

***UNITED STATES – ORIGIN MARKING REQUIREMENTS  
(DS597)***

**FIRST WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**July 2, 2021**

## TABLE OF CONTENTS

Table of Reports.....	v
Table of Exhibits.....	vii
I. Introduction.....	1
II. Background.....	5
III. Argument .....	9
A. Article XXI(b) of the GATT 1994 is self-judging.....	9
1. VCLT Article 31 Application: The text of the GATT 1994 Article XXI(b) in its context, and in the light of the Agreement’s object and purpose, establishes that the exception is self-judging.....	11
a. The plain meaning of the text of Article XXI(b) of the GATT 1994 establishes that the exception is self-judging. ....	11
b. The object and purpose of GATT 1994 supports that that Article XXI(b) is self-judging.....	20
c. A subsequent agreement regarding the application of the treaty confirms that Article XXI(b) is self-judging. ....	21
2. VCLT Article 32 Application: Supplementary means of interpretation, including negotiating history, confirm that Article XXI(b) is self-judging.....	24
a. The negotiating history of GATT Article XXI(b) confirms that the provision is self-judging.....	25
b. Internal documents of the U.S. delegation also confirm that Article XXI(b) is self-judging.....	45
3. VCLT Article 33 Application: Reconciliation of the English, Spanish and French versions of Article XXI(b) does not alter the self-judging nature of the provision.....	56
a. Idiosyncrasies in the Spanish text do not warrant interpreting the English text of Article XXI(b) in a manner inconsistent with the ordinary meaning of the text.....	57
b. Reconciling the English, Spanish and French versions of Article XXI(b) leads to an interpretation that is fundamentally the same as that presented by the United States. ....	61
4. WTO Members have repeatedly expressed the view that Article XXI(b) is self-judging. ....	64

a.	GATT Contracting Parties accepted Ghana’s invocation of Article XXI during the accession of Portugal.....	65
b.	GATT Contracting Parties accepted Egypt’s invocation of Article XXI during its accession.....	65
c.	The GATT Contracting Parties accepted the invocation of Article XXI by the EC, Canada, and Australia in their imposition of their trade restrictions affecting Argentina.....	66
d.	Views expressed during the United States – Trade Measures Affecting Nicaragua GATT dispute indicate that Article XXI is self-judging, the GATT is not a forum for political disputes, and non-violation nullification or impairment claims are the appropriate recourse for countries affected by measures taken under Article XXI. ....	69
e.	Post-Uruguay Round invocations of Article XXI also indicate that the provision is self-judging.....	71
B.	The <i>Russia – Traffic In Transit</i> panel erred in deciding it had authority to review a responding party’s invocation of Article XXI. ....	72
1.	That panel erred in erred in ignoring the ordinary meaning of the terms of Article XXI, and basing its conclusion instead on the “Logical Structure” of the provision. ....	73
2.	The Panel’s “Similar Logical Query” into whether the provision “is designed to be conducted objectively” similarly ignores the ordinary meaning of Article XXI. ....	75
3.	That Panel erred in finding that interpreting Article XXI to be self-judging would be inconsistent with the object and purpose of the WTO Agreement.....	80
4.	That Panel erred in its interpretation of the negotiating history of Article XXI(b).....	81
5.	That Panel’s flawed conclusions appear results-driven.....	85
C.	The Exception under Article XXI of the GATT 1994 Applies to the Claims under the <i>Agreement on Rules of Origin</i> .....	87
1.	The structure of the WTO Agreement shows that the essential security exception applies to the Multilateral Agreements on Trade in Goods, including the <i>Agreement on Rules of Origin</i> .....	87
2.	The <i>Agreement on Rules of Origin</i> provides disciplines tied to the implementation of the GATT 1994, thus indicating the applicability of the GATT 1994’s essential security exception. ....	91

---

a.	The Agreement on Rules of Origin includes multiple textual links to the GATT 1994. ....	92
b.	The Agreement on Rules of Origin provides members with discretion, including to take actions to protect their essential security interests. ....	94
3.	Supplementary means of interpretation confirm that Article XXI applies. ....	95
4.	The claims in this dispute confirm the link between the GATT 1994 and the <i>Agreement on Rules of Origin</i> , and the availability of Article XXI(b). ....	96
D.	The Exception under Article XXI of the GATT 1994 Applies to the Claims under the TBT Agreement .....	98
1.	The structure of the WTO Agreement and textual references within the TBT Agreement confirm that essential security measures are not reviewable under the TBT Agreement, and this understanding is further confirmed by negotiating history. ....	98
2.	Multiple provisions of the TBT Agreement link the Agreement to the GATT 1994 and essential security considerations. ....	98
3.	The negotiating history of the TBT Agreement supports the understanding that essential security measures are not reviewable under the TBT Agreement. ....	101
4.	The claims in this dispute confirm the link between the GATT 1994 and the TBT Agreement, and the availability of Article XXI(b). ....	104
E.	In light of the self-judging nature of Article XXI of the GATT 1994, the sole finding that the Panel may make consistent with its terms of reference under Article 7.1 of the DSU is to note the invocation of Article XXI .....	105
F.	The Panel should begin its analysis by addressing the invocation by the United States of Article XXI .....	107
IV.	Conclusion .....	107

## TABLE OF REPORTS

SHORT TITLE	FULL CITATION
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)</i>	Appellate Body Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
<i>Chile – Price Band System (Panel)</i>	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
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/AB/R, adopted 23 October 2002
<i>China – Rare Earths (AB)</i>	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
<i>China – Raw Materials (AB)</i>	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
<i>EC – Bananas III (Ecuador) (Article 22.6 – EC)</i>	Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000
<i>EC – Chicken Cuts (AB)</i>	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
<i>EC – Computer Equipment (AB)</i>	Appellate Body Report, European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
<i>EC – IT Products</i>	Panel Reports, European Communities and its member States – Tariff Treatment of Certain Information Technology Products, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
<i>EC – Seal Products (AB)</i>	Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014

SHORT TITLE	FULL CITATION
<i>Korea – Beef (Panel)</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , WT/DS512/R and Add.1, adopted 26 April 2019
<i>Saudi Arabia – Protection of IPR (Panel)</i>	Panel Report, <i>Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights</i> , WT/DS567/R
<i>US – Clove Cigarettes (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
<i>US – Textiles Rules of Origin (Panel)</i>	Panel Report, <i>United States – Rules of Origin for Textiles and Apparel Products</i> , WT/DS243/R and Corr.1, adopted 23 July 2003
<i>US – Tuna II (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012
<i>US – Tuna II (Mexico) (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW, adopted 3 December 2015

## TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
US-1	Dispute Settlement Body – Minutes of meeting held in Centre William Rappard on 11 February 2021, para. 5.3 (WT/DSB/M/449)
US-2	Executive Order 13936 on Hong Kong Normalization of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020)
US-3	United States-Hong Kong Policy Act of 1992, Pub. L. 102-383, <i>codified at</i> 22 U.S.C. § 5701-5732
US-4	Hong Kong Human Rights and Democracy Act of 2019, Pub. L. 116-76
US-5	2020 Hong Kong Policy Act Report (May 28, 2020)
US-6	2021 Hong Kong Policy Act Report (March 31, 2021)
US-6A	<i>Hong Kong’s pro-democracy Apple Daily signs off in “painful farewell”</i> , Reuters (June 24, 2021) available at <a href="https://www.reuters.com/world/asia-pacific/hong-kongs-pro-democracy-apple-daily-signs-off-painful-farewell-2021-06-23/">https://www.reuters.com/world/asia-pacific/hong-kongs-pro-democracy-apple-daily-signs-off-painful-farewell-2021-06-23/</a>
US-6B	U.S. Department of State, Department Press Briefing – June 17, 2021 available at <a href="https://www.state.gov/briefings/department-press-briefing-june-17-2021/">https://www.state.gov/briefings/department-press-briefing-june-17-2021/</a>
US-7	Department of Homeland Security, U.S. Customs and Border Protection [CBP Dec. 20-15], Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48551 (August 11, 2020)
US-8	Revisions to the Export Administration Regulations: Suspension of License Exceptions for Hong Kong, 85 Fed. Reg. 45998 (July 31, 2020)
US-9	Hong Kong Autonomy Act, Pub. L. 116-149
US-10	Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304
US-11	<i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-12	<i>Draft Articles on the Law of Treaties with Commentaries (1966)</i> , Yearbook of the International Law Commission, 1966, vol. II

EXHIBIT	DESCRIPTION
US-13	GATT Contracting Parties Third Session, Agenda (Revised 8 <sup>th</sup> April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949)
US-14	Statement by the Head of the Czechoslovak Delegation, Mr. Zdeněk Augenthaler to Item 14 of the Agenda, GATT/CP.3/33 (May 30, 1949)
US-15	Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949)
US-16	Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & GATT/CP.3/SR.22/Corr.1 (June 20, 1949)
US-17	GATT, Decision of 8 June 1949, BISD vol. II at 28
US-18	General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedures GATT/CP.2/3 Rev.1 (Aug. 18, 1948)
US-19	General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949)
US-20	Ian Sinclair, <i>The Vienna Convention on the Law of Treaties</i> , Manchester University Press, 2nd edn (1984) (excerpt)
US-21	Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter
US-22	Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946)
US-23	Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947)
US-24	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23 (May 6, 1947)
US-25	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/236 (July 4, 1947)
US-26	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947)



EXHIBIT	DESCRIPTION
US-27	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947)
US-28	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947)
US-29	United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947)
US-30	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947); & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947)
US-31	Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33 (July 24, 1947)
US-32	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947)
US-33	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/12 (June 12, 1947)
US-34	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 35th meeting of Commission A, held on Monday 11 August 1947, E/PC/T/A/SR/35 (Aug. 12, 1947)
US-35	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Chapter V, Articles 34, 35 and 38, Report by the Sub-Committee for submission to Commission A on Monday, 4th August, 1947, E/PC/T/146 (July 31, 1947)
US-36	Summary Record of the Twelfth Meeting, E/PC/T/A/SR/12 (June 12, 1947),
US-37	Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947)

EXHIBIT	DESCRIPTION
US-38	Verbatim Report, Second Session of the Preparatory Committee of the United Nations Conference on Trade & Development, Twenty-Second Meeting In Executive Session, E/PC/T/EC/PV.2/2 (Aug. 22, 1947)
US-39	United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan 9, 1948)
US-40	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), January 13, 1948, E/CONF.2/C.6/W.41 (Jan. 13, 1948)
US-41	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948)
US-42	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948)
US-43	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947)
US-44	Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988)
US-45	Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988)
US-46	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988)
US-47	Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990)
US-48	Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990)
US-49	Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989)
US-50	Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990)
US-51	Communication from Japan, MTN.GNS/W/107 (July 10, 1990)

EXHIBIT	DESCRIPTION
US-52	Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982)
US-53	Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990)
US-54	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) (excerpts)
US-55	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991) (excerpts)
US-56	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman’s Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990)
US-57	Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987)
US-58	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987)
US-59	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr 29, 1988)
US-60	Negotiating Group on Dispute Settlement, Meeting of 25 June, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987)
US-61	Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988)
US-62	Tokyo Round Code on Government Procurement (1979) (excerpt)
US-63	Agreement on Government Procurement, Revised Text (1988) (excerpt)
US-64	Agreement on Government Procurement, Article XXIII (1994) (excerpt)
US-65	Agreement on Government Procurement (2012) (excerpt)
US-66	Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America (excerpt)

EXHIBIT	DESCRIPTION
US-67	Treaty of Rome (excerpt)
US-68	Agreement on the European Economic Area (excerpt)
US-69	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947
US-70	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 Memo
US-71	<i>Young Loan Arbitration</i> , (UK, US, France, Belgium and Switzerland v. Federal Republic of Germany), Arbitral Award of 16 May 1980, ILR 59 (1980)
US-72	Permanent Court of Arbitration, <i>Iron Rhine (‘Ijzeren Rhin’) Railway Arbitration (Belgium v. Netherlands)</i> , 27 RIAA 35, (2005)
US-73	U.S. Delegation (Internal), Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946)
US-74	U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946)
US-75	U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946
US-76	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 4, 1947, at 2

EXHIBIT	DESCRIPTION
US-77	WTO Analytical Index: Language incorporating the GATT 1947 and other instruments into GATT 1994, <a href="https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_incorp_o th.pdf">https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_incorp_o th.pdf</a>
US-78	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. I (revised) (1955) (excerpt)
US-79	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. III (1958) (excerpt)
US-80	Decision of the Trade Negotiations Committee (TNC) on “Corrections to be Introduced in the General Agreement on Tariffs and Trade” MTN.TNC/41 (Mar 30, 1994)
US-81	<i>The Oxford Spanish Dictionary</i> , 2 <sup>st</sup> edn (revised), (Oxford University Press, 2001) (excerpt)
US-82	<i>The Oxford French Dictionary</i> , 4 <sup>th</sup> edn, (Oxford University Press, 2007)
US-83	<i>The Oxford Spanish Dictionary</i> , 1 <sup>st</sup> edn, (Oxford University Press, 1994)
US-84	Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961)
US-85	Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970)
US-86	GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982)
US-87	Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982)
US-88	GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982)
US-89	Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985)
US-90	Minutes of Meeting of March 12, 1986, C/M/196 & C/M/196/Corr.1(April 2, 1986)
US-91	Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986), at 2 (excerpt)

EXHIBIT	DESCRIPTION
US-92	GATT Panel Report, <i>United States – Trade Measures Affecting Nicaragua</i>
US-93	Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986)
US-94	Trade Policy Review Body, Trade Policy Review of Switzerland, Minutes of Meeting, May 28-29, 1996, WT/TPR/M/13 (July 3, 1996)
US-95	Dispute Settlement Body, Minutes of Meeting of April 7, 2000, WT/DSB/M/78 (May 12, 2000)
US-96	Dispute Settlement Body, Minutes of Meeting of May 18, 2000, WT/DSB/M/80 (June 26, 2000)
US-97	Tom Miles, <i>Adjudicator says any security defense of U.S. auto tariffs at WTO ‘very difficult’</i> , Reuters Business News (May 27, 2019), available at <a href="https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX1I7">https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX1I7</a>
US-98	<i>The New Shorter Oxford English Dictionary</i> , 4th edn., L. Brown (ed.) (Clarendon Press, 1993) at 451
US-99	<i>Dictionary of Trade Policy Terms</i> , 5th edn., W. Goode (ed.) (Cambridge University Press, 2007)
US-100	Report (2020) of the Committee on Rules of Origin to the Council on Trade in Goods, G/L/1378 (23 Nov. 2020)
US-101	Rules of Origin: Background Note by the Secretariat, MTN.GNG/NG2/W/12 (21 June 1998)
US-102	Points Made in Relation to Rules of Origin, Synopsis by the Secretariat, Revision, MTN.GNG/NG2/W/54/Rev. 1 (13 Mar. 1990)
US-103	INTENTIONALLY OMITTED
US-104	INTENTIONALLY OMITTED
US-105	THE TOKYO ROUND Statement by GATT Director-General, and Publication of Agreements, April 12, 1979, GATT/1234
US-106	Tokyo Round Agreement on Technical Barriers to Trade (LT/TR/A/5)
US-107	GATT BODIES AND OTHER ENTITIES available at <a href="https://docs.wto.org/gtd/GattTree.aspx?pagename=GATTBodiesTree&amp;language=e&amp;dadid=418">https://docs.wto.org/gtd/GattTree.aspx?pagename=GATTBodiesTree&amp;language=e&amp;dadid=418</a>

EXHIBIT	DESCRIPTION
US-108	Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade: Contents of Revised Draft Prepared for Consideration by the Drafting Group on 11 January, 1972 (Spec(71)143))
US-109	Report on Working Group 3 on Non-Tariff Barriers: Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade), COM.IND/W/41 (26 November 1970)
US-110	Multilateral Trade Negotiations, Group "Non-Tariff Measures", Sub-Group "Technical Barriers to Trade", Special Distribution, MTN/NTM/w/92/Rev.3 (21 December 1978)
US-111	Multilateral Trade Negotiations, Group "Non-Tariff Measures", Sub-Group "Technical Barriers to Trade", Special Distribution, MTN/NTM/w/92/Rev.4 (21 March 1979)

## I. INTRODUCTION

1. This dispute concerns the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. WTO Members did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”),<sup>1</sup> and WTO Members have not agreed to subject the exercise of this right to legal review.

2. As the United States has explained in meetings of the Dispute Settlement Body,<sup>2</sup> and will explain further below, the measures identified by Hong Kong, China, reflect a determination that the situation with respect to Hong Kong, China, constitutes a threat to the essential security of the United States. Hong Kong, China, is challenging the Executive Order on Hong Kong Normalization (Executive Order 13936) and associated instruments. In the Executive Order, the President of the United States explicitly determined that Hong Kong, China “is no longer sufficiently autonomous to justify differential treatment in relation to the People’s Republic of China [PRC]” and 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.”<sup>3</sup>

3. Notwithstanding this clear language, as well as previous U.S. communications that this dispute involves essential security interests under Article XXI of the GATT 1994,<sup>4</sup> Hong Kong, China, attempts to characterize the measures at issue in this dispute as simply “involv[ing] a determination by the United States that goods indisputably manufactured or processed within the customs territory of Hong Kong, China originate within the People’s Republic of China. . . .”<sup>5</sup> But the record shows otherwise. Hong Kong, China, cannot overcome the central issue in this dispute—namely, that the measures at issue are covered by the essential security exception under Article XXI—simply by trying to avoid the issue.

---

<sup>1</sup> *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

<sup>2</sup> Dispute Settlement Body – Minutes of meeting held in Centre William Rappard on 11 February 2021, para. 5.3 (WT/DSB/M/449) (US-1).

<sup>3</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

<sup>4</sup> *United States – Origin Marking Requirement*, Communication from the United States, November 9, 2021 (WT/DS597/2) (“Without prejudice to whether the consultations request raises issues of national security not susceptible to review or capable of resolution by WTO dispute settlement, the United States accepts the request of Hong Kong, China, to enter into consultations.”); Dispute Settlement Body – Minutes of meeting held in Centre William Rappard on 11 February 2021, para. 5.3 (WT/DSB/M/449) (“The WTO could not, consistent with Article XXI of the General Agreement on Tariffs and Trade 1994, consider those claims or make the requested findings. No WTO Member could be surprised by this view. For decades, the United States had consistently held the position that actions taken pursuant to Article XXI are not subject to review in GATT or WTO dispute settlement.”) (US-1); U.S. Response to Hong Kong, China, Comments on the Draft Timetable on May 17, 2021, para. 10.

<sup>5</sup> First Written Submission by Hong Kong, China, (“HKC First Written Submission”), para. 2.



