U.S. Opening Statement at the First Videoconference, paras. 19-22; United States-Hong Kong Policy Act of 1992 (US-3).

[170] U.S. First Written Submission, paras. 16-17, 19-20; U.S. Opening Statement at the First Videoconference, paras. 19-22; United States-Hong Kong Policy Act of 1992 (US-3).

[171] *Russia – Traffic in Transit*, para. 7.122.

U.S. consideration that the actions it was taking were necessary for the protection of its essential security interests.

Question 121.

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

221. Article XXI(b) does not provide for a Member's appraisal of "its" essential security interests to be second-guessed by a dispute settlement panel. As the United States has explained in its First Written Submission, the phrase "its essential security interests" could encompass a broad range of security interests considered by the invoking Member to be "essential."[172] Importantly, it is "its" essential security interests – those of the acting Member – that the action is taken for the protection of. With this language, Article XXI(b) acknowledges that the essential security interests at issue are those as determined by the acting Member, and reflects that these interests might change over time and across Members.

222. As noted in the response to Questions 118 and 119, the *Russia – Traffic in Transit* report read a good faith obligation into Article XXI(b), and suggested that a Member's assessment of "its essential security interests" is subject to review by a panel for compliance with an obligation of good faith.[173] As the United States has explained, there is no basis in the customary rules of treaty interpretation or the DSU for reading such an obligation into Article XXI(b).[174]

223. In addition, negotiators addressed the possibility of abuse – for example, that a Member might seek to identify "any" interest as an essential security interest. The text of Article XXI(b) reflects the balance that they struck; Article XXI(b) is self-judging, thus preserving the role of the multilateral trading system as a forum for trade issues, not security issues. However, this does not mean there are no consequences for a Member's invocation of Article XXI(b). A Member who considers itself aggrieved by such an action has recourse to non-violation nullification and impairment claims in those circumstances.

Question 122.

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

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[172] U.S. First Written Submission, paras. 39-40; *see also* Response to Question 116.

[173] *Russia – Traffic in Transit*, para. 7.132.

[174] U.S. Second Written Submission, paras. 29-31; U.S. Opening Statement at the Second Videoconference, paras. 15-17; *see also* U.S. Response to Question 118.

224. Under Article 7.1 of the DSU, a panel is "[t]o examine" the matter referred to it by the DSB and to "make such findings *as will assist the DSB in making the recommendations* or in giving the rulings provided for" in the covered agreement. Article 11 of the DSU confirms this dual function of a panel: a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," and "such other findings *as will assist the DSB in making the recommendations* or in giving the rulings provided for in the covered agreements."

225. In a dispute in which a Member has invoked Article XXI(b), such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. That is, a panel is not prevented from interpreting the terms of that provision in accordance with those rules.[175] As the United States has explained, the ordinary meaning of the terms of Article XXI(b) confirm that it is self-judging.[176]

226. Under the Panel's terms of reference, and the objective assessment of Article XXI(b) contemplated by the DSU, the sole finding that the Panel may make is to recognize the Member's invocation of Article XXI(b). Because Article XXI(b) is self-judging in its entirety, no additional findings will assist the DSB in resolving this dispute. Thus, in this objective assessment, the Panel must limit its findings to an acknowledgement that the United States has invoked its rights under Article XXI(b).

Question 123.

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

227. Question 123 is for Hong Kong, China.

Question 124.

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

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[175] As the United States has explained, the ordinary meaning of "essential security interests" supports the interpretation that Article XXI(b) is self-judging. Importantly, it is "its" essential security interests – those of the acting Member – that the action is taken for the protection of. With this language, Article XXI(b) acknowledges that the essential security interests at issue are those as determined by the acting Member, and reflects that these interests might change over time and across Members.

[176] U.S. First Written Submission, paras. 39-40; Response to Question 116.

228. To be clear, the United States considers that the Panel should not examine the U.S. invocation of Article XXI(b)(iii) with respect to the measures at issue. The fact that, in light of the circumstances with respect to Hong Kong, China, in particular the erosion of its autonomy and democratic institutions and the rights and freedoms of its people, the United States took a number of actions as set forth in Executive Order 13936 demonstrates why negotiators agreed in the text of Article XXI(b), to reserve judgment as to what measures are necessary for a Member's essential security interests, and in what circumstances, to that Member alone.

229. Under the DSU, the terms of reference for a dispute must be determined based on the particular panel request at issue and the specific measures identified in that request. Article 6.2 of the DSU provides that a panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Article 7.1, in turn, provides the standard terms of reference for a panel: "[t]o examine, in the light of the relevant provisions in" the covered agreements, "the matter referred to the DSB" in the panel request "and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

230. A Member taking an essential security action may determine, based on its assessment of the issues and risks involved, to take a number of measures. Understanding the reason for the collective acts or interaction between them may require analysis of security and geopolitical issues that are not appropriate subjects for a forum for technical trade issues. Again, that is the point: under Article XXI(b), it is not appropriate for a panel to make the judgment as to which parts of an essential security action are permissible and which are not. Doing so would undermine a Member's right to take action to protect its essential security interests.