4. Hong Kong, China does acknowledge that the dispute involves “political considerations.”<sup>6</sup> But Hong Kong, China is wrong in asserting that such considerations can have no relevance to the application of the WTO Agreement. Rather, where those political considerations involve a Member’s essential security, the considerations are the most important aspect of the dispute. What Hong Kong, China, dismisses as mere “political considerations” are actions that the United States, in the directly applicable language of Article XXI of the GATT 1994, “considers necessary for the protection of its essential security interests.” Questions of essential security are inherently political, and can only be answered by the Member in question. A WTO dispute settlement panel cannot substitute its views for those of a Member on such matters. Yet that is exactly what Hong Kong, China, urges this Panel to do, inviting serious damage to the WTO and international trading system by involving a trade organization in fundamental matters of essential security.

5. Indeed, the claims by Hong Kong, China, all solely concern the political determination by the United States as to the autonomy of Hong Kong, China, and its essential security effect on the United States. That is, all the claimed breaches of the various cited provisions of the GATT 1994, the *Agreement on Rules of Origin*, and the *Agreement on Technical Barriers to Trade* (the “TBT Agreement”) stem from the determination that Hong Kong, China, is “no longer sufficiently autonomous” from the People’s Republic of China for multiple purposes under U.S. law.

6. It appears that Hong Kong, China, is dissatisfied with the fact that, as a result of the U.S. determination based on essential security grounds with respect to the autonomy of Hong Kong, China, vis-à-vis the People’s Republic of China, its goods must now be marked as China. Hong Kong, China, acknowledges that this is a political matter. Nonetheless, it seeks to address the matter through WTO dispute settlement rather than through political channels.

7. In Section II of this submission, the United States will describe to the Panel the factual background for the measures in dispute. In the President’s Order on Hong Kong Normalization (Executive Order 13936), the President determined 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) . . . 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.”<sup>7</sup>

---

<sup>6</sup> HKC First Written Submission, para. 5.

<sup>7</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2). As discussed in more detail in Section II, the authority for Executive Order included the United States-Hong Kong Policy Act of 1992 (US-3) and the Hong Kong Human Rights and Democracy Act of 2019 (US-4).

8. The 2020 Hong Kong Policy Act Report by the State Department details how “[t]he erosion of liberties [in Hong Kong, China,] has happened gradually over a period of years.” Among other issues, the report notes:

- “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.”<sup>8</sup>

On March 31, 2021, the Secretary of State issued the 2021 Hong Kong Policy Act Report confirming that “[b]y unilaterally imposing on Hong Kong the Law of the PRC on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL), the PRC dramatically undermined rights and freedoms in Hong Kong.”<sup>9</sup>

9. It is indeed regrettable, and revealing, that Hong Kong, China, protests in the WTO the U.S. finding of a lack of autonomy while, in reality, the national security law passed by the People’s Republic of China and imposed on Hong Kong, China, is used to dramatically curtail the freedom of speech of Hong Kongers, including the freedom to criticize China. Just recently, in response to the police raid on the offices of the *Apple Daily* newspaper and the arrests of its executive and journalists, a spokesperson for the U.S. State Department explained that the United States is “deeply concerned by Hong Kong authorities’ selective use of the national security law to arbitrarily target independent media organizations. The charges of [] ‘collusion with a foreign country or with external elements to endanger national security’ appear to be entirely politically motivated . . . [and the United States is furthermore] concerned by increased efforts by authorities to wield the national security law as a tool to suppress independent media, to silence dissenting views, and to stifle freedom of expression.”<sup>10</sup>

---

<sup>8</sup> 2020 Hong Kong Policy Act Report (US-5).

<sup>9</sup> 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6).

<sup>10</sup> The State Department spokesperson further explained, “These actions undermine Beijing’s obligations, their own obligations under the Sino-British Joint Declaration, which is a binding international agreement, to uphold Hong

10. The Panel need not, and under the WTO Agreement may not, wade into these sensitive political issues.

11. In Section III.A, using customary rules of treaty interpretation, the United States will demonstrate that Article XXI(b) of the GATT 1994 is self-judging, as established by the ordinary meaning of its terms, in their context, and in the light of the object and purpose of the GATT. The United States then explains that this understanding is confirmed by the subsequent agreement of the GATT Contracting Parties regarding the interpretation or application of that provision. This understanding of Article XXI(b) is further confirmed by the negotiating history of the provision – including drafting revisions and explicit discussion of the appropriate claim when a Member is affected by a security action – as well as other supplementary means of interpretation. Reconciling the English, French, and Spanish texts of Article XXI(b) likewise leads to an interpretation that commits the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

12. In Section III.B of this submission, the United States addresses the analysis of Article XXI(b) in the recent *Russia – Traffic in Transit* panel report and explains why that panel’s findings are incorrect and unpersuasive. In brief, the panel in that dispute failed to apply customary rules of interpretation and failed to interpret Article XXI as a whole, based on the ordinary meaning of its terms, in context, and in the light of the object and purpose of the GATT 1994. In fact, the panel reached its conclusion regarding Article XXI(b)(iii) before its analysis of the provision even started, suggesting the interpretation was guided, not by the text of Article XXI as agreed to by WTO Members, but by the result sought by the panelists. The public comments by the Chair of that panel, opining on the possible application of Article XXI to other situations, also raises grave concerns that the *Russia – Traffic in Transit* panel’s interpretation was results-oriented.<sup>11</sup> In light of numerous other errors, that panel’s analysis is unpersuasive and should not be relied upon by this Panel in making its own objective assessment of the matter before it.

13. In Section III.C and D, the United States establishes that the Article XXI(b) exception applies to claims under the both the *Agreement on Rules of Origin* and the TBT Agreement based on the structure of the WTO Agreement as a whole, as well as the texts of those agreements, in their context and in light of the object and purpose of those agreements.<sup>12</sup>

---

Kong’s high degree of autonomy and protected rights and freedoms.” U.S. Department of State, Department Press Briefing – June 18, 2021 *available at* <https://www.state.gov/briefings/departments-press-briefing-june-17-2021/> (US-6A).

<sup>11</sup> See *infra* at text accompanying footnote 292.

<sup>12</sup> The United States notes that, although Hong Kong, China, has the burden of proof with respect to each of its claims and, having chosen to pursue this dispute, must establish a prima facie case of violation for each claim, Hong Kong, China, chose not to present any facts or arguments with respect to Article 2(e) of the *Agreement on Rules of Origin* or Article X of the GATT 1994 in its first written submission. Rather, in a footnote, Hong Kong, China, states, “Hong Kong, China reserves the right to develop those claims in subsequent submissions to the Panel, and to

14. In Section III.E, the United States explains that the function of a panel under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) to make an “objective assessment of the matter before it” does not render the Member’s determination under Article XXI(b) subject to testing by the Panel. Because the panel’s objective assessment of the text of Article XXI leads to the conclusion that the provision is self-judging and does not subject a Member’s invocation of Article XXI(b) to further review, the U.S. interpretation of Article XXI(b) as self-judging is consistent with the Panel’s terms of reference and the DSU. In this situation, the sole finding that the Panel can make is to note the U.S. invocation of Article XXI(b). Furthermore, the type of review proposed by Hong Kong, China, would necessarily require a panel to substitute its judgment for the judgment that Article XXI(b) reserved to the Member alone. The approach advanced by the United States is the only way to fulfil the Panel’s role under the DSU without substituting its judgment for that of the United States. Any finding leading to a recommendation would be inconsistent with DSU Articles 3.2 and 19.2 as it would “diminish the rights” of the United States under the covered agreements.

15. In Section III.F, the United States explains the appropriate order of analysis in light of the invocation of Article XXI(b) of the GATT 1994.

## II. BACKGROUND

16. The United States-Hong Kong Policy Act of 1992 (“US-HK Policy Act”) established the policy of the United States with respect to Hong Kong, China, as well as the status of Hong Kong, China, under U.S. law, in light of the July 1, 1997, resumption of sovereignty over Hong Kong, China, by the People’s Republic of China.<sup>13</sup> Section 201(a) of the US-HK 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, unless otherwise provided for by law or by an Executive order under section 202. Section 202 of the US-HK Policy Act provides that, on or after July 1, 1997, the President may issue an Executive order to suspend differential treatment whenever the President determines that Hong Kong, China, is “no longer sufficiently autonomous to justify

---

seek findings and recommendations in respect of those claims, depending on how the United States responds to the claims and arguments developed herein.” HKC First Written Submission, n.64.

The Panel’s Working Procedures provides, “Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.” The deadline for Hong Kong, China’s first written submission was May 28.

The United States does not consider that presenting facts or arguments to establish a *prima facie* case “depending on how the United States responds” to Hong Kong, China’s arguments with respect to other claims is consistent with the Panel’s Working Procedures, nor is it consistent with the respective burdens on a complainant and a respondent. The establishment of a case under one claim is not a rebuttal to arguments under another claim.

<sup>13</sup> United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-5732 (US-3). Section 2(6) of the US-HK Policy Act also provides, “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.” US-HK Policy Act (US-3).

treatment under a particular law of the United States, or any provision thereof, different from that accorded the People’s Republic of China.”

17. The US-Hong Kong Policy Act was amended by the Hong Kong Human Rights and Democracy Act of 2019 (“HK Human Rights Act”) on November 27, 2019.<sup>14</sup> The HK Human Rights Act reaffirms the principles and objectives set forth in the US-HK Policy Act, including that Hong Kong, China, must remain sufficiently autonomous to warrant treatment under U.S. law different than that accorded China. The HK 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,<sup>15</sup> 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.<sup>16</sup> The HK Human Rights Act also amended the US-HK Policy Act to require the Secretary of State to make an annual certification of whether Hong Kong, China, continues to warrant treatment in the same manner as prior to July 1, 1997, and include an assessment of “the degree of any erosions to Hong Kong’s autonomy” in a number of areas resulting from actions by the Government of the People’s Republic of China.<sup>17</sup>

18. On May 27, 2020, the Secretary of State issued its report under the U.S.-Hong Kong Policy Act, as amended by the Hong Kong Human Rights Act, for 2020.<sup>18</sup> The 2020 report documents the development of the People’s Republic of China’s unilateral and arbitrary imposition of *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (“PRC National Security Legislation”) onto Hong Kong, China. In the 2020 report, the Secretary of State explained that the People’s Republic of China had fundamentally undermined the autonomy of Hong Kong, China, and decertified Hong Kong, China, as warranting treatment under U.S. law in the same manner as U.S. laws were applied before July 1, 1997.<sup>19</sup> The report concluded with the following statement:

The people of Hong Kong turned out in the millions to protest these violations of their human rights and fundamental freedoms, not to mention China’s betrayal of

---

<sup>14</sup> Section 4 of the HK Human Rights Act (US-4).

<sup>15</sup> Section 3(2) of the HK Human Rights Act (US-4). Specifically, the Joint Declaration of the Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, done at Beijing December 19, 1984; the International Covenant on Civil and Political Rights, done at New York December 19, 1966; and the Universal Declaration of Human Rights done at Paris December 10, 1948. *Id.*

<sup>16</sup> *See* Section 3 of the HK Human Rights Act (US-4). As reflected in the statute, it is also the policy of the United States to “draw international attention to any violations by the Government of the People’s Republic of China of the fundamental rights of the people of Hong Kong, as provided by the International Covenant on Civil and Political Rights, and any encroachment upon the autonomy guaranteed to Hong Kong by the Basic Law and the Joint Declaration.” *Id.*

<sup>17</sup> Section 4(a) of the HK Human Rights Act (US-4).

<sup>18</sup> 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5).

<sup>19</sup> 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5).

its own promises to the territory. Instead of listening to their grievances and finding a democratic solution, 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.

Hong Kong flourished for decades as a bastion of liberty and example of what China could aspire to become. I hope that someday in the future, I will be able to recertify that the territory once again warrants differential treatment under U.S. law. Given present circumstances, the chance of that happening is remote. In the meantime, the United States stands with the people of Hong Kong as they struggle against the CCP’s increasing denial of the autonomy they were promised.<sup>20</sup>

19. On July 14, 2020, pursuant to laws including the US-HK Policy Act, the HK Human Rights Act (Public Law 116-76), the Hong Kong Autonomy Act of 2020 (Public Law 116-149), the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), and the National Emergencies Act (50 U.S.C. 1601 et seq.), the President of the United States issued the Executive Order on Hong Kong Normalization (Executive Order 13936).<sup>21</sup> In Executive Order 13936, citing the report by the Secretary of State as well as the PRC 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. 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

---

<sup>20</sup> 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5).

On March 31, 2021, the Secretary of State issued the 2021 Hong Kong Policy Act Report confirming the concerns identified in the prior year’s report. 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6). The report documented the erosion of the fundamental human rights and autonomy in Hong Kong, China. The report noted the arrest of 99 politicians, activists, and protestors, including one U.S. citizen, under the PRC national security legislation. Among those arrested, “55 people [were] arrested in January [of 2021] for organizing or running in pan-democratic primary elections in July 2020, 47 of whom were formally charged with subversion on February 28[, 2021].” *Id.* The report further noted that under supervision of People’s Republic of China officials, the Hong Kong Department of Justice and the Hong Kong Police Force carried out politically motivated reprisals against opposition politicians and activists that are critics of Beijing. *Id.* The responsive U.S. actions included sanctions on 35 officials from Hong Kong, China, and the People’s Republic of China in connection with the development adoption and implementation of the PRC national security legislation and other actions and policies that undermined the autonomy of and basic freedoms in Hong Kong, China. *Id.*

With respect to the concerns expressed in the 2020 and 2021 Hong Kong Policy Act Report, the governments of Hong Kong, China, and the PRC, using the PRC National Security Legislation as basis, have indeed taken concerning action to muzzle free press that is critical of Beijing, with the most recent action being freezing the assets of media publisher *Apple Daily*, leading to its forced closure. *Hong Kong’s pro-democracy Apple Daily signs off in “painful farewell”*, Reuters (June 24, 2021) available at <https://www.reuters.com/world/asia-pacific/hong-kongs-pro-democracy-apple-daily-signs-off-painful-farewell-2021-06-23/> (US-6B).

<sup>21</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

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.

20. 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.”<sup>22</sup> The President declared a national emergency with respect to that threat.

21. Accordingly, Executive Order 13936 suspended treatment under section 201 of the Hong Kong Policy Act with respect to provisions in the Immigration Act of 1990, the Immigration and National Act of 1952, the Arms Export Control Act, the Defense Production Act of 1950, the Export Control Reform Act of 2018, and section 1304 of title 19 of the United States Code (“19 U.S.C. § 1304”).<sup>23</sup> In addition to these actions, agencies were directed to take “all appropriate actions to further the purposes of” the Order. Those actions include amending certain regulations, suspending or terminating certain agreements, and “taking steps to end the provision of training to members of the Hong Kong Police Force or other Hong Kong security services at the Department of State’s International Law Enforcement Academies.”<sup>24</sup> The Executive Order further blocked asset transfers of certain persons, including persons determined to have been responsible, complicit, or engaged in the degradation of democracy, peace, security, stability, and autonomy of Hong Kong, China.<sup>25</sup>

22. On August 11, 2020, U.S. Customs and Border Protection (CBP) issued a clarification in the *Federal Register* indicating that in light of Executive Order 13936, for purposes of 19 U.S.C. § 1304, imported goods produced in Hong Kong, China, may no longer continue to be marked as

---

<sup>22</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

<sup>23</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2). The suspension of Preferential Treatment also applied to export license exceptions bringing in line license exceptions of Hong Kong, China, with that of the People’s Republic of China. *See* Revisions to the Export Administration Regulations: Suspension of License Exceptions for Hong Kong, 85 Fed. Reg. 45998 (July 31, 2020) (US-8).

<sup>24</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

<sup>25</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2). On the same day, the United States enacted the Hong Kong Autonomy Act, which imposes sanctions on individuals and financial institutions that are determined to be “materially contributing to, has materially contributed to, or attempts to materially contribute to the failure of the Government of China to meet its obligations under the Joint Declaration of the Basic Law.” Hong Kong Autonomy Act, Pub. L. 116-149, section 5 (US-9).

“Hong Kong,” as was the case prior to July 1, 1997. Unless exempted from marking, those goods must be marked to indicate “China”.<sup>26</sup>

23. The United States considers that the requirement to mark goods of Hong Kong, China, to indicate “China,” pursuant to Executive Order 13936, is an action necessary to protect U.S. essential security interest as consistent with Article XXI(b) of the GATT 1994.

### III. ARGUMENT

24. Article XXI(b) of the GATT 1994 is self-judging, as is clear from that provision’s text, in its context and in the light of the object and purpose of the agreement. A subsequent agreement in the application of the treaty, and supplementary means of interpretation also confirm the self-judging nature of GATT 1994 Article XXI(b).

25. Article XXI(b) of the GATT 1994 is also applicable to the *Agreement on Rules of Origin* and the TBT Agreement based on the structure of the WTO Agreement as a whole, and the texts of those agreements, in their context and in light of the object and purpose of those agreements. The negotiating history of those agreements also confirms this understanding.

26. In light of the self-judging nature of this provision and its application to all the claims at issue here, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests.

#### A. ARTICLE XXI(B) OF THE GATT 1994 IS SELF-JUDGING.

27. Under DSU Article 3.2, the provisions of the GATT 1994 are to be interpreted “in accordance with customary rules of interpretation of public international law.” Section 3 (Articles 31 to 33) of the *Vienna Convention on the Law of Treaties* (“Vienna Convention” or “VCLT”) reflects the rules for such interpretation. As discussed below in this section, an interpretation of Article XXI(b) of the GATT 1994 applying the rules in VCLT Articles 31 through 33 establishes that Article XXI(b) is self-judging.

28. In Section III.A.1., the United States explains that an interpretation of Article XXI(b) in accordance with its ordinary meaning in its context, and in the light of the treaty’s object and purpose, as provided for in Article 31 of the VCLT, establishes that the provision is self-judging. In Section III.A.2., the United States explains that supplementary means of interpretation, as described in Article 32 of the VCLT, confirm that Article XXI(b) is self-judging. In Section III.A.3., the United States explains that reconciling the three authentic language versions of Article XXI, as provided for in Article 33 of the VCLT, in light of certain idiosyncrasies that are contained in the Spanish version, likewise leads to the same fundamental meaning, that is, that Article XXI(b) is self-judging. Finally, in Section III.A.4., the United States demonstrates that

---

<sup>26</sup> Department of Homeland Security, U.S. Customs and Border Protection [CBP Dec. 20-15], Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48551 (August 11, 2020) (US-7). ). 19 U.S.C. 1304 is provided as Exhibit US-10.



the U.S. interpretation of Article XXI(b) has been repeatedly expressed in the past by other WTO Members.

29. Section III.A.1. demonstrates that the self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, in the light of the objective and purpose of the GATT 1994, and is further confirmed by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. In particular, Article XXI(b) refers to “any action which it [a Member] considers necessary for the protection of its essential security interests,” reflecting the desire of WTO Members to reserve an assessment of the necessity of an invocation of security interests to the Member taking the action. Each WTO Member likewise must determine whether a situation implicates “its security interests,” and whether the interests at stake are “essential” to that Member. These questions are political in nature—as apparently recognized by Hong Kong, China<sup>27</sup>—and can only be answered by the Member in question. A WTO panel cannot substitute its views for those of a Member on such matters.

30. The context provided by Articles XXI(a) and XX, and provisions in other WTO agreements, further supports this self-judging interpretation of Article XXI(b). Specifically, Article XXI(a) does not require a WTO Member to provide any information disclosure of which the Member considers as contrary to its essential security interest. As immediate context to Article XXI(b), this implies that the factual considerations and basis that forms the actions under Article XXI(b) may not be tested. With respect to Article XX, while it permits exceptions for certain actions that are “necessary,” it lacks the crucial phrase “it considers,” which is present in Article XXI(b) and indicates that essential security determinations are left to Members and not subject to panel review. A number of provisions of the GATT 1994 and other WTO agreements also refer to action that a Member “considers” appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. By way of contrast, and further context, in DSU Articles 26.1 (non-violation claims) and 26.2 (situation complaints) what a Member “considers” is expressly subject to review through dispute settlement. This understanding is further confirmed by the object and purpose as set out in the preamble of the GATT 1994, and by a subsequent agreement in the *United States Export Measures* dispute between the United States and Czechoslovakia.

31. Section III.A.2. demonstrates that recourse to permissive supplementary means of interpretation, including the drafting history of Article XXI(b), also confirms that this provision is self-judging, and that trade organizations were not intended to be a forum for political disputes. The drafting history of Article XXI also shows that the appropriate means of redress for Members affected by essential security action is a non-violation, nullification or impairment claim, and not a claim that a Member has breached its trade obligations.

32. Section III.A.3. addresses the idiosyncrasies in the Spanish version of the GATT 1994, as compared to the English and French versions, and demonstrates that the interpretation that best reconciles those differences, as provided for by Article 33 of the VCLT, leads to the same

---

<sup>27</sup> See, e.g., HKC First Written Submission, para. 5.

fundamental meaning—that Article XXI(b) is self-judging. Specifically, 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). However, this different phrasing does not warrant departure from the understanding that the provision is self-judging. Furthermore, Article 33 of the VCLT requires adoption of the meaning that best reconciles different linguistic versions of the text, having regard to the object and purpose of the treaty. Based on this approach, the reconciled interpretation of the three texts leads to the same fundamental meaning presented in Section III.A.1, that is, committing the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

33. Section III.A.4. describes the views expressed by GATT Contracting Parties (now WTO Members) when Article XXI has been invoked in the past. As explained in Section III.A.4, those views provide further support that this provision is self-judging, and that the GATT—and now the WTO—is not the appropriate forum to address political disputes.

**1. VCLT Article 31 Application: The text of the GATT 1994 Article XXI(b) in its context, and in the light of the Agreement’s object and purpose, establishes that the exception is self-judging.**

34. Fundamentally, Article XXI(b) is about a Member taking an action “which it considers necessary.” The relative clause that follows the word “action” describes the circumstances which the Member “considers” to be present when it takes such an “action.” The clause begins with “which it considers it necessary” and ends at the end of each subparagraph ending. All of the elements in the text, including each subparagraph ending, are thus part of a single relative clause, and they are left to the determination of the Member. As discussed in detail below, this is the only grammatically correct reading of the English text of Article XXI(b).

***a. The plain meaning of the text of Article XXI(b) of the GATT 1994 establishes that the exception is self-judging.***

35. The text of GATT 1994 Article XXI(b), in its context and in the light of the agreement’s object and purpose, establishes that the exception is self-judging.<sup>28</sup> As this provision states in full:

Nothing in this Agreement shall be construed ...

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

---

<sup>28</sup> See Articles 31(1) and (2) of the Vienna Convention on the Law of Treaties (“Vienna Convention”).

- (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations.

36. As this text provides “[n]othing” in the GATT 1994 shall be construed to prevent a WTO Member from taking “any action” which “it considers necessary” for the protection of its essential security interests. This text establishes that (1) “nothing” in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member “considers necessary” for such protection.

37. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision’s reference to actions that the Member “considers necessary” for the protection of its essential security interests. The ordinary meaning of “considers” is “[r]egard in a certain light or aspect; look upon as” or “think or take to be.”<sup>29</sup> 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 action as having the aspect of being necessary for the protection of that Member’s essential security interests.

38. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish (“estime”) and the future with an implied subjunctive mood in French (“estimera”) support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.<sup>30</sup>

39. The ordinary meaning of the terms in the phrase “its essential security interests,” also supports the self-judging nature of Article XXI. The word “interest” is defined as “[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage.”<sup>31</sup> The term “security” refers to “[t]he condition of being protected from or not exposed to danger.”<sup>32</sup> The definitions of “essential” include “[t]hat is such in the absolute or highest sense” and “[a]ffecting the essence of anything; significant, important.”<sup>33</sup>

---

<sup>29</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-11).

<sup>30</sup> The United States recognizes that there are idiosyncrasies within the Spanish text, and addresses the issue in Section III.A.3. However, these idiosyncrasies do not include the use of the subjunctive tense, nor impact the fundamental meaning of Article XXI, as discussed in detail below.

<sup>31</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1393 (US-11).

<sup>32</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-11).

<sup>33</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852 (US-11).

40. And it is “its” essential security interests—the Member’s in question—that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves “its interests,” that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its “security” interests (not being exposed to danger), and whether the interests at stake are “essential,” that is, significant or important, in the absolute or highest sense. By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

41. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. Again, the text of Article XXI(b) reads:

Nothing in this Agreement shall be construed

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations.

42. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction “or”, to demonstrate alternatives, or the conjunction “and”, to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

43. Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase “relating to” and directly follow the phrase “essential security interests” in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase “essential security interests” and thus illustrate the types of “essential security interests” that Members considered could lead to action under Article XXI(b).

44. Subparagraphs (i) and (ii) do not limit a Member’s essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what “its interests” are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member’s essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

45. Subparagraph (iii) begins with temporal language: “*taken in time of war* or other emergency in international relations.”<sup>34</sup> The phrase “taken in time of” echoes the reference to “taking any action” in the chapeau of Article XXI(b), and it is actions that are “taken”, not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word “action,” rather than the phrase “essential security interests.” Accordingly, Article XXI(b)(iii) reflects a Member’s right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations. Nor does the text of Article XXI(b)(iii) require that the emergency in international relations or war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

46. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of “essential security interests” and a temporal circumstance that Members considered could lead to action under Article XXI(b). A Member taking action pursuant to Article XXI(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii) or to be taken in time of war or other emergency in international relations. In this way, the subparagraphs guide a Member’s exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

47. As discussed in detail in Section III.A.3 below, analyses of the French and Spanish texts of Article XXI(b) confirm the U.S. interpretation of Article XXI(b). The interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions is not fully supported by the Spanish text of the subparagraphs. This means that, under Article 33 of the Vienna Convention on the Law of Treaties (VCLT), the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted.

48. The interpretation that best reconciles the three texts is that the subparagraph endings modify the terms “any action which it considers” in the main text of Article XXI(b). Under this reading, the terms of the provision still form 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. The context of Article XXI(b), provided by Articles XXI(a) and XXI(c), Article XX, and other WTO provisions supports that Article XXI(b) is self-judging.

49. Under the Vienna Convention, the Panel must interpret the terms of the GATT 1994 according to their ordinary meaning, in context and in light of the object and purpose of the GATT 1994. As shown above, the ordinary meaning of the terms in Article XXI(b) demonstrates that the provision is self-judging. As discussed below, the context of Article

---

<sup>34</sup> Emphasis added.

XXI(b) also supports this understanding, in particular, Articles XXI(a) and XXI(c) and Article XX of the GATT 1994, as well as a number of other WTO provisions.

*i. Articles XXI(a) and XXI(c) of the GATT 1994 support that Article XXI(b) is self-judging*

50. Article XXI(a) is immediate context for understanding the ordinary meaning of the terms of Article XXI(b). Article XXI(a) states that “[n]othing 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.” That is, a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests. In this way, Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to “test” a Member’s invocation of Article XXI(b).

51. Article XXI(b) cannot be interpreted so as to undermine a responding Member’s rights under Article XXI(a). Interpreting Article XXI(b) as subjecting a Member’s security measures to review by a panel effectively requires that Member to furnish information concerning its essential security measure. This would mean that, at least in some instances, a Member exercising its rights under Article XXI(a) to withhold “information the disclosure of which it considers contrary to its essential security interests” may thereby not be able to demonstrate that its measure meets whatever standard is applied by a panel. In such a situation, a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b). While it may not be that such a conflict would arise in every instance, the Panel must avoid any interpretation of one provision that could undermine or even invalidate the effectiveness of another.<sup>35</sup>

52. Moreover, the phrase “which it considers necessary” is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase “which it considers” in Article XXI(b), and not reduce these words to inutility.<sup>36</sup>

---

<sup>35</sup> As scholars have noted, “the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable.” Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edn (1984), at 120 (US-20).

<sup>36</sup> *US – Gasoline (AB)*, at 23 (“One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”) *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.57 (“[T]he principle of effective treaty interpretation requires us to give meaning to every term of the provision.”).

ii. *Article XX of the GATT 1994 supports that Article XXI(b) is self-judging*

53. The context provided by Article XX also supports the understanding that Article XXI(b) is self-judging. Specifically, Article XX sets out “general exceptions,” and a number of subparagraphs of Article XX relate to whether an action is “necessary” for some listed objective. For example, Article XX(a), (b), and (d), respectively, provide exceptions for certain measures “*necessary to protect public morals,*” “*necessary to protect human, animal or plant life or health,*” and “*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*” (emphases added).<sup>37</sup>

54. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase “which it considers” to introduce the word “necessary.” Furthermore, Article XX includes a chapeau which subjects a measure qualifying as “necessary” to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member’s action, is absent from Article XXI.

55. Specifically, the Article XX subparagraphs themselves—not the chapeau—contain the operative language regarding the relation between the measure taken and the Member’s objective; namely, the measure must be, for example, “necessary to,” “relating to,” or “essential to” the relevant objective. The exception provided in Article XX(a) therefore reads: (from the chapeau) “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...” (from the subparagraph) “*necessary to protect public morals.*” In this way, it is the subparagraph that indicates on what basis a Member may avail itself of the exception—when the measure in question is “*necessary to protect public morals.*”

56. The chapeau of Article XX includes an additional non-discrimination requirement, which subjects a Member’s action to additional scrutiny based on the particular factual circumstances. Specifically, the chapeau states that “*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent...*”<sup>38</sup> Under Article XX(a), then, a Member: 1) may take a measure that is necessary to protect public morals, *but only if* 2) that measure does not arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade. It was these two substantive obligations set out in the text, therefore—not the mere presence of a chapeau followed by subparagraphs—that led the Appellate Body to its statement that the “structure and logic of Article XX” suggests a two-step analysis.<sup>39</sup> That the analysis

---

<sup>37</sup> Article XX(i) similarly provides an exception for certain measures “involving restrictions on exports of domestic materials *necessary* to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan.” (emphasis added).

<sup>38</sup> Emphasis added.

<sup>39</sup> *US – Shrimp (AB)*, para. 119.

began with the requirement set out in the subparagraphs and then moved to the requirement set out in the chapeau is coincidental.

57. By contrast, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau—“any action which it considers necessary for the protection of its essential security interests.” As the United States has explained, the requirement for applicability of the exception is that the Member taking the action must consider that action necessary for the protection of its essential security interests. The subparagraphs of Article XXI(b), rather than identifying the obligation itself, modify the nature of the security interests involved, or in the case of subparagraph (iii), provide a temporal requirement regarding when the measure would be taken. This key difference explains why, although a panel examining an Article XX defense might look to the relationship between the measures and the objectives set out in the subparagraph endings of Article XX first, it would make no sense for a panel examining an Article XXI defense to first determine applicability of the subparagraphs. The fundamental structure and logic of Article XXI(b) is simply different, and the Appellate Body’s finding based on the structure and logic of Article XX of the GATT 1994 is therefore not applicable.

*iii. Other WTO provisions support the understanding that Article XXI(b) is self-judging*

58. A number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member “considers” appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, “[a]ny Member” may bring to the attention of the Committee on Agriculture “any measure which it considers ought to have been notified by another Member.” Similarly, Article III(5) of the General Agreement on Trade in Services (GATS) permits “[a]ny Member” to notify the Council for Trade in Services of any measure taken by another Member which “it considers affects” the operation of GATS.

59. DSU Article 3.7 also provides an example of a provision that imposes an obligation on a Member, and – similar to Article XXI(b) – does not permit a panel to look behind a Member’s decision. DSU Article 3.7 provides “[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.” There is no basis for a panel to opine on whether or not a Member has exercised its judgment “before bringing a case.” Once a dispute has been brought, the Member has exercised its judgment, and the provision imposes no ongoing obligation.<sup>40</sup>

---

<sup>40</sup> The findings of the panel in *Saudi Arabia – Measures Concerning the Protection of IPRs* regarding DSU Article 3.7 are consistent with this conclusion. There, Saudi Arabia argued that Qatar “had not exercised sound judgment in taking action under Article 3.7 of the DSU” due to “the comprehensiveness of the diplomatic and economic measures imposed by Saudi Arabia and other Members in the region, and the underlying rationale for those measures.” *Saudi Arabia – Protection of IPRs*, para. 7.19. The panel in that dispute rejected Saudi Arabia’s argument, however, based on the discretion granted to Qatar under Article 3.7. As that panel explained, “[g]iven the discretion granted to complainants in deciding whether to bring a dispute under the DSU, the Panel does not



60. In other provisions of the GATT 1994 or other WTO agreements, however, certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee. Under Article 12.9 of the DSU, for example, “[w]hen the panel considers” that it cannot issue its report within a certain period of time, the panel must provide certain information to the DSB. Under Article 4(1) of the *Agreement on Rules of Origin*, the Committee on Rules of Origin may request work from the Technical Committee on Rules of Origin “as it considers appropriate” for the furtherance of the objectives of that agreement.

61. Numerous other provisions of WTO agreements include language to vest particular considerations with a WTO Member, a panel, the Appellate Body, or another entity.<sup>41</sup> The text

---

consider that Qatar failed to exercise its judgment within the meaning of Article 3.7 in bringing this case.” *Saudi Arabia – Protection of IPRs*, para. 7.19.

<sup>41</sup> Such provisions include GATT 1994 Art. XXIII:1 (“If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired... [in three situations] the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.”); TBT Agreement, chapeau (sixth recital) (“*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement”); TBT Agreement Art. 10.8.3 (“Nothing in this Agreement shall be construed as requiring: . . . Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.”); TBT Agreement Art. 14.4 (“The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected.”); DSU Art. 3.3 (“The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”); DSU Art. 4.11 (“Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[], such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations.”); DSU Art. 13.1 (“A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.”); DSU Art. 17.5 (“When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.”); *Agreement on Rules of Origin*, Article 4(2) (“The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the above-mentioned objectives of the Agreement.”); *Agreement on Trade Facilitation*, Article 3(8) (“Each Member shall endeavor to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information.”); *General Agreement on Trade in Services* Article XIV *bis*(a) (“Nothing in this Agreement shall be construed: to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests.”); *General Agreement on Trade in Services* Article XXIV(1) (“The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.”); *Revised Agreement on Government Procurement* Art. III(1) (“Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests

of such provisions makes clear that the judgment of whether a particular situation has arisen is left to the discretion of the named actor, whether that is a WTO panel, the Appellate Body, a WTO committee, or a WTO Member. This context makes clear that the phrase “it considers necessary” in GATT 1994 Article XXI(b) refers to the judgment of the WTO Member taking action to protect its essential security interests, not the judgment of a WTO panel or the Appellate Body.

62. This understanding of “it considers” in GATT 1994 Article XXI(b) is consistent with the Arbitrator’s approach in *EC – Bananas* with respect to the phrase “if that party considers” in Article 22.3(c) of the DSU,<sup>42</sup> and reflects that such language is self-judging absent additional text.<sup>43</sup> Unlike the “it considers” language in GATT 1994 Article XXI(b), the phrase “that party considers” in DSU Article 22.3(c) is preceded by mandatory language in the chapeau (“the complaining party shall apply the following principles and procedures”) and followed by permissive language in the subsection (“it may seek to suspend concessions or other obligations”). Accordingly, while the text of DSU Article 22.3(c) provides that the judgment whether to suspend concessions or other obligations resides with the party in question, the provision expressly limits that discretion by imposing an obligation to apply certain principles and procedures. Conformity with the obligation (“shall apply the following principles and procedures”) was viewed as permitting review of the decision to take action.<sup>44</sup>

63. Additionally, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, “[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines” that a particular measure does not conflict with a WTO agreement, among other requirements. Thus, in this provision, Members explicitly agreed that it is not sufficient that “[a] party considers” a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that “a panel or the Appellate Body determines that” a non-violation situation is present. A similar limitation—that a “party considers and a panel

---

relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.”).

<sup>42</sup> See DSU, Article 22.3(c) (“In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures . . . if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.”).

<sup>43</sup> See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 51-61.

<sup>44</sup> Indeed, the panel in *Russia – Traffic in Transit*, while otherwise disparaging of U.S. arguments as a third party in that dispute, expressly adopted the understanding of *EC – Bananas* (Art. 22.6) reflected above without noting that only the United States had raised this argument in relation to Article 22.3(c) and *EC – Bananas*. See *Russia – Traffic in Transit*, para. 7.147.

determines that”—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

64. The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member’s judgment is set out in Article XXI(b), which permits a Member to take action “which it [a Member] considers necessary for the protection of its essential security interests.” In agreeing to GATT 1994, Members could have subjected a Member’s essential security judgment to an additional check through phrasing similar to the text of DSU Articles 26.1 and 26.2. For example, Article XXI(b) could have permitted a Member to take action to protect its essential security interests only if the Member considered “and a panel (or the Appellate Body) determined” that such action was necessary. But Members did not agree to such language in Article XXI(b). Accordingly, the context of Article XXI(b) demonstrates that Members did not agree to subject a Member’s essential security judgments to review by a WTO panel.

***b. The object and purpose of GATT 1994 supports that that Article XXI(b) is self-judging.***

65. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement’s Preamble. That Preamble provides, among other things, that the GATT 1994 set forth “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.”<sup>45</sup> Particularly with these references to arrangements that are “mutually advantageous” and tariff reductions that are “substantial” (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI.

66. Consistent with this language, the obligations and exceptions of the GATT 1994 are part of a single undertaking, in which it is specifically contemplated that Members will make use of exceptions, consistent with their text. As discussed above at Section III.A.1, the text of Article XXI establishes that the invocation of this exception is self-judging by the Member taking action. And the GATT 1994 makes available a claim through which an affected Member may seek to maintain the level of reciprocal arrangements. Accordingly, the object and purpose of the GATT 1994, as set forth in the agreement’s Preamble, further supports an interpretation of Article XXI(b) as self-judging.

67. In sum, the text of GATT 1994 Article XXI(b), in context and in the light of the agreement’s object and purpose, establishes that this provision is self-judging, and permits the Member to determine what action is necessary to protect its essential security interests.

---

<sup>45</sup> GATT 1994, pmb1.

***c. A subsequent agreement regarding the application of the treaty confirms that Article XXI(b) is self-judging.***

68. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia. Shortly after the GATT entered into force, relations between the United States and Czechoslovakia deteriorated, and the United States took certain measures affecting Czechoslovakia's trade. Czechoslovakia requested the CONTRACTING PARTIES to find those U.S. actions were inconsistent with the GATT 1947, but the CONTRACTING PARTIES rejected that challenge, instead finding that the U.S. invocation of essential security interests was not justiciable. That action by the CONTRACTING PARTIES reflects the interpretation of Article XXI(b) as self-judging and constitutes a subsequent agreement regarding the interpretation of the treaty or application of its provisions, within the meaning of Article 31(3)(a) of the Vienna Convention.

69. As Article 31(3)(a) of the Vienna Convention provides, “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” A subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention is “a further authentic element of interpretation to be taken into account together with the context.”<sup>46</sup> The WTO Agreement sets out procedures for consideration of an authoritative interpretation by the Ministerial Conference, but such procedures had not been elaborated or agreed in 1951 when Czechoslovakia requested the GATT CONTRACTING PARTIES to consider its claims.

70. Here, the resolution of the *United States Export Measures* dispute between the United States and Czechoslovakia establishes a subsequent agreement between the CONTRACTING PARTIES that Article XXI is self-judging. In this dispute, Czechoslovakia requested that the GATT Council decide under Article XXIII whether the United States had failed to carry out its GATT obligations through its administration of export licenses.<sup>47</sup> In explaining its request, Czechoslovakia claimed that the United States had engaged in discrimination in violation of

---

<sup>46</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 221 (US-12).

<sup>47</sup> GATT Contracting Parties Third Session, Agenda (Revised 8<sup>th</sup> April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949) (US-13), item 14 (“Request of the Government of Czechoslovakia for a decision under Article XXIII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.”).

Article I by withholding certain export licenses.<sup>48</sup> In response, the United States invoked Article XXI and proposed that Czechoslovakia’s request be dismissed.<sup>49</sup>

71. In the GATT Council meeting discussing Czechoslovakia’s request, various parties expressed the view that Article XXI is self-judging. For instance, the United Kingdom delegate commented that “since the question clearly concerned Article XXI, the United States action would seem to be justified.”<sup>50</sup> The United Kingdom delegate explained further that “every country must have the last resort on questions relating to its own security.”<sup>51</sup>

72. The delegate from Cuba supported dismissal of Czechoslovakia’s request, and explained that “the question asked by the Czechoslovakian representative in relation to the provisions of Article I did not require an answer since the United States representative had justified his case under Article XXI whose provisions overrode those of Article I.”<sup>52</sup> The representative of Pakistan similarly opined that, because the situation involved Article XXI, “the case called for examination only under the provisions of that Article.”<sup>53</sup>

73. In discussing the decision to be made in that meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I “was not appropriately put” because the United States had defended its actions under Article XXI, which “embodied exceptions” to Article I.<sup>54</sup> Instead, the Chairman stated, the question should be whether the United States “had failed to carry out its obligations” under the GATT 1947. The Chairman’s statement indicates that the relevant question is a broader one—whether the United States has any obligations under the GATT 1947 given its invocation of Article XXI.

---

<sup>48</sup> See Statement by the Head of the Czechoslovak Delegation, Mr. Zdeněk Augenthaler to Item 14 of the Agenda, GATT/CP.3/33 (May 30, 1949), at 1 (US-14) (“Request of the Government of Czechoslovakia for a decision under Article XXXII as to whether or not the Government of the United States has failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.”).

<sup>49</sup> Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949), at 2—3 & 4 (US-15) (referring to provisions of GATT Article XXI and stating that the United States is “making use of these exceptions”); Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 5 (US-16) (proposing dismissal of Czechoslovakia’s request).

<sup>50</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16).

<sup>51</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16).

<sup>52</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 5 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16).

<sup>53</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 6 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16).

<sup>54</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16).

74. After discussing the matter, 17 contracting parties held—with only Czechoslovakia dissenting—that the United States had not failed to carry out its obligations under the GATT.<sup>55</sup> This decision of the CONTRACTING PARTIES was published in its official documents,<sup>56</sup> and the summary record of the meeting was sent to all signatories of the Havana Final Act and to other members of the United Nations.<sup>57</sup>

75. This GATT decision constitutes a subsequent agreement between the CONTRACTING PARTIES that Article XXI is self-judging.<sup>58</sup> As the Chair noted in his summary of the decision to be taken, the United States had defended its actions in particular on the basis of Article XXI, and the CONTRACTING PARTIES had not supported establishing a Working Party to review this issue. Further, as the United Kingdom delegate stated during the discussions leading up to this decision, every country must have the last resort on questions relating to its own security. Accordingly, this subsequent agreement between the CONTRACTING PARTIES confirms the United States' interpretation that GATT 1994 Article XXI(b) is self-judging.

76. The rules of procedure existing at that time provided that “decisions shall be taken by a majority of the representatives present and voting.”<sup>59</sup> The rules neither restricted the contracting parties' ability to interpret the provisions of GATT 1947, nor provided special procedures for adopting an interpretation of the provisions. It is in this context that the CONTRACTING PARTIES came to their decision regarding the United States' invocation of Article XXI, and under Article 31(3)(a) of the Vienna Convention the Panel should take this decision into account.

---

<sup>55</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

<sup>56</sup> GATT, Decision of 8 June 1949, BISD vol. II, at 28 (US-17) (“The CONTRACTING PARTIES decided to reject the contention of the Czechoslovak delegation that the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licenses.”).

<sup>57</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 10 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16).

<sup>58</sup> While a few parties abstained and one party dissented, the decision nonetheless constitutes a subsequent agreement on interpretation. Article 31.3(a) of the Vienna Convention does not require a subsequent agreement on interpretation to be unanimous. The text of Article 31 of the Vienna Convention demonstrates this point. Article 31.2(a) refers to “all the parties.” By contrast, Article 31.3(a) merely refers to “the parties.” The drafters intentionally omitted the word “all” from Article 31.3(a) of the Vienna Convention, thus showing an intention not to require a subsequent agreement on interpretation to be unanimous.

<sup>59</sup> General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedures GATT/CP.2/3 Rev.1 (Aug. 18, 1948) (Rule 27 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-18); General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949) (Rule 28 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-19).

77. After the vote, the representative of Czechoslovakia inquired “whether the decision could not be communicated to all members of the Interim Commission of the International Trade Organization, so that they would be informed of the *interpretation* given by the CONTRACTING PARTIES of the provisions of the Havana Charter”.<sup>60</sup> No Contracting Party disagreed with that statement. This supports the United States’ long-standing view that, in the very earliest days of the GATT and pursuant to then-applicable rules, the CONTRACTING PARTIES had reached agreement on the interpretation of Article XXI that actions pursuant to that provision are not subject to review for consistency in GATT or WTO dispute settlement.

78. This subsequent agreement by the CONTRACTING PARTIES constitutes a further authentic element of interpretation. Consistent with the customary rules of interpretation, this Panel must take into account this subsequent agreement, together with the text and context and the object and purpose of the agreement, when interpreting Article XXI. The text, context, object and purpose, and this subsequent agreement, all establish that every sovereign has the right to take action it considers necessary for the protection of its essential security interests. This right is enshrined in Article XXI(b).

**2. VCLT Article 32 Application: Supplementary means of interpretation, including negotiating history, confirm that Article XXI(b) is self-judging.**

79. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that GATT 1994 Article XXI(b) is self-judging.<sup>61</sup> In particular, the United States draws the Panel’s attention to the negotiating history of GATT 1947, as such materials may constitute historical background against which the GATT 1994 was agreed.<sup>62</sup>

80. Under customary rules of interpretation, not all preparatory materials may be correctly considered part of a treaty’s negotiating history, or *travaux préparatoires*, and therefore appropriate for recourse as a supplementary means of interpretation. Instead, for materials to be so considered, they should be in the public domain, or at least “in the hands of all the parties.”<sup>63</sup>

---

<sup>60</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-16) (emphasis added).

<sup>61</sup> See Vienna Convention, Article 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.”).

<sup>62</sup> *EC – Computer Equipment (AB)*, para. 86 (“With regard to ‘the circumstances of [the] conclusion’ of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.”).

<sup>63</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 223 (US-12) (noting that the Commission did not define *travaux préparatoires* and suggesting that unpublished *travaux préparatoires* could be relevant to the interpretation of bilateral treaties because such documents “will usually be in the hands of the all the parties”); Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edition (1984), at 144 (US-20) (“The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the

**a. The negotiating history of GATT Article XXI(b) confirms that the provision is self-judging.**

*i. Negotiations to establish the International Trade Organization of the United Nations.*

81. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following two exceptions provisions:

Article 32 (General Exceptions to Chapter IV):

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures

.....

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):

None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.<sup>64</sup>

82. The United States asserted at the time that Article 32(e) “afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests” in a time of war or a national emergency.<sup>65</sup> As originally drafted, however, neither exceptions provision was explicitly self-judging. These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that “it considers necessary for” the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of

---

possibility of consulting them.”); *EC – IT Products*, paras. 7.573-7.581 (declining to consider as *travaux préparatoires* documentation which was only reviewed by a subset of participants in treaty negotiations and were not circulated prior to the dispute).

<sup>64</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter (US-21).

<sup>65</sup> Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11 (US-22).



which later formed the basis for the general exceptions at GATT 1994 Article XX. Thus, this initial proposed text drew no distinction between essential security interests and other issues that would permit derogation from ITO commitments.

83. In March 1947, the same exceptions text was proposed as both GATT Article XX and Article 37 the ITO draft charter, in Chapter V, which related to “[g]eneral commercial policy.” This text provided that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures

....

(e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a contracting party.<sup>66</sup>

84. The chapeau of this proposed text and a number of the subparagraphs are identical to what would become GATT 1994 Article XX. With its proviso, the chapeau contemplated panel review so that the exceptions would not be applied to discriminate unfairly. The subparagraphs corresponding to essential security were included in this proposed text, together with other exceptions, and thus were subject to the proviso in the chapeau, like these other exceptions. This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.

85. In May 1947, the United States offered amendments to the ITO draft charter, and proposed removing, *inter alia*, subparagraph (e) from the ITO draft charter exceptions provision quoted above.<sup>67</sup> In the U.S. proposal, item (e) would be included in a new article, to be inserted at an “appropriate” place at the end of the ITO draft charter, so that these exceptions would apply

---

<sup>66</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 31 (ITO draft charter) & 77 (GATT draft text) (US-23). *See also* Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-23) (“The draft [GATT] reproduces many provisions of the [ITO draft] Charter.”). In addition to item (e) that provided an exception for measures “[i]n time of war or other emergency in international relations” relating to the protection of essential security interests, the proposed text also included other security-based exceptions at items (c), (d), and (k), respectively, providing for measures “[r]elating to fissionable materials; [r]elating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; ... [or] [u]ndertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.”)

<sup>67</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947) (US-24).

to the whole charter.<sup>68</sup> The United States also proposed that the new article would begin by stating “[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures,” including those relating to the protection of essential security interests.<sup>69</sup>

86. Thereafter, the United States proposed the addition of a new chapter, entitled “Miscellaneous” at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole be included in this new chapter.<sup>70</sup> The United States also suggested additional text to this exceptions provision, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:

- a) Relating to fissionable materials or their source materials;
- b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
- d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.<sup>71</sup>

87. For the first time in the drafting of this provision, the text now referenced what a Member considered to be necessary, explicitly indicating that this provision could be invoked based on a Member’s own judgment. Moreover, this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interests. The drafting history thus shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and

---

<sup>68</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947) (US-24).

<sup>69</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23, at 5 (May 6, 1947) (US-24).

<sup>70</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236 (July 4, 1947), at 1, 12—14 (US-25).

<sup>71</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947) (US-25) (Emphases added).

exceptions related to other interests that, unlike the security-based exceptions referenced above, were retained as part of the “[g]eneral commercial policy” chapter of the ITO draft charter.

88. In July 1947, this provision was revised in a manner that strengthened and emphasized the explicitly self-judging nature of this exception. In this revision, the language of the exception was changed from “action which *it may consider* necessary” to the current GATT formulation, “action which *it considers* necessary for the protection of its essential security interests.”<sup>72</sup> The GATT 1947 final text reflected this revision to the essential security provision.<sup>73</sup> A summary of the draft charter prepared in late 1947 by the negotiating group comments on the self-judging nature of this provision. As this November 1947 summary states, the essential security exceptions would permit members to do “whatever they think necessary to protect their essential security interests relating to” the circumstances presented in that provision.<sup>74</sup>

89. Regarding the exception’s scope, at a July 1947 meeting of the ITO negotiating committee, the delegate from The Netherlands requested clarification on the meaning of a Member’s “essential security interests,” and suggested that this reference could represent “a very big loophole” in the ITO charter.<sup>75</sup> The U.S. delegate responded that the exception would not “permit anything under the sun,” but suggested that there must be some latitude for security measures.<sup>76</sup> The U.S. delegate further observed that in situations such as times of war, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war and to *determine for itself*—which I think we cannot deny—what its security interests are.”<sup>77</sup> This is consistent with the U.S. view expressed in this dispute, namely that the reference in Article XXI(b)(iii) to “a time of war or other emergency in international relations,” and the text that became subparagraphs (i) and (ii) of Article XXI(b), do not alter the operative chapeau text – which reserves to the Member the judgment whether

---

<sup>72</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25–26 (US-26) (emphasis added). *See also* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (retaining “it considers” language at ITO draft charter provision on essential security) (US-27).

<sup>73</sup> *See* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947), at 47 (US-28).

<sup>74</sup> United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35 (US-29).

<sup>75</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 19 (US-30).

<sup>76</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-30).

<sup>77</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-30) & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-30) (emphasis added).

particular action is necessary to protect its essential security interests – but nonetheless serve to guide a Member’s exercise of its rights under Article XXI(b).

90. In those discussions the Chairman made a statement “in defence of the text,” and recalled the context of the essential security exception as part of the ITO charter.<sup>78</sup> As the Chairman observed, when the ITO was in operation “the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind” raised by The Netherlands delegate.<sup>79</sup> That is, the parties would not have the ability to challenge a security action as breaching the charter; rather, the parties would serve to police each other’s use of the essential security through a culture of self-restraint.

91. During the same July 1947 meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the essential security exception “should not provide for any possibility of redress.”<sup>80</sup> In response, the U.S. delegate observed that such actions “*could not be challenged* in the sense that it *could not be claimed* that the Member was *violating the Charter*”<sup>81</sup>— indicating the view that essential security actions could not be found to breach the Charter. The United States acknowledged, however, that a member affected by such actions “would have the right to seek redress *of some kind*” under Article 35(2) of the ITO charter.<sup>82</sup>

92. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.<sup>83</sup> If the parties were

---

<sup>78</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30).

<sup>79</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30).

<sup>80</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26 (US-30).

<sup>81</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 & 29 (US-30) (emphases added).

<sup>82</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 & 29 (US-30).

<sup>83</sup> Article 35(2) stated in full:

If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be effected, the matter may be referred to the Organization, which shall, after investigation, and, if necessary after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations to the Members concerned. The Organization, if it considers the case serious enough to justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this

unable to resolve the matter, it could be referred to the ITO, which in turn could make recommendations, including the suspension of obligations or concessions.<sup>84</sup>

93. In response to the explanation from the U.S. delegate, including the right to seek redress for non-violation under Article 35(2), the Australian delegate lifted a reservation on the essential security exception at this July 1947 meeting. The delegate from Australia stated that, as the exception was “so wide in its coverage”—particularly the “which it may consider to be necessary” language—Australia’s agreement was done with the assurance that “a Member’s rights under Article 35(2) will not be impinged upon.”<sup>85</sup>

94. This exchange demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment.

95. Around the same time, negotiators of the ITO Charter and the GATT 1947 were also discussing the distinction between what are now known as breach claims and non-violation claims. That distinction was introduced into the negotiations by Australia in June 1947. Like the text that became GATT 1994 Article XXIII(1), Australia’s June 1947 proposal permitted Members to seek redress for (a) “the failure of another Member to carry out its obligations under

---

Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended. Any affected Member shall then be free, not later than sixty days after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization.

Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-23).

<sup>84</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-23).

<sup>85</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (US-30). *See also* Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 5 (July 24, 1947) (US-31) (“During the discussion the Delegate for Australia stated that it should be clear that the terms of Article 94 [on essential security] would be subject to the provisions of paragraph 2 of Article 35. On being assured that this was so he stated that he did not wish to make any reservation.”).

this Charter”, (b) “the application by another Member of any measure, whether or not it conflicts with the provisions of this Charter”, or (c) “the existence of any other situation.”<sup>86</sup>

96. In introducing its proposal, Australia set out several “main purposes” of the revised text.<sup>87</sup> These purposes included “to set out more clearly the circumstances in which a Member may make a complaint and seek to be released from obligations undertaken or concessions granted by it,” and “to provide for the fact that in some cases a complaining Member’s difficulties might not be due to any act or failure of another Member to whom complaint could appropriately be made, while retaining the provision that when another Member is clearly involved, consultation and conciliation between the Members should be attempted before the Matter is referred to the Organisation.”<sup>88</sup> After discussion in an ITO drafting sub-committee,<sup>89</sup> a revised version of Australia’s proposal was incorporated into a draft of the GATT 1947 on July 24, 1947.<sup>90</sup> This text was adopted into the draft ITO Charter on August 22, 1947.<sup>91</sup>

---

<sup>86</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 1—2 (US-32).

<sup>87</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (US-32).

<sup>88</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (US-32); *see also* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/12 (June 12, 1947), at 22 (quoting the Australian representative as stating that the reference to “the application by another Member of any measure, whether or not it conflicts with the provisions of Charter” was “taken over automatically from a standard clause in the old type of Trade Agreement and was designed, I presume, to deal primarily with possible attempts to evade obligations accepted in an exchange of tariff concessions” ) (US-33).

<sup>89</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 35<sup>th</sup> meeting of Commission A, held on Monday 11 August 1947, E/PC/T/A/SR/35 (Aug. 12, 1947), at 3 (discussing the transfer of Article 35(2) to Chapter VIII) (US-34); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Chapter V, Articles 34, 35 and 38, Report by the Sub-Committee for submission to Commission A on Monday, 4<sup>th</sup> August, 1947, E/PC/T/146 (July 31, 1947), at 2 (stating that the sub-committee was unanimously in favor of transferring Article 35(2) to Chapter VIII) (US-35); Summary Record of the Twelfth Meeting, E/PC/T/A/SR/12 (June 12, 1947), at 1-7 (summarizing discussion of potential transfer of Article 35(2) to Chapter VIII) (US-36).

<sup>90</sup> *See* Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947), at 2 & 55 (including the revised text at Article XXI (the on “Nullification or Impairment”) and noting that the draft text appears in its “latest form” sometimes based on “texts prepared by sub-committees and Commissions of this Conference”) (US-37).

<sup>91</sup> *See* Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 166 (with “breach” language at Article 89 and NVNI language transposed from former Article 35) (US-27); Verbatim Report, Second Session of the Preparatory Committee of the United Nations Conference on Trade & Development, Twenty-Second Meeting In Executive Session,

97. Australia’s statements in proposing the distinction between breach claims and non-violation claims are consistent with the other statements by drafters. Specifically, Australia’s reference to cases in which “a complaining Member’s difficulties might not be due to any act or failure of another Member *to whom complaint could appropriately be made*”<sup>92</sup> seems to acknowledge that in some instances breach claims would not be “appropriate” but that other types of claims could still be available.

98. Documents from early 1948 further confirm the drafters’ understanding that non-violation, nullification or impairment claims – and not breach claims – would be the appropriate recourse for countries affected by essential security actions. As stated in their report of January 9, 1948, Working Party of representatives from Australia, India, Mexico, and the United States had “extensive discussions” of the provision on “Consultation between Members,” particularly subparagraph (b) of that provision, for claims based on the application of a measure “whether or not it conflicts with the provisions of the Charter.”<sup>93</sup> At the time, the “Consultation between Members” provision explicitly distinguished between what are now understood as breach claims and non-violation claims. Non-violation claims were set out in subparagraph (b), while subparagraph (a) related to breach claims, that is, claims based “on the failure of a Member to carry out its obligations under the Charter.”<sup>94</sup>

99. This Working Party “considered that [subparagraph (b) of the “Consultation between Members” provision] would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter [then the essential security exception].”<sup>95</sup> The explanation of the Working Party is worth reading in full:

Such action, for example, in the interest of national security in time of war or other international emergency *would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter*, but on the ground that the

---

E/PC/T/EC/PV.2/2 (Aug. 22, 1947), at 47-48 (examining and approving Article 89 as reflected in report of August 19, 1947) (US-38).

<sup>92</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (emphasis added) (US-32).

<sup>93</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-39)

<sup>94</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-39)

<sup>95</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-39)

measure so taken effectively nullified benefits accruing to the complaining Member.<sup>96</sup>

100. As noted, the draft ITO Charter text before the Working Party at this time explicitly distinguished between breach and non-violation claims, but the Working Party’s report provides no indication that breach claims – in addition to non-violation claims – could be an appropriate recourse for Members affected by essential security actions. Rather, the Working Party’s conclusion that non-violation claims are the appropriate recourse for Members affected by essential security actions is consistent with the understanding reached between the United States and Australia in July 1947. This language from the Working Party’s report is consistent with and tracks closely the intervention by the U.S. delegate in July 1947, lending further support to the conclusion that the U.S. delegate was referring to non-violation, nullification or impairment claims in that discussion.

101. A similar discussion occurred a few days later, at a meeting of the Sub-Committee on Chapter VIII (entitled “Settlement of Differences – Interpretation”). At that meeting, “[f]ive representatives agreed with the Chairman that action of the type mentioned in Article 94 [the essential security provision] could not be *challenged* by recourse to the procedures of Chapter VIII”<sup>97</sup> – indicating that Members did not believe that essential security actions could be found to breach the Charter. However, the record of their meeting suggests that “any Member which considered that any *benefit* accruing to it being nullified or impaired as specified in Article 89 might invoke the procedures of Chapter VIII in order that compensatory measures might be permitted.”<sup>98</sup> The representative of the United Kingdom stated that his delegation “intended to move an amendment to Article 94 which would make clear this relationship.”<sup>99</sup> Two other representatives at this meeting “expressed some doubts as to the opinion given by the Chairman,” and the committee left “the question of [the] relationships between Article 94 and Chapter VIII for further consideration later, if necessary after final texts of Article 94 and 43 [on general exceptions] had been prepared.”<sup>100</sup>

---

<sup>96</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-39).

<sup>97</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-40) (emphasis added).

<sup>98</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-40) (emphasis added).

<sup>99</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-40).

<sup>100</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-40) (emphasis added).



102. The report of that meeting does not elaborate on these “doubts,” and one may speculate whether perhaps these two doubting representatives believed that *no* recourse – not even a non-violation claim – was available to Members affected by essential security measures. Regardless of the content of these “doubts,” however, subsequent discussions indicate that they were resolved and negotiators reached a common understanding that non-violation claims, rather than breach claims, were the appropriate redress for Members affected by essential security actions.

103. As foreshadowed, the United Kingdom soon thereafter proposed amendments to the essential security exception. These proposed amendments included the suggested addition of an explicit statement in Article 94 that if an action a Member considered necessary for the protection of its essential security interests “nullifie[d] or impair[ed] any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking the action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate.”<sup>101</sup>

104. The United States stated at the time that this additional text was “unnecessary” because it was “in effect a *repetition of paragraph (b)* of Article 89.”<sup>102</sup> At the time, Article 89(b) provided for consultations when a Member considered that any benefit accruing to it under the Charter was being nullified or impaired as a result of another Member’s measure, “whether or not it conflicts with the provision of the Charter.”<sup>103</sup> The UK representative responded to the United States that “he would be agreeable to having the applicability of Articles 89 and 90 written into the record rather than incorporated into the actual text of Article 94.”<sup>104</sup> Notably, neither the UK nor any other representative disagreed with the U.S. statement regarding Article 89(b), and after further discussion, although other aspects of the UK proposal were adopted, ITO charter negotiators declined to incorporate into the essential security exception the UK’s proposed text regarding the suspension of obligations or concessions.

105. As the foregoing demonstrates, the drafters of the security exception that became GATT 1994 XXI(b) made several intentional choices that make clear that this provision is self-judging. Specifically, they separated this provision from the “commercial” exceptions that became Article XX, altered the placement of this text so that it was broadly applicable, and inserted the pivotal “it considers” language. Accordingly, the drafting history of GATT Article XXI(b) confirms that a Member’s invocation of its essential security interests is self-judging and not subject to review by a dispute settlement panel. This drafting history also makes clear that nullification or

---

<sup>101</sup> United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1-2 (US-41).

<sup>102</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), at 3 (US-42) (emphasis added).

<sup>103</sup> Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development – Draft Charter, E/PC/T/A/SR/186 (Sept. 10, 1947), article 89 (US-43).

<sup>104</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), at 3 (US-42).

impairment claims, rather than breach claims, are the means of recourse for parties affected by essential security measures.

106. In this dispute, Hong Kong, China, has not advanced any non-violation nullification or impairment claim under GATT 1994 Article XXIII:1(b). Given the clear text of Article XXI(b) and the negotiating history reviewed above, this decision by Hong Kong, China, can only be understood as deliberate.

*ii. Uruguay Round Negotiators Rejected Proposals to Alter the Terms of Article XXI*

107. Uruguay Round discussions indicate that these negotiators in agreed with the statements made by their predecessors in 1947. During the Uruguay Round the Negotiating Group on GATT Articles rejected proposals by Nicaragua and Argentina to amend Article XXI in a manner that would have limited Members’ discretion when taking action under that provision.<sup>105</sup> In these discussions—which took place in June 1988—some delegates emphasized the sensitivity of issues presented under Article XXI and the need to preserve Members’ discretion with respect to such issues.<sup>106</sup> These Members further suggested that “it was unrealistic to think of a GATT body placing conditions on [Article XXI’s] use since only the individual contracting party concerned was ultimately in a position to judge what its security interests were.”<sup>107</sup> Another delegation opined that “since the GATT has no competence in the determination of questions of security or of a political nature, it seemed doubtfully useful to set up any institutional test to determine whether a matter was security-related or political.”<sup>108</sup>

108. With these statements, negotiators during the Uruguay Round expressed views consistent with those expressed by the negotiators of Article XXI—namely, that matters of essential security under Article XXI are left to the judgment of the invoking Member. In fact, even those delegations that agreed with Nicaragua and Argentina acknowledged this meaning of the existing text of Article XXI. Meeting minutes indicate that some delegations “shared the view that there was a danger of [Article XXI] being abused if governments were not cautious in its

---

<sup>105</sup> See Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-44); Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-45).

<sup>106</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-46).

<sup>107</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-46).

<sup>108</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2—3 (US-46).

invocation.”<sup>109</sup> As such statements indicate, Uruguay Round negotiators did not intend to alter the self-judging nature of Article XXI, and they rejected proposals that would have done so.

*iii. Uruguay Round Negotiators Decided to Repeat the Pivotal Language of Article XXI in the Security Exceptions of GATS and TRIPS*

109. Uruguay Round negotiators also decided to include, in GATS and TRIPS, security exceptions that mirror Article XXI in relevant part. Specifically, like Article XXI, the security exceptions in GATS and TRIPS refer to actions that a Member “considers necessary”; security exceptions are separate from general exceptions for public morals, health, and other matters; and general exceptions—but not security exceptions—are explicitly subject to review. The Uruguay Round drafters’ decision to use, in the GATS and TRIPS security exceptions, the same text as was used in Article XXI further confirms that Uruguay Round drafters were aware of the self-judging nature of this exception and did not intend to alter it.

110. The negotiating history of the GATS demonstrates the deliberate choice of Uruguay Round negotiators to repeat these crucial aspects of Article XXI. During GATS negotiations, some Members suggested draft security exceptions that would have diverged from the text of Article XXI by merging the security exceptions with general exceptions, omitting the pivotal “it considers” language from the security exceptions, and subjecting essential security measures to review for non-discrimination.<sup>110</sup>

111. For example, in its GATS proposal of June 1990, Switzerland included a provision called “Exceptions for Public Order and National Security” which referred to “measures that are necessary to protect” certain interests, rather than using Article XXI’s pivotal “it considers” language.<sup>111</sup> Switzerland’s proposal also would have treated in the same manner both measures necessary to protect “essential national security interests” and measures necessary to protect “public morals, public order, safety, health, or the environment,” and required that “measures necessary to protect” these interests “shall not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between PARTIES, a disguised restriction on trade in services, or a means of circumventing the objectives of the Agreement.”<sup>112</sup>

112. Similarly, a joint proposal by Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay, included an exception for

---

<sup>109</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 3 (US-46).

<sup>110</sup> See Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-47); Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-48).

<sup>111</sup> See Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-47).

<sup>112</sup> See Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-47).

“measures consistent with international law that are . . . necessary,”<sup>113</sup> and did not include the pivotal “it considers” language from Article XXI. This joint proposal also would have treated in the same manner measures “[n]ecessary to protect national security” as measures “necessary to protect public morals, cultural and social values, public order, safety or health.”<sup>114</sup> Finally, similar to the Swiss proposal, this joint proposal required that “[s]uch measures [including national security measures] shall not be used as a means to circumvent the objectives, principles and disciplines of this Framework nor as disguised restrictions on international trade in services.”<sup>115</sup>

113. By contrast, the security exceptions in GATS proposals put forward by the United States (in October 1989), the EC (in June 1990), and Japan (in July 1990) mirrored Article XXI in relevant part.<sup>116</sup> Specifically:

- First, all three proposals used the pivotal language from Article XXI and referred to action that a Member “considers necessary” for the protection of its essential security interests.<sup>117</sup>
- Second, all three proposals also separated the exceptions for essential security matters from the exceptions for public morals, health, and other matters.
- Third, all three proposals included a non-discrimination requirement in the exception for public morals, health, and similar matters – but did not include such a requirement in the essential security exception.<sup>118</sup>
- Fourth, the GATS proposals from the United States, Japan, and the EC also repeated the language of Article XXI(b)(iii) referring to action “taken in time of war or other

---

<sup>113</sup> Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-48).

<sup>114</sup> Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-48).

<sup>115</sup> Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-48).

<sup>116</sup> See Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-49); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-50); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-51).

<sup>117</sup> See Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-49); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-50); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-51).

<sup>118</sup> See Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-49); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-50); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-51).

emergency in international relations.”<sup>119</sup> The repetition of this language in these three proposals (and in the final version of the agreement) is particularly notable in light of the existence of alternative approaches, as discussed in Section III.A.2.a.v below.”<sup>120</sup>

114. In the GATS draft prepared by the chairman of the negotiating group in late July 1990, the security exceptions provision reflected in relevant part the proposals by the United States, Japan, and the EC.<sup>121</sup> Specifically, in this July 1990 chairman’s draft, the security and general exceptions were separate sub-paragraphs of the exceptions provision at Article XIV, and the sub-paragraph on security exceptions lacked a non-discrimination proviso while permitting measures that a Member “considers necessary” to protect its essential security interests.<sup>122</sup> This deliberate choice of exceptions language demonstrates that the GATS drafters—like the drafters of the GATT 1947 (and the GATT 1994)—intended to distinguish security exceptions from general exceptions, and that security exceptions were to be self-judging and not subject to review for non-discrimination.

115. These aspects of the draft GATS exceptions text remained in the December 1990 draft of the agreement.<sup>123</sup> The December 1991 draft GATS text further distinguished security exceptions from general exceptions, as the general exceptions remained in Article XIV while the security exceptions were placed into a new article, Article XIVbis.<sup>124</sup> This adjustment further confirms that the GATS essential security exception that was finally incorporated at GATS Article XIVbis(2)(b) is self-judging, and unlike the general exceptions that remained in the final Article XIV, this provision is not subject to review for non-discrimination.

---

<sup>119</sup> Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-49); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-50); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-51).

<sup>120</sup> Notably, the EC’s GATS proposal appears to acknowledge the self-judging nature of essential security actions by including the following text at the end of its proposed sub-paragraph on security exceptions: “In taking action under this paragraph, *parties* shall take into consideration the interests of third parties which may be affected.” Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (emphasis added) (US-50). By stating that “parties shall take into consideration” the interests of third parties, the EC acknowledged that it was the parties – now Members – that would be choosing whether to take action under this provision. The EC also acknowledged the 1982 Decision Concerning Article XXI by providing in its proposal that “All parties affected by action under this Article retain their full rights under this Agreement.” *Id.* at 13 (using language similar to the Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982) (US-52)). This language indicates that the EC was mindful of the 1982 Decision when it prepared its draft GATS text – and yet retained the self-judging reference to actions a Member “considers necessary for the protection of its essential security interests.”

<sup>121</sup> See Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11–12 (US-53).

<sup>122</sup> See Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11–12 (US-53).

<sup>123</sup> See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/35/rev.1 (Dec. 3, 1990), at 347–48 (US-54).

<sup>124</sup> Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC.W.FA (Dec. 20, 1991), at Annex II, pp. 17–19 (US-55)).

116. The TRIPS negotiations similarly show that the drafters intended to incorporate into that agreement a security exception that would mirror the self-judging security exception at GATT Article XXI(b) and that would not be subject to review for non-discrimination. In fact, a July 1990 draft TRIPS agreement would have explicitly incorporated GATT exceptions by providing that “[o]ther provisions of the [GATT] shall apply to the extent that [TRIPS] does not provide for more specific rights, obligations and exceptions thereof.”<sup>125</sup> By December 1991, however, this reference to GATT had been replaced in relevant part by language that mirrored GATT 1994 Article XXI(b),<sup>126</sup> and this language remained in the final TRIPS text.

117. Thus, presented again with the choice of whether to diverge from the language of Article XXI—and the discretion it bestows upon a Member taking action it considers necessary for the protection of its essential security interests—Uruguay Round negotiators again decided to use the language of Article XXI in the security exceptions at TRIPS Article 73 and GATS Article XIVbis. This decision by the Uruguay Round negotiators confirms that these negotiators were well aware of the manner in which this provision had been interpreted, and were comfortable continuing with that interpretation.

*iv. Uruguay Round Negotiators Declined to Include Language in the DSU that Would Alter the Longstanding Interpretation of Article XXI*

118. Finally, Uruguay Round negotiators discussed the potential reviewability of Article XXI in the context of dispute settlement negotiations and decided *not* to include in the DSU language that would alter the longstanding interpretation of Article XXI as self-judging.

119. In a November 1987 communication to the Negotiating Group on Dispute Settlement, Nicaragua described its “disappointing” experiences with dispute settlement under the GATT 1947, including its 1985 dispute with the United States in which the United States invoked Article XXI.<sup>127</sup> Nicaragua proposed, among other things, that when a panel had been established to resolve a dispute, “[n]o contracting party may oppose examination of the applicability of GATT provisions and compliance with them” and that “[a]ny panel must reach a clear conclusion regarding nullification and impairment of benefits.”<sup>128</sup>

---

<sup>125</sup> See Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman’s Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990), at 78 (US-56).

<sup>126</sup> Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), at 90 (setting forth Article 73: Security Exceptions in the draft TRIPS Agreement) (US-55).

<sup>127</sup> Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-57).

<sup>128</sup> Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-57).

120. At a meeting shortly after Nicaragua made this proposal, negotiators of the DSU discussed a variety of topics, including “GATT Article XXI and its review by a GATT panel.”<sup>129</sup> Minutes from that meeting suggest that negotiators did not discuss Nicaragua’s proposal in a substantive way. Certainly nothing in the record of this meeting indicates that negotiators intended that the DSU would alter the manner in which Article XXI had been interpreted during the previous four decades. In an addendum to the minutes of that meeting, Chile agreed with some portions of Nicaragua’s statement, but disagreed with other portions, including the lack of any reference to Article XXI, which it described as “fully valid.”<sup>130</sup> Nicaragua’s proposal was not incorporated into the DSU.

121. Numerous statements by the drafters of the DSU further confirm that the DSU does not alter the ordinary meaning of the terms of the covered agreements. For example, in a meeting of the Negotiating Group on Dispute Settlement on June 25, 1987, negotiators “expressed the view that the GATT dispute settlement procedures should not be used to create, by constructive interpretation, obligations which were not established in the text of the General Agreement.”<sup>131</sup> Instead, these negotiators opined that “[p]anelists should merely interpret and apply existing GATT rules to the particular sets of circumstances in the disputes before them without purporting to create new obligations.”<sup>132</sup> Similarly, during the group’s discussions of developing countries and dispute settlement, one delegation “noted that the Group’s mandate did not include the negotiation of new substantive rights for contracting parties.”<sup>133</sup>

122. In sum, numerous decisions of the Uruguay Round negotiators—their rejection of proposed changes to Article XXI, their repetition of Article XXI’s pivotal language in the GATS and TRIPS security exceptions, and their decision not to include language in the DSU that would alter the interpretation of Article XXI—confirm that these Uruguay Round negotiators were well aware of the existing interpretation of Article XXI, and that they agreed with that interpretation. This Uruguay Round negotiating history further confirms the interpretation of Article XXI. Notably, other GATT and WTO agreements also used language similar to that of Article XXI and maintained the same self-judging approach to essential security exceptions.<sup>134</sup>

---

<sup>129</sup> Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987), at 3 (US-58).

<sup>130</sup> Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr. 29, 1988), at 2 (US-59).

<sup>131</sup> Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987), at 5 (US-60).

<sup>132</sup> Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15 1987), at 5 (US-60).

<sup>133</sup> Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988) (US-61).

<sup>134</sup> Specifically the Tokyo Round Agreement on Government Procurement retained the distinction between security exceptions and general exceptions and mirrored the pivotal “it considers” language of Article XXI in the security exception. *See* Tokyo Round Code on Government Procurement (1979), Article VIII (US-62). By doing so, the

v. *Uruguay Round Negotiators Made These Decisions Despite the Existence of Other Approaches to Security Exceptions at that Time*

123. These decisions by Uruguay Round negotiators are particularly notable in light of the various approaches to security exceptions that had been included in trade agreements since 1947. Some post-1947 agreements, such as the 1985 Agreement on the Establishment of a Free Trade Area between Israel and the United States, simply incorporated by reference Article XX and Article XXI of the GATT 1947.<sup>135</sup> Other agreements, such as the Treaty of Rome and Agreement on the European Economic Area (EEA Agreement), reflect significant deviations from the text of Article XXI, including by expressly providing for the review of measures taken by a government for essential security purposes.

*Treaty of Rome*

124. The Treaty of Rome, now known as the Treaty on the Functioning of the European Union (TFEU) was signed on March 25, 1957, by representatives of Belgium, Germany, France, Italy, Luxembourg, and The Netherlands. Since that time, other EU Member States have joined the agreement and it has been renamed the TFEU and its provisions renumbered. The security exceptions remain the same as they were in 1957, however, and these provisions are very different from those present in the GATT 1947. As the relevant Treaty of Rome (and TFEU) provisions state:

ARTICLE 223 [now TFEU Article 346]

1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the

---

Tokyo Round GPA—consistent with Article XX and Article XXI – ensured that a party would judge for itself whether it considers action necessary for the protection of its essential security interests while measures sought to be justified under the general exceptions would be subject to review for necessity and non-discriminatory application. See Tokyo Round Code on Government Procurement (1979), Article VIII (US-62). The text of this provision remained largely unchanged as the GPA was revised in 1988, 1994, and 2012. See Agreement on Government Procurement, Revised Text (1988), Article VIII (US-63) (same as Article VIII 1979 GPA); Agreement on Government Procurement, Article XXIII (1994) (same as Article VIII of 1979 GPA except adding a colon in Article VIII(2) as follows “imposing or enforcing measures necessary to protect public morals”) (emphasis added) (US-64); Agreement on Government Procurement, Article III (same as Article XXIII of the 1994 GPA, except dividing the text of subparagraph 2 into sub-paragraphs) (US-65).

<sup>135</sup> See Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, Article 7 (“[GENERAL AND SECURITY EXCEPTIONS] Article XX and XXI of the GATT are hereby incorporated into and made a part of this Agreement.”) (US-66).



production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. During the first year after the entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which the provisions of paragraph 1(b) shall apply. 3. The Council may, acting unanimously on a proposal from the Commission, make changes in this list.

ARTICLE 224 [now TFEU Article 347]

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.

ARTICLE 225 [now TFEU Article 348]

If measures taken in the circumstances referred to in Articles 223 and 224 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in this Treaty. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling *in camera*.<sup>136</sup>

125. With the terms of these provisions, the drafters of the Treaty of Rome—writing just 10 years after the GATT 1947—approached security matters differently from the drafters of the GATT 1947. Article 223 of the Treaty of Rome—similar to Article XXI(b)—refers to “measures as it [a Member State] considers necessary for the protection of the essential interests of its security.” Slightly different language appears in Article 224 of the Treaty of Rome, however, which refers to “measures which a Member State may be called upon to take” and requires Member States to “consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected” in the circumstances described in that article.<sup>137</sup>

---

<sup>136</sup> Treaty of Rome, Articles 223-225 (US-67)

<sup>137</sup> Treaty of Rome, Article 224 (US-67).

126. Notably, the Treaty of Rome drafters included *additional* language in Article 225 which would explicitly subject such measures to review in certain circumstances. Specifically, Article 225 imposes Commission review of “measures taken in the circumstances referred to in Articles 223 and 224” when such measures have “the effect of distorting the conditions of competition in the common market.” Article 225 further describes the manner in which this review shall occur, and states that “the Commission shall, together with the state concerned, examine how these measures can be adjusted to the rules laid down in this treaty.” Article 225 further permits involvement by the European Court of Justice, and states that “the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling *in camera*.”

127. Thus, in Article 225, the Treaty of Rome drafters provided specific instructions that permit review of action that a Member State “considers necessary” in certain circumstances. Their decision to add a specific provision permitting review—and specifying the manner in which this review should occur—indicates that they felt additional language was necessary to ensure that actions taken pursuant to Article 223 and Article 224 would be subject to review. Put differently, the Treaty of Rome drafters apparently concluded that the reference in Article 223 to “measures as it [a Member State] considers necessary”, by itself, was not necessarily subject to review.

128. Furthermore, the Treaty of Rome refers to measures taken “in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war [or] serious international tension constituting a threat of war.”<sup>138</sup> This language is significantly different from the reference in Article XXI(b)(iii) to “in time of war or other emergency in international relations.” Specifically, the Treaty of Rome only permits action if the “serious international tension” in question “constitut[es] a threat of war,” while the GATT 1947 (and the GATT 1994) Article XX(b)(iii) permits a Member to take action it considers necessary for the protection of its essential security interests in time of an “other emergency in international relations”—without requiring that this “other emergency” constitute a threat of war. In addition, the Treaty of Rome refers to “the event of” certain situations, while the GATT 1994 simply refers to “time of war or other emergency in international relations.”

*Agreement on the European Economic Area*

129. Another approach to security exceptions can be seen in the EEA Agreement, which was established in 1992 and which has been ratified by the EU Member States, Norway, Iceland, and Liechtenstein. The security exception in that agreement provides:

Article 123

Nothing in this Agreement shall prevent a Contracting Party from taking any measures:

---

<sup>138</sup> Treaty of Rome, Article 224 (US-67).

- (a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests;
- (b) which relate to the production of, or trade in, arms, munitions and war materials or other products indispensable for defence purposes or to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes;
- (c) 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.<sup>139</sup>

130. Similar to the Treaty of Rome, this provision of the EEA Agreement refers to “serious internal disturbances affecting the maintenance of law and order” and “war or serious international tension constituting threat of war”, rather than using the language of Article XXI(b)(iii), “war or other emergency in international relations.” Thus, like the Treaty of Rome—but unlike the GATT 1994—the EEA Agreement permits action only if the “serious international tension” in question “constitut[es] a threat of war,” while the GATT 1947 (and the GATT 1994) Article XX(b)(iii) permits a Member to take action it considers necessary for the protection of its essential security interests in time of an “other emergency in international relations” – without requiring that this “other emergency” constitute a threat of war.

131. The EEA Agreement also refers to measures “which [a party] considers essential to its own security”, as opposed to the GATT 1994’s reference to action that a Member “considers necessary for the protection of its essential security interests.” Notable here is the EEA Agreement’s use of the word “essential” rather than “necessary”, and the EEA Agreements reference to “measures” which a party considers “essential to its own security”, as opposed to as “action” that a Member “considers necessary for the protection of its essential security interests.”

132. Neither Article XXI(b) of the GATT 1994—nor the analogous security exceptions in GATS or TRIPS, nor the DSU—reflects the approaches taken in the Treaty of Rome or the EEA Agreement. None of these agreements include a provision along the lines of Article 225 of the Treaty of Rome that would explicitly provide for review of measures that a Member “considers necessary”, set out the circumstances in which this review could occur, and the manner in which review should take place. None of these agreements—particularly the DSU—contains a provision stating that any body “shall” examine a Member’s national security measures. Had the Uruguay Round drafters intended to make actions taken under Article XXI(b) reviewable in some manner, they could have adopted this language of the Treaty of Rome.

---

<sup>139</sup> Agreement on the European Economic Area, Art. 123 (US-68).

133. Furthermore, none of these agreements limits a Member’s action to action “in the event of war [or] serious international tension constituting a threat of war,” as stated in the Treaty of Rome or “in time of war or serious international tension constituting threat of war” as stated in the EEA Agreement. Nor did the Uruguay Round drafters incorporate into Article XXI any reference to “the maintenance of law and order” despite the existence of such language in both the Treaty of Rome and the EEA Agreement. Had the Uruguay Round drafters intended to limit the scope of the reference to “other emergency in international relations” to “events” that constitute a “threat of war” or refer to “the maintenance of law and order”, they could have done so by adopting this language of the Treaty of Rome and the EEA Agreement. These decisions by the drafters should be given effect.

134. In sum, the existence of alternative approaches to security exceptions makes the decisions of the Uruguay Round negotiators even more striking. With knowledge of these alternative approaches to security exceptions, Uruguay Round negotiators not only *rejected* proposals to change the terms of Article XXI, but they also incorporated into the GATS and TRIPS security exceptions language identical to Article XXI and declined to include in the DSU text that would require a change to the longstanding approach to Article XXI as self-judging. In other words, Uruguay Round negotiators were aware of the possibility that essential security actions *could* be subject to review—and they chose not to incorporate into the text modifications or additional language providing for such review.

135. Among the errors of in the analysis of the panel in *Russia – Traffic in Transit* (discussed further below) was that it interpreted Article XXI(b)(iii) on the basis of text found in other treaties, even though that text is *not* reflected in the GATT 1994. That panel suggested, “[a]n emergency in international relations” within the meaning of Article XXI(b)(iii) “appear[s] to refer generally to a situation of armed conflict, or latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”<sup>140</sup> In reaching its erroneous interpretation of the phrase “other emergency in international relations” in Article XXI(b)(iii), the *Russia – Traffic in Transit* panel relied on a provision in the Covenant of the League of Nations that refers to “[a]ny war or threat of war,” terms are significantly different from those in Article XXI(b)(iii) —but terms that appear in both the Treaty of Rome and the EEA Agreement.<sup>141</sup> Thus, the *Russia – Traffic in Transit* panel appears to have deliberately inserted a meaning drawn from other treaties with different essential security text in place of the actual text used in Article XXI. This Panel should not repeat such an error, particularly in light of the numerous decisions by Uruguay Round negotiators that indicate they did not intend to diverge from the longstanding interpretation of Article XXI.

***b. Internal documents of the U.S. delegation also confirm that Article XXI(b) is self-judging.***

136. In its analysis of the negotiating history of Article XXI(b), the *Russia – Traffic in Transit* panel referred at length to internal documents of the U.S. delegation to the GATT

---

<sup>140</sup> *Russia – Traffic in Transit*, para. 7.76.

<sup>141</sup> *Russia – Traffic in Transit*, para. 7.76 & note 153.

negotiations.<sup>142</sup> Specifically, in addition to considering published documents associated with the negotiating history of Article XXI(b), that panel considered a study that discusses internal documents of the U.S. delegation.<sup>143</sup> In particular, the panel report recounts at some length this study’s discussion of an internal U.S. delegation meeting of July 4, 1947.<sup>144</sup> The panel used these documents as negotiating history to confirmed the panel’s interpretation that it had the authority to review a Member’s invocation of its essential security interests<sup>145</sup>

137. The Panel in *Russia – Traffic in Transit* erred in relying on such material because it is not “negotiating history” within the meaning of the Vienna Convention. It is concerning that the panel would commit such an elementary error in interpretive approach.

138. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging.

- i. The Russia – Traffic in Transit panel erred in considering materials internal to the U.S. government as supplementary means of interpretation.*

139. As explained above, to be considered part of the *travaux préparatoires* for a treaty, materials should be in the public domain, or at least “in the hands of all the parties,” so that States which have not participated in the drafting of the text may consult them.<sup>146</sup> The internal U.S. government documents relied upon by the *Russia – Traffic in Transit* panel, however, were confidential, internal memoranda of the United States delegation to the ITO charter negotiations.

140. These materials were neither introduced into the negotiation process nor officially published. Accordingly, these documents were not in the public domain at the time of the negotiations, nor were they available to all the parties to the GATT 1947. In fact, these documents were considered “confidential” or “secret” at the time, meaning that access to them

---

<sup>142</sup> *Russia – Traffic in Transit*, paras. 7.89—7.91.

<sup>143</sup> *Russia – Traffic in Transit*, paras. 7.89—7.91. We note that none of the documents to which this study referred were themselves on the panel record in the *Russia – Traffic in Transit* dispute.

<sup>144</sup> *Russia – Traffic in Transit*, footnotes 169 to 174.

<sup>145</sup> *Russia – Traffic in Transit*, paras. 7.89—7.100.

<sup>146</sup> See *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 223 (US-12) (noting that the Commission did not define *travaux préparatoires* and suggesting that unpublished *travaux préparatoires* could be relevant to the interpretation of bilateral treaties because such documents “will usually be in the hands of the all the parties”); Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edition (1984), at 144 (US-20) (“The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them.”); *EC – IT Products*, paras. 7.573-7.581 (declining to consider as *travaux préparatoires* documentation which was only reviewed by a subset of participants in treaty negotiations and were not circulated prior to the dispute).

was restricted even within the U.S. government.<sup>147</sup> The *Russia – Traffic in Transit* panel erred in considering these internal U.S. government materials as supplementary means of interpretation of Article XXI.

141. In fact, the *Russia – Traffic in Transit* panel’s misguided approach is a radical departure from the approach of other WTO panels and the Appellate Body in considering preparatory work under Article 32 of the Vienna Convention. For example, the *EC – IT Products* panel emphasized that, to be relevant for consideration under Article 32 of the Vienna Convention, documents from individual members should be officially published and publicly available, so that all relevant parties, not just those which participated in the original negotiations, can access those materials and use them to interpret their obligations.<sup>148</sup> In *EC – Chicken Cuts*, the Appellate Body similarly relied on a document’s official publication and public availability when determining whether to consider it as circumstances of a treaty’s conclusion under Article 32 of the Vienna Convention.<sup>149</sup>

142. Indeed, even when considering supplementary means of interpretation that are not part of the preparatory work of the treaty, WTO panels have emphasized that these materials they are considering are available to the relevant parties before and during the negotiations.<sup>150</sup> Other international tribunals have similarly focused on the availability of materials when considering whether they are appropriate supplementary means of interpretation under Article 32 of the Vienna Convention.<sup>151</sup>

---

<sup>147</sup> See “confidential” and “secret” markings on U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947 (US-69) & 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).

<sup>148</sup> *EC – IT Products*, paras. 7.156-7.157.

<sup>149</sup> *EC – Chicken Cuts (AB)*, paras. 282–309.

<sup>150</sup> *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.”).

<sup>151</sup> *Young Loan Arbitration*, (UK, US, France, Belgium and Switzerland v. Federal Republic of Germany), Arbitral Award of 16 May 1980, ILR 59 (1980), para. 34 (“A further prerequisite if material is to be considered as a component of travaux préparatoires is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.”) (US-71); Permanent Court of Arbitration, *Iron Rhine (‘Ijzeren Rhin’) Railway Arbitration (Belgium v Netherlands)*, 27 RIAA 35, (2005), para. 48 (“Although the Parties have provided it with extracts from the prolonged diplomatic negotiations leading up to the conclusion of the 1839 Treaty of Separation, these do not, in the view of the Tribunal,

143. Not only is there no need to consider the confidential, internal documents of one delegation to a negotiation, but it would be legal error to consider such documents as negotiating history constituting supplementary means of interpretation.

- ii. *When viewed in context, internal U.S. government documents confirm that Article XXI(b) is self-judging and that nullification or impairment claims are the appropriate recourse.*

144. As explained, it would be legal error to consider as negotiating history the internal documents of one delegation to a negotiation. Moreover, even putting aside the panel’s error in considering these documents as part of its interpretative analysis, the *Russia – Traffic in Transit* panel also erred in concluding, based on its limited review of an article discussing U.S. internal documents, that U.S. negotiators believed internally that “the risk of abuse [of a security exception] by some countries outweighed concerns regarding the scope of action left to the United States by the Charter,”<sup>152</sup> and that “the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision.”<sup>153</sup> Importantly, the panel in its limited review of a secondary source failed to recognize that the version of the text to which these internal documents relate was *not* the final version found in the GATT 1994. In fact, the draft provision was amended soon after the internal discussions to which the panel refers, and the later-revised text, by proposal of the United States, clarified further the self-judging nature of this exception.

145. Therefore, contrary to the views expressed by the panel in *Russia – Traffic in Transit*, these U.S. internal documents—when viewed as a whole and in context—further confirm that Article XXI(b) was understood by the majority of the U.S. delegation to be self-judging as then currently drafted, both as to whether certain action was “necessary” and as to the appropriate relationship between the action and other elements of the provision. These internal U.S. government materials also demonstrate that U.S. negotiators and other ITO negotiating parties sought to exclude essential security and other political matters from scrutiny in international fora focused on trade.

146. For completeness, the United States notes that in June 1946 internal deliberations, before the United States presented a draft ITO charter to negotiating partners, some U.S. government stakeholders recognized potential tension between ITO obligations and the ability to act unilaterally to protect national security. During internal U.S. government discussions at that time, U.S. military stakeholders sought an exception to ITO obligations that would permit the

---

have the character of travaux préparatoires on which it may safely rely as a supplementary means of interpretation under Article 32 of the Vienna Convention. These extracts may show the desire or understanding of one or other of the Parties at particular moments in the extended negotiations, but do not serve the purpose off illuminating a common understanding as to the meaning of the various provisions of Article XII.”) (US-72).

<sup>152</sup> *Russia – Traffic in Transit*, para. 7.90.

<sup>153</sup> *Russia – Traffic in Transit*, para. 7.91.

United States “unilaterally” to take measures “which they feel might be helpful to security.”<sup>154</sup> This exception, military stakeholders suggested, should apply “without regard to whether or not there was an imminent threat of war.”<sup>155</sup>

147. Other U.S. government stakeholders suggested in these early, internal discussions that such a broad exception—in which military security interests would “override all considerations of economic and social wellbeing”—was inconsistent with “established foreign policy” and the United Nations Charter.<sup>156</sup>

148. To satisfy these competing views, the U.S. delegation initially devised a “procedural solution.”<sup>157</sup> Specifically, in a July 1946 internal U.S. government memorandum, a State Department representative suggested reconciling differing interests of U.S. military and other government stakeholders by “assigning some body, presumably international . . . the task of granting exceptions to the Charter provisions on the grounds of national defense.”<sup>158</sup> The State Department suggested that the ITO Executive Board could make such decisions in the first instance, with the possibility of appeal to the United Nations Security Council.<sup>159</sup>

149. A version of this procedural solution was included in the draft ITO Charter that the United States presented to its counterparts in September 1946. As noted above at paragraph 58, September 1946 draft ITO charter included a single exceptions provision that covered public health, essential security, and other measures.<sup>160</sup> At that time, the ITO Conference—made up of

---

<sup>154</sup> U.S. Delegation (Internal) Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946) (US-73).

<sup>155</sup> U.S. Delegation (Internal) Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946) (US-73).

<sup>156</sup> U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946) (US-74).

<sup>157</sup> U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-75).

<sup>158</sup> U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-75).

<sup>159</sup> U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-75).

<sup>160</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter IV General Commercial Policy, Section I, General Exceptions, Article 32, General Exceptions to Chapter IV, at 60 (“Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures . . . (c) relating to fissionable materials; (d) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests



representatives of ITO Members—was charged with interpreting the Charter.<sup>161</sup> ITO members could seek review by the International Court of Justice (ICJ), however, of “[a]ny justiciable issue” arising out of a decision of the Conference with respect to essential security and other national security-related exceptions.<sup>162</sup>

150. The United States asserted that the then-existing essential security exception “afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests in time of war or other national emergency.”<sup>163</sup> Other negotiating parties also did not question “[t]he absolute right of appeal to the International Court of Justice in security matters, as set out in the United States Draft Charter.”<sup>164</sup>

151. In 1947, the draft ITO Charter was revised (1) to limit the ICJ’s role to issuing advisory opinions, (2) to separate national security exceptions from general commercial exceptions, and (3) to make national security exceptions both explicitly self-judging and applicable to the entire Charter. Changes to the ICJ’s role in the ITO arose out of suggestions that it would be improper for the ICJ to review decisions by the ITO Conference,<sup>165</sup> and that “[t]he distinction between ‘justiciable’ and other issues”—in the dispute settlement provisions relating to essential security matters—was “untenable and unworkable.”<sup>166</sup> Accordingly, in the September 1947 revised draft charter, the Executive Board or the Conference of the ITO were permitted to investigate and make recommendations regarding the resolution of alleged violations of the Charter, and these bodies were permitted to request advisory opinions from the ICJ on “legal questions arising

---

of a Member; (k) undertaken in pursuance of obligations under the United Nations Charter for the maintenance or restoration of international peace and security.”) (US-21).

<sup>161</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter VII Organization, Section C, The Conference, Article 52 & 53, at 64 (stating that the Conference shall consist of the representatives of the Members of the ITO, each Member shall have one representative, and each Member shall have one vote in the Conference) (US-21).

<sup>162</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter VII, Organization, Section G, Miscellaneous Provisions, Article 76. Interpretation and Settlement of Legal Questions, at 67 (“Any justiciable issue arising out of ruling of the Conference with respect to the interpretation of subparagraphs (c), (d), (e) or (k) of Article 32 or of Paragraph 2 of Article 49 may be submitted by any Party to the dispute to the International Court of Justice, and any justiciable issue arising out of any other ruling of the Conference may, if the Conference consents, be submitted by any Party to the dispute to the International Court of Justice.”) (US-21).

<sup>163</sup> Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11 (US-22).

<sup>164</sup> Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - London Draft - E/PC/T/33 October 31, 1946, at 26 (US-21).

<sup>165</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-23).

<sup>166</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-23).

within the scope of the activities of the Organization.”<sup>167</sup> The opinions of the ICJ on questions referred to it was binding upon the ITO.<sup>168</sup>

152. In addition, as discussed above at in Section III.A.2.a.i, the draft ITO charter’s national security exceptions were separated from the general commercial exceptions moved to the end of the ITO Charter, where they would be applicable to the entire Charter.<sup>169</sup> The United States also suggested new text for the essential security exception, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests, or to prevent any Member from taking any action *which it may consider to be necessary* to such interests:

- a) Relating to fissionable materials or their source materials;
- b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations, relating to the protection of its essential security interests;
- d) Undertaken in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security.<sup>170</sup>

153. In internal discussions of this text, some U.S. government stakeholders sought to make the self-judging nature of the national security exception even more explicit. These are the internal debates upon which the panel in *Russia – Traffic in Transit* relies so heavily. Specifically, a U.S. military representative suggested revising the essential security exception to

---

<sup>167</sup> Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947), articles 89—91, at 53—54 (US-43).

<sup>168</sup> Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947), article 91, at 53—54 (US-43).

<sup>169</sup> The United States initially suggested moving the essential security exception to the end of the draft charter in May 1947, and stated that this move “would make these items general exceptions to the entire Charter.” Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - E/PC/T/W/23 May 6, 1947, at 5 (US-24). Thereafter, the United States proposed the addition of a new chapter, entitled “Miscellaneous” at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole—including the essential security provision—be included in this new chapter. Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236 (July 4, 1947), at 1, 12—14 (US-25).

<sup>170</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947) (emphasis added) (US-25).

state that “none of the obligations of this Charter shall apply to any measure or agreement” relating to the enumerated categories.<sup>171</sup> The same representative suggested an explicit statement in the essential security exception that Charter provisions on the interpretation and settlement of disputes “shall not apply” to essential security measures, and that “each Member shall have independent power of interpretation” over such measures.<sup>172</sup> In a separate proposal, the same representative suggested that the chapeau of paragraph 2 of the essential security exception should provide that, nothing in the charter shall be construed to prevent the adoption or enforcement of any measure which it may “consider to be necessary and to relate to” the enumerated categories.<sup>173</sup>

154. The majority of the U.S. delegation declined to adopt these suggestions, describing this additional language as “unnecessary” and observing that the then-existing text permitted “ample latitude to meet any contingency that might arise.”<sup>174</sup> Thus, contrary to the *Russia – Traffic in Transit* panel’s interpretation, the U.S. rejection of these internal suggestions was *not* based on a U.S. view that “the risk of abuse by some countries outweighed concerns regarding the scope of action left to the United States by the Charter.”<sup>175</sup> Instead, these suggestions were rejected as unnecessary, as the majority of the U.S. delegation felt that the then-existing text adequately preserved U.S. freedom of action.

155. This rationale for rejecting the internally-proposed changes to the essential security provision is further confirmed in a July 1947 memorandum responding to these proposals. In this memorandum, a State Department representative noted that the existing text of the essential security exceptions provision “gives a great deal of leeway for unilateral determination on

---

<sup>171</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947 (US-69).

<sup>172</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947 (US-69).

<sup>173</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 4, 1947, at 2 (US-76).

<sup>174</sup> U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947, at 5 (US-69).

<sup>175</sup> *Russia – Traffic in Transit*, paras. 7.90–7.91.

matters affecting security.”<sup>176</sup> With respect to “[t]he question of the power to interpret the security exception,” this memorandum reasons that:

I agree that there is some difference between the present wording and the wording, as proposed by Mr. Neff [a U.S. military representative], which would make the sentence in question read “. . . . from taking any action which it may consider to relate to:

a) Fissionable materials . . . “ etc. (underlining supplied)

As correctly pointed out by Mr. Neff, his suggested change would make it perfectly clear that any Member had the unilateral power to decide that any action which it proposed to take did relate to the matters contained in the lettered paragraphs. This would make unchallengeable by the Organization or any other Member a justification, however far-fetched, of any action on this basis. To the extent that the wording approved by the Delegation does not permit this completely open escape from the Charter, it may be said, as Mr. Neff argues, to limit the scope of the unilateral interpretation portion of the security exceptions.

However, the security exceptions are as drafted sufficiently broad to take care of any reasonable case. They have been redrafted to provide for unilateral determination by each Member, unchallenged by any other Member, as to what action it deems necessary in a field “relating to” the listed subjects. Thus, no challenge can be made to any action taken by the U.S. which:

1) fall in the field of fissionable materials, etc.; no challenges can be made to any regulation which we may enact regulating the use of “source materials” for fissionable materials, or the traffic in arms, ammunitions and implements of war, no matter how remote may be considered the relevance of the measures undertaken to the problem to be solved, if the measure falls in any of these fields; or

---

<sup>176</sup> 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 (US-70).

2) if the measure relates to any of these fields of interest – another phrase which grants broad power of unilateral determination.<sup>177</sup>

156. Far from conceding that the U.S. military representative’s proposal would expand the power of unilateral determination under the essential security exception, this memorandum states only that “[t]o the extent that” such broad power of unilateral interpretation was not already preserved in the text, the U.S. military representative’s suggestions would have expanded that power. Thereafter, the memorandum observes that the security exceptions had been “redrafted” to provide for “unilateral determination by each Member” as to what action that Member deemed necessary in the listed fields.<sup>178</sup>

157. In addition, the memorandum reiterates that “no challenge can be made to any action taken by” the United States which “fall[s] in the field of fissionable materials . . . or the traffic in arms . . . no matter how remote may be considered the relevance of the measures undertaken to the problem to be solved, if the measure falls in any of these fields.”<sup>179</sup> Accordingly, the U.S. delegation viewed the then-current text of the essential security exception as already permitting each Member to determine, for itself, what actions are necessary to protect its essential security interests in the listed fields. This memorandum makes clear that it was on this basis – that the existing text was already sufficient to establish the self-judging nature of the exception – that the U.S. military representative’s proposals were rejected.

158. Consistent with this understanding of the U.S. delegation’s views, this July 1947 memorandum concluded by recognizing 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.”<sup>180</sup> Thus, the U.S. delegation did not take the position “that the scope of the unilateral action

---

<sup>177</sup> 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 (US-70).

<sup>178</sup> 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 (US-70).

<sup>179</sup> 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 (US-70).

<sup>180</sup> 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).

accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision,” as the panel in *Russia – Traffic in Transit* concluded.<sup>181</sup> To the contrary, this July 1947 memorandum specifically states that, under the then-existing text of the essential security provision, the United States could justify such security measures “as it may contemplate as ‘relating to’” the listed subjects.

159. In fact, the United States proposed a subsequent revision of the text, in which the original language was changed from “action which it may consider necessary” to the more strongly self-judging formulation—also the current GATT formulation—“action which it considers necessary for the protection of its essential security interests.”<sup>182</sup> In addition, the reference to a Member’s action “relating to the protection of its essential security interests” was removed from the third subparagraph of the exception, such that action taken “[i]n time of war or other emergency in international relations” was presumed to implicate the Member’s essential security interests.<sup>183</sup> With these changes, the essential security provision was included as a separate article, in a new final chapter in the September 1947 draft of the ITO Charter.<sup>184</sup>

160. Consistent with the views of the majority of the U.S. delegation, discussions among the ITO negotiating parties in January 1948 confirm that their prevailing view as well was that a party’s consideration of its essential security interests could not be questioned, and that measures taken for purposes of essential security were not subject to challenge before the ITO. As

---

<sup>181</sup> *Russia – Traffic in Transit*, para. 7.91.

<sup>182</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25–26 (US-26). *See also* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (retaining “it considers” language at ITO draft charter provision on essential security) (US-27). The GATT Article XX text proposed in March 1947 was likewise revised in August 1947 to reflect the current operative language of GATT Article XXI(b). *See* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947), at 47 (US-28).

<sup>183</sup> *Compare* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25–26 (US-26) (stating that “[n]othing in this Charter shall be construed . . . to prevent any Member from taking any action which it may consider to be necessary to such interests: . . . (c) In time of war or other emergency in international relations, relating to the protection of its essential security interests.”) *with* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (stating that “[n]othing in this Charter shall be construed . . . to prevent any member from taking 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”) (US-27).

<sup>184</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Commission A, E/PC/T/A/SR/33 July 24, 1947 (US-30); Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter - E/PC/T/A/SR/186 September 10, 1947, article 94, at 56 (providing at article 94, paragraph (b) that “[n]othing in this Charter shall be construed . . . to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests” relating to particular enumerated categories) (US-43).

discussed above at paragraphs 72 to 78, members of numerous delegations expressed the view during this time that measures a member considered necessary to protect its essential security interests could not be challenged as violations of ITO obligations. Instead, members affected by such essential security measures could resort to non-violation nullification or impairment procedures.

161. Accordingly, the *Russia – Traffic in Transit* panel was incorrect not only in considering the internal deliberations of the U.S. delegation in its review of the negotiating history of the ITO charter, as these documents do not form part of the *travaux préparatoires*, but also in concluding that these documents supported its interpretation that the essential security exception is subject to review by a WTO panel. To the contrary, when viewed in their proper context, these internal U.S. government deliberations confirm that Article XXI(b) of the GATT 1994 is self-judging, and that trade organizations were not the intended fora to resolve such political matters.

### **3. VCLT Article 33 Application: Reconciliation of the English, Spanish and French versions of Article XXI(b) does not alter the self-judging nature of the provision.**

162. As discussed in section III.A.1-2, the ordinary meaning of the English text of Article XXI(b) establishes that the provision is self-judging. As noted, however, the interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions is not fully supported by the Spanish text of the subparagraphs. Specifically, the Spanish text of the three subparagraphs – in particular, use of the feminine plural “relativas” – indicates that they must be read to modify the term “action” in the chapeau of Article XXI(b), whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term “interests” in the chapeau while the temporal limitation in subparagraph (iii) relates to “action”. Thus, as discussed further below, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, must be adopted under Article 33 of the VCLT.

163. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms “any action which it considers” in the chapeau, because this reading is consistent with the Spanish text, and also—while less in line with rules of grammar and conventions—permitted by the English and French texts. 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. All of the elements in the text, including each subparagraph ending, are part of a single relative clause beginning with “which it considers necessary” and ending at the end of each subparagraph ending, and are left to the determination of the Member. As explained above, Article XXI(b) is fundamentally about a Member taking an action “which it considers necessary,” and this reading of Article XXI(b) is the only grammatically correct reading of the English text. Idiosyncrasies in the Spanish text of Article XXI(b), compared to the English and French texts of Article XXI, as well as the Spanish texts of security exceptions in the GATS and TRIPS Agreement, do not warrant a different interpretation.

164. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented in Section III.A.1.a committing the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

***a. Idiosyncrasies in the Spanish text do not warrant interpreting the English text of Article XXI(b) in a manner inconsistent with the ordinary meaning of the text***

165. The GATT 1994 is equally authentic in English, French, and Spanish.<sup>185</sup> The chart below shows the text of Article XXI(b) in all three languages. An examination of the Spanish text of Article XXI against the English and French texts of Article XXI demonstrates that the Spanish text diverges from these other two versions in many respects, including the inclusion of “relativas” preceded by a comma in the main text and confusing addition of “a las” in subparagraph (iii). In addition, the word “relativas” appears in a feminine plural construction. Therefore, 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.

	<b>English</b>	<b>French</b>	<b>Spanish</b>
<b>GATT 1994 Art. XXI(b)</b>	<p>Nothing in this Agreement shall be construed</p> <p>...</p> <p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such</p>	<p>Aucune disposition du présent Accord ne sera interprétée</p> <p>...</p> <p>b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>(i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout</p>	<p>No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:</p> <p>...</p> <p>b) 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:</p> <p>i) a las materias fisionables o a aquellas que sirvan para su fabricación;</p>

<sup>185</sup> An Explanatory Note to the GATT 1994 provides that “[t]he text of GATT 1994 shall be authentic in English, French and Spanish.” In contrast, the text of Parts I through III of the GATT 1947 was authentic only in English and French, while Part IV was authentic in English, French, and Spanish. Although Spanish translations of Parts I through III were prepared, they had no formal legal status. WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-77). Some negotiators sought to establish an authentic Spanish text of Parts I through III of the GATT 1957 during the Uruguay Round; around the same time, negotiators raised concerns about lack of concordance between the English, French, and Spanish texts, among other issues. *Id.* The negotiators agreed to conform the French and Spanish texts of the GATT 1947 to the linguistic usage reflected in the English language text and in the Uruguay Round Agreements. *Id.* The Secretariat Translation and Documentation Division proposed corrections to the French and Spanish texts of Parts I through III of the GATT 1947, and they were incorporated in the French and Spanish texts of the GATT 1994 published by the Secretariat. *Id.* The Spanish text of Article XXI(b) has remained almost identical since it first appeared as an informal translation in 1955 in Instrumentos Básicos y Documentos Diversos (IBDD) volume 1, with the only change the correction made during the Uruguay Round replacing “desintegrables” with “fissionables”. IBDD, Vol. I (revised) 48-49 (1955) (US-78); IBDD, Vol. III, 48049 (1958) (US-79); Decision of the Trade Negotiations Committee on “Corrections to be Introduced in the General Agreement on Tariffs and Trade” MTN.TNC/41 (Mar. 20, 1994), Annexure (US-80).



	English	French	Spanish
	<p>traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>ii) 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;</p> <p>iii) <b>a las</b> aplicadas en tiempos de guerra o en caso de grave tensión internacional;</p>

166. The U.S. interpretation of Article XXI(b), presented in [section xx], is based on the English text and reflects the most natural reading of its terms and grammatical structure.

167. The text and structure of the French version of Article XXI(b) is 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 “appliqués en temps”, which refers back to the word “mesures”.

168. The Spanish text is structurally different from both the English and French texts of Article XXI(b). These differences do not themselves permit a coherent reading of Article XXI, and the existence of a comma and “relativas” in the chapeau must therefore be understood in the context of the English and French versions to produce the best understanding of these texts.

169. First, while the chapeau of Article XXI(b) ends with the term “of its essential security interests” in the English text and “des intérêts essentiels de sa sécurité” in the French text, the chapeau in the Spanish text ends with “de los intereses esenciales de su seguridad, **relativas**”. The chapeau of the Spanish text therefore includes “relativas” preceded by a comma, when neither the corresponding word nor the comma appears in the chapeau in the English and French texts.<sup>186</sup> Instead, “relating to” and “se rapportant” appear in the subparagraph endings (i) and (ii) of the English and French texts, respectively.

170. In addition, perhaps to account for the inclusion of “relativas” in Article XXI(b)(iii), the phrase “**a las**” appears before “aplicadas.” The Spanish text of Article XXI(b)(iii) therefore reads as if the action (“medidas”) referred to in the chapeau must relate to (“relativas a”) *another* set of measures (“las [medidas] aplicadas”), those that are applied in the temporal circumstance

---

<sup>186</sup> The Spanish word “relativas” is a feminine plural of a phrasal verb “relativo”. Typically, it is used in conjunction with “a”—“relativo a”—to mean “relating to something.” *The Oxford Spanish Dictionary*, 2<sup>nd</sup> edn (revised), (Oxford University Press, 2001), at 637 (US-81).

set forth in subparagraph (b)(iii): “(b) 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*: ... (iii) *a las [medidas] aplicadas* en tiempos de guerra o en caso de grave tensión internacional.” This text could be translated in English as: “Nothing in this Agreement shall be construed to: prevent any contracting party from taking all measures which it considers necessary for the protection of its essential security interests, *relating to those applied* in times of war or in case of grave international tension.” This reference to another set of measures does not appear in either the English or the French texts of Article XXI(b)(iii).

171. The corresponding French provision reads: “(b) ou comme empêchant une partie contractante de prendre *toutes mesures* qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité ... (iii) *appliquées en temps* de guerre ou en cas de grave tension internationale”. This text can be translated in English as: “(b) or to prevent any contracting party from taking *all measures* which it considers necessary for the protection of its essential security interests: ... (iii) *applied in times* of war or in case of grave international tension.” There is therefore no reference to another set of measures—“relating to those”—as in the Spanish text. Rather, the French and English texts of Article XXI(b)(iii) concord.

172. An examination of the Spanish text of the essential security exception in the GATT 1994, GATS, and TRIPS confirms that the inclusion of a comma and “relativas” in the chapeau may be a translation error. The chart below shows the English, French, and Spanish texts of the essential security exception in the GATT 1994, GATS, and TRIPS. The Spanish text of Article XXI(b) of the GATT 1994 also appears to diverge from the Spanish text of the essential security exception in the GATS and TRIPS. Furthermore, it is striking that of the nine versions of the essential security exception, only one version—the Spanish text of Article XXI(b)—has a comma and a term that corresponds to “relating to” at the end of the chapeau.

	GATT 1994, Art. XXI	GATS, Art. XIVbis	TRIPS Agreement, Art. 73
EN	<p>Nothing in this Agreement shall be construed</p> <p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>Nothing in this Agreement shall be construed:</p> <p>(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:</p> <p>(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;</p> <p>(ii) relating to fissionable and fusionable materials or the materials from which they are derived;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>Nothing in this Agreement shall be construed:</p> <p>(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>

	<b>GATT 1994, Art. XXI</b>	<b>GATS, Art. XIVbis</b>	<b>TRIPS Agreement, Art. 73</b>
<b>FR</b>	<p>Aucune disposition du présent Accord ne sera interprétée</p> <p>...</p> <p>b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) <b>se rapportant</b> aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) <b>se rapportant</b> 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;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>Aucune disposition du présent accord ne sera interprétée:</p> <p>...</p> <p>b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) <b>se rapportant</b> à la fourniture de services destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>ii) <b>se rapportant</b> aux matières fissiles et fusionables ou aux matières qui servent à leur fabrication;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>Aucune disposition du présent accord ne sera interprétée:</p> <p>...</p> <p>b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) <b>se rapportant</b> aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) <b>se rapportant</b> 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;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>
<b>SP</b>	<p>No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:</p> <p>...</p> <p>b) impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad <b>relativas</b>:</p> <p>i) a las materias fisiónables o a aquellas que sirvan para su fabricación;</p> <p>ii) 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;</p> <p>iii) <b>a las</b> aplicadas en tiempos de guerra o en caso de grave tensión internacional;</p>	<p>Ninguna disposición del presente Acuerdo se interpretará en el sentido de que:</p> <p>...</p> <p>b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad:</p> <p>i) <b>relativas</b> al suministro de servicios destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</p> <p>ii) <b>relativas</b> a las materias fisiónables o fusionables o a aquellas que sirvan para su fabricación;</p> <p>iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional; o</p>	<p>Ninguna disposición del presente Acuerdo se interpretará en el sentido de que:</p> <p>...</p> <p>b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad:</p> <p>i) <b>relativas</b> a las materias fisiónables o a aquellas que sirvan para su fabricación;</p> <p>ii) <b>relativas</b> 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;</p> <p>iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional;</p>

173. As evident in the chart above, the English text of the essential security exception in the GATT 1994, GATS, and TRIPS are largely consistent. Other than the replacement of “any

contracting party” with “any Member” and the addition of a colon in the GATS and a semicolon in the TRIPS, the chapeau of the exception in the GATT 1994, GATS, and TRIPS remained the same. The subparagraph endings in the GATT 1994 and TRIPS are identical. The subparagraph endings in GATS largely remained the same as in the GATT 1994, with some changes to reflect that GATS addresses trade in services, along with the addition of “fusionable” in subparagraph ending (ii).

174. Similarly, other than “un Membre” replacing “une partie contractante,” the chapeau in the French text of the essential security exception in GATT 1994, GATS, and TRIPS remained identical. The subparagraph endings largely remained the same: the subparagraph endings in the GATT 1994 and TRIPS are identical, and changes in the French text of the GATS essential security exception correspond to the English text of the exception in GATS.

175. Unlike the English and French texts, however, there are numerous differences in the Spanish versions of the essential security exception in the GATT 1994, GATS, and TRIPS. In the GATS and TRIPS texts, the word “relativas” is not in the chapeau and instead placed in the subparagraph endings (i) and (ii). It is therefore not part of the subparagraph ending (iii), and the phrase “a las” is also omitted from the subparagraph ending (iii). The comma that preceded “relativas” is also absent from the chapeau. As a result, both Article XIVbis(b)(iii) of GATS and Article 73(b)(iii) of TRIPS read: “Ninguna disposición del presente Acuerdo se interpretará en el sentido de que: ... (b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad: ... (iii) *aplicadas en* tiempos de guerra o en caso de grave tensión internacional.” (Emphasis added.)

176. This text can be translated in English as: “Nothing in this Agreement shall be construed to prevent: ... (b) any contracting party from taking all measures which it considers necessary for the protection of its essential security interests: ... (iii) *applied in times of war* or in case of grave international tension.” The Spanish texts of Article XIVbis(b)(iii) of GATS and Article 73(b)(iii) of TRIPS therefore do not have a reference to *another* set of measures that appears in the Spanish text of Article XXI(b), and are more consistent with the English and French texts of Article XXI(b).

177. The Spanish text of Article XIVbis(b) of GATS and Article 73(b) of TRIPS provides an immediate context for understanding the ordinary meaning of the Spanish text of the GATT 1994 Article XXI(b). Given this context, the Panel should understand the Spanish text of Article XXI(b) as written in Article XIVbis(b)(iii) of GATS and Article 73 of TRIPS. The Panel should not attach any significance to the inclusion of a comma, placement of “relativas”, and addition of the confusing “a las” in the Spanish text of the GATT Article XXI(b)(iii).

***b. Reconciling the English, Spanish and French versions of Article XXI(b) leads to an interpretation that is fundamentally the same as that presented by the United States.***

178. Article 33 of the VCLT provides that “[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language” and that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.” As discussed earlier, the

GATT 1994 is authentic in English, French, and Spanish. The three texts are therefore, in principle, equally authoritative and are presumed to have the same meaning.<sup>187</sup>

179. However, Article 33(4) recognizes that a difference in meaning may emerge from comparing two or more authentic texts and that application of the rules of treaty interpretation in Articles 31 and 32 may not remove such a difference. In such instance, Article 33(4) provides that “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”<sup>188</sup> Consistent with the VCLT, the Appellate Body has taken the view that “the treaty interpreter should seek the meaning that gives effect, simultaneously to all the terms of the treaty, as they are used in each authentic language” but to make an effort to find a meaning that best reconciles any apparent differences.<sup>189</sup>

180. As noted above, in the Spanish text of Article XXI(b), the word “relativas” appears in a feminine plural construction. Therefore, 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.

181. At the same time, consistent with the English text, both the Spanish and French terms of Article XXI(b) confirm that the word “consider” refers to the subjective opinion held by a person or, in this case, a Member. The ordinary meaning of the word “considers” as used in Article XXI(b) is “regard in a certain light or aspect; look upon as” or “think to be.”<sup>190</sup>

182. The French word “estimer” has the following English translations: (1) “to feel” or “to **consider**”; (2) “to think highly of”; (3) “to value” or “to assess”; (4) “to estimate”; and (5) “to reckon”.<sup>191</sup> The most appropriate translation is the first one, as demonstrated from the following examples: “elle a estimé indispensable/prematuré de faire” (translated “she felt it essential/too early to do”); “nécessaire de faire” (translated “to consider...it necessary to do”); and “ces

---

<sup>187</sup> An Explanatory Note to the GATT 1994 provides that “[t]he text of GATT 1994 shall be authentic in English, French and Spanish.”

<sup>188</sup> However, scholars have pointed to jurisprudence that “supports the view that account must be taken, by way of priority, of the language version or versions in which the disputed provision of the treaty was originally drafted.” Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2<sup>nd</sup> ed. (1984), at 152 (US-20).

<sup>189</sup> *US – Softwood Lumber IV (AB)*, para 59. See also *Chile – Price Band System (AB)*, para 271 (“Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term ‘ordinary customs duty’ to mean something different from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the Vienna Convention whereby ‘when a comparison of the authentic texts discloses a difference of meaning . . . , the meaning which best reconciles the texts . . . shall be adopted.’”).

<sup>190</sup> *The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-11).

<sup>191</sup> *The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007) at 331 (emphasis added) (US-82).

mesures, estime l’opposition, sont insuffisantes” (translated “the opposition considers these measures to be inadequate”).<sup>192</sup>

183. The Spanish word “estimar” has the following English translations: (1) (a) “to respect, hold” and (b) “to value”; (2) “to **consider**, deem”; and (3) “to estimate”.<sup>193</sup> The most appropriate translation for purposes of Article XXI is the second as shown from the following examples: “no estimo necesario que se tomen esas medidas” (translated “I do not consider it necessary to take those measures”) and “estimé conveniente que otra persona lo sustituyese” (translated “I considered it advisable for someone else to replace him”).<sup>194</sup>

184. The use of the Spanish term “estimar” and French term “estimer” in the Spanish and French texts confirm the ordinary meaning of the English word “consider”. Furthermore, the use of the subjunctive in Spanish (“estime”) and the future with an implied subjunctive mood in French (“estimera”) supports the view that the action taken reflects the belief of the WTO Member.

185. Here, the presumption under Article 33(3) that the terms of the treaty have the same meaning in each authentic text may be confirmed. While there is a difference in meaning that may emerge from the comparison of the English and French texts and the Spanish text of Article XXI(b)<sup>195</sup>, the English, French and the Spanish texts can be reconciled.

186. 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 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). Reconciling the three authentic texts in this manner gives effect to the ordinary meaning of the terms of Article XXI(b) and the intention of the parties that, given the extremely sensitive nature of a Member’s essential security interests, the determination as to whether to take action under Article XXI(b) would be reserved for the acting Member.

187. The object and purpose of the GATT 1994 as set out in its Preamble supports this interpretation reconciling the three texts. That Preamble provides, among other things, that the GATT 1994 set forth “reciprocal and mutually advantageous arrangements directed to the

---

<sup>192</sup> The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007) at 331 (emphasis added) (US-82).

<sup>193</sup> The *Oxford Spanish Dictionary*, 1st edn. (Oxford University Press, 1994) at 327 (emphasis added) (US-83).

<sup>194</sup> The *Oxford Spanish Dictionary*, 1st edn. (Oxford University Press, 1994) at 327 (emphasis added) (US-83).

<sup>195</sup> The word “relativas” is a feminine plural and therefore cannot modify “intereses esenciales de su seguridad” but must modify “medidas.” 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.

substantial reduction of tariffs and other barriers to trade.”<sup>196</sup> Particularly with these references to arrangements that are “mutually advantageous” and tariff reductions that are “substantial” (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI. Consistent with this language, the obligations and exceptions of the GATT 1994 are part of a single undertaking, in which it is specifically contemplated that Members will make use of exceptions, consistent with their text. The drafters of Article XXI(b) of the GATT 1947 understood the sensitive nature of a national security determination and reserved for each Member to determine what is necessary for the protection of its essential security interests and to take action accordingly.

188. Scholars have warned that “automatic and unthinking reliance on the principle of equal authenticity of texts can lead to a failure to give effect to the common intentions of the parties” and have urged tribunals to take into consideration the language in which the treaty provision was originally drafted and “the circumstances in which the various language versions of the disputed clause were drawn up.”<sup>197</sup> The interpretation offered above reconciles the Spanish text with the French and English texts of Article XXI(b) in a manner that respects the ordinary meaning of Article XXI(b), taking into account the circumstances in which the Spanish text was developed and the context in which the Spanish text of Article XXI(b) must be understood.

#### **4. WTO Members have repeatedly expressed the view that Article XXI(b) is self-judging.**

189. In Sections III.A.1-3 above, the United States has shown that: 1) The text of the GATT 1994 Article XXI(b) in its context, and in the light of the Agreement’s object and purpose, establishes that the exception is self-judging; 2) supplementary means of interpretation, in particular documents appropriately considered *travaux préparatoires*, confirm that the exception is self-judging; and 3) the English, French, and Spanish texts of Article XXI(b) can and, under Article 33 of the VCLT, must, be reconciled in way that establishes that the exception is self-judging.

190. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests. Specifically, on numerous occasions in which a contracting party has invoked its essential security interests, other contracting parties have expressed the view that Article XXI(b) is self-judging, and that the GATT is not the appropriate forum in which to resolve disputes over matters of essential security.

---

<sup>196</sup> GATT 1994, pmbl.

<sup>197</sup> Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edn (1984), at 152 (US-20).

***a. GATT Contracting Parties accepted Ghana’s invocation of Article XXI during the accession of Portugal.***

191. For example, in 1961, the contracting parties considered Portugal’s draft protocol of accession to the GATT.<sup>198</sup> In a meeting to consider this draft, Ghana reminded the contracting parties that “[h]is Government had . . . found it necessary” to impose a ban on imports from Portugal, and that their justification for this ban rested on Article XXI(b)(iii).<sup>199</sup> Further, Ghana emphasized that Article XXI is self-judging. As Ghana stated, under Article XXI, “each contracting party was the sole judge of what was necessary in its essential security interests” and there could be “no objection” regarding Ghana’s boycott of goods justified by its security interests.<sup>200</sup>

192. No contracting party at the meeting contradicted Ghana’s remarks, and the Chairman noted Ghana’s statement invoking Article XXI of the GATT.<sup>201</sup> The exchange between Ghana and the Chairman at this meeting, combined with other Members’ acceptance of Ghana’s invocation of Article XXI, indicates the parties viewed Ghana’s invocation of Article XXI as self-judging.

***b. GATT Contracting Parties accepted Egypt’s invocation of Article XXI during its accession.***

193. Similar views were expressed in 1970, during Egypt’s accession to the GATT. At this time, concerns were raised regarding the Arab League boycott against Israel and the secondary boycott against firms having relations with Israel.<sup>202</sup> In response to these concerns, the representative of Egypt observed that “[t]he state of war which had long prevailed in [the Middle East] area necessitated the resorting to this system.”<sup>203</sup> The representative of Egypt stated further that his country did not wish to discuss the matter within the GATT “[i]n view of the political character of this issue.”<sup>204</sup>

---

<sup>198</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 194 (US-84).

<sup>199</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196 (US-84).

<sup>200</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196 (US-84).

<sup>201</sup> Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961), at 196 (US-84).

<sup>202</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), paras. 18-20 (US-85).

<sup>203</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), para. 22 (US-85).

<sup>204</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), para. 22 (US-85).



194. Several members of the working party supported Egypt’s views that the background of the boycott measures was political and not commercial.<sup>205</sup> Such expressions of support indicate further that the GATT contracting parties (now WTO Members) viewed Article XXI as self-judging.

***c. The GATT Contracting Parties accepted the invocation of Article XXI by the EC, Canada, and Australia in their imposition of their trade restrictions affecting Argentina.***

195. In 1982, the European Communities (EC) and its member states, Canada, and Australia invoked Article XXI to justify their application of certain measures against Argentina in light of Argentina’s invasion of the Falkland Islands.<sup>206</sup> When Argentina brought the matter for discussion in the GATT,<sup>207</sup> the EC, Canada, and Australia made clear that they did not view the GATT as the appropriate forum to address the matter; instead, they expressed hope that the situation could be resolved by “appropriate negotiations elsewhere.”<sup>208</sup>

196. In a GATT Council meeting discussing the matter, the EC representative explained that the EC and its member states had taken these measures based on “their inherent rights, of which Article XXI of the General Agreement was a reflection.”<sup>209</sup> Further, the EC representative explained that the exercise of these “inherent rights” constituted a “general exception” that “required neither notification, justification nor approval.”<sup>210</sup> As the EC representative reasoned, the procedures applied by contracting parties over the previous thirty-five years “showed that every contracting party was—in the last resort—the judge of its exercise of these rights.”<sup>211</sup>

197. In the same Council discussion, the representative of Canada stated that “Canada’s sovereign action was to be seen as a political response to a political issue” and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.<sup>212</sup>

---

<sup>205</sup> Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970), para. 23 (US-85).

<sup>206</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982) (US-86); Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-87).

<sup>207</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 2 (US-86).

<sup>208</sup> Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-87).

<sup>209</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-86).

<sup>210</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-86).

<sup>211</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-86).

<sup>212</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-86).

198. Expressing the same view, the representative of Australia opined that “the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification.”<sup>213</sup>

199. Other delegations—including Hungary,<sup>214</sup> Japan,<sup>215</sup> New Zealand,<sup>216</sup> Norway,<sup>217</sup> Romania,<sup>218</sup> Singapore,<sup>219</sup> the United Kingdom,<sup>220</sup> and Zaire<sup>221</sup>—expressed similar views at this meeting, and emphasized that the GATT was not the appropriate forum to decide the matter. For its part, the United States opined that “the GATT had never been the forum for resolution of any disputes whose essence was security and not trade, and that for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or security disputes.”<sup>222</sup> The U.S. representative further stated that “GATT, by its own terms, left it to each

---

<sup>213</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 11 (US-86).

<sup>214</sup> Hungary stated that “the security considerations under Article XXI of the General Agreement were within the realm of the individual contracting parties.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-86).

<sup