231. However, were the Panel nonetheless to examine the U.S. invocation of Article XXI(b), the United States notes that Hong Kong, China, has characterized the measure that it is challenging as the "revised origin marking requirement", that is, "Section 304 of the Tariff Act of 1930, Part 134 of the USCBP's regulations, the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice".[177] As Hong Kong, China, acknowledges, Executive Order 13936 includes the determination that Hong Kong, China, lacks sufficient autonomy from the People's Republic of China for purposes of multiple laws,

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[177] Hong Kong, China, First Written Submission, para. 20; *see also* paras. 36-37, 53 ("the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice also form part of the United States' origin marking requirement as they apply to goods imported from the customs territory of Hong Kong, China"). The panel request by Hong Kong, China listed "Section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304"; "The USCBP regulations implementing Section 304, set forth at 19 C.F.R. Part 134"; "Title II of the United States-Hong Kong Policy Act of 199", 22 U.S.C. §§ 5721-5724"; "The 'Executive Order on Hong Kong Normalization' signed by the President of the United States Donald J. Trump on 14 July 2020"; "The USCBP, Country of Origin Marking of Products of Hong Kong", 85 Fed. Reg. 48551 (11 August 2020)". Request for Establishment of a Panel, WT/DS597/5 (14 Jan. 2021).

including the marking statute.[178] The United States further notes that "sufficient autonomy" is the condition that Hong Kong, China, has identified as being a condition unrelated to manufacturing or processing for purposes of Article 2(c) of the Agreement on Rules of Origin, as well as the condition that is discriminatorily applied for purposes of Article 2(d) of the Agreement on Rules of Origin, Articles I and IX:1 of the GATT 1994, and Article 2.1 of the TBT Agreement.

232. Were the Panel to consider the merits of U.S. invocation of Article XXI(b), the actions set forth in the Executive Order beyond suspension of differential treatment of the marking requirement provide context for that evaluation. As noted, the suspension of differential treatment applies for multiple purposes, and the determination with respect to lack of sufficient autonomy resulted in multiple actions. Although Hong Kong, China, takes issue with that determination only with respect to the marking requirement,[179] it is not the place of Hong Kong, China, or a dispute settlement panel, to decide that there is some "lesser" package of measures that the United States could have taken to protect its essential security interests. To the extent that the package of measures reflects a concern with lack of autonomy and a determination of a threat to the national security, foreign policy, and economy of the United States, there is no basis to suggest that that concern is somehow less valid with respect to marking.

Question 125.

To the United States: The Panel's understanding is that outside this package of measures, relations between the parties continue as before, including in respect of trade. Is this understanding correct? If so, what relevance, if any, do you consider should the Panel give to this fact when examining the United States' invocation of Article XXI(b)~~(iii)~~ with respect to the revised origin marking requirement?

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[178] First Written Submission of Hong Kong, China, para. 18.

[179] The United States is aware that in its closing statement at the second videoconference, Hong Kong, China, asserted that it is not challenging the determination with respect to autonomy. The United States finds this assertion inconsistent with Hong Kong, China's position throughout this dispute. What Hong Kong, China, calls the "sufficient autonomy" condition has, to date, been the crux of its claims. *See, e.g.*, First Written Submission of Hong Kong, China, para. 21 (with respect to the *Agreement on Rules of* Origin, "That country of origin determination is based on a criterion – 'sufficient autonomy', as determined by the United States – that is unrelated to considerations of manufacturing or processing and that the United States does not apply to determine the origin of imports from other Members"); *see also* paras. 39, 44, 58, 84; Responses of Hong Kong, China, to the First Set of Panel Questions, para. 46 ("For purposes of Article 2.1, what matters is that the United States applies a requirement for goods imported from the customs territory of Hong Kong, China (i.e. the 'sufficient autonomy' requirement) that it does not apply to goods originating in other Members (and non-Members)"); paras. 29, 45; Hong Kong, China, Second Written Submission, paras. 69, 76, 91-92, 104, n. 62, 122. As noted, the recharacterization of its Article 2.1 claims by Hong Kong, China, appears simply to be a restatement of its arguments regarding the U.S. consideration of autonomy, and Hong Kong, China, has not offered any new argument for its other claims. To the extent that Hong Kong, China, no longer wishes to challenge the determination with respect to autonomy, it is free to abandon its claims.

233. The Panel's question appears to give rise to the very risk the United States has warned about in the context of this and other disputes implicating Members' essential security interests. The question suggests that the Panel might review for itself whether the action taken by the United States was "necessary" or "taken in time of war or other emergency in international relations" by reviewing the action in the context of the larger U.S.-Hong Kong relationship. This is not an appropriate exercise for the Panel to engage in, and as the United States has explained, is not supported by the text of Article XXI.

Question 126.

To the United States: Please elaborate on the relationship between the suspension of section 1304 of title 19 of the United States Code and the suspension of other regulations and the adoption of other measures mandated in Presidential Executive Order 13936 and other legal acts with respect to Hong Kong, China.

234. The suspension of section 1304 and the suspension of other regulations and the adoption of other measures pursuant to Executive Order 13936 are grounded in the determination that, in light of a series of actions by the People's Republic of China that have increasingly denied autonomy and freedoms that China promised to the people of Hong Kong, China, under the Joint Declaration, Hong Kong, China, is no longer sufficiently autonomous to justify differential treatment vis-à-vis the People's Republic of China for purposes of U.S. law, and that the situation with respect to Hong Kong constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States.[180]

[180] Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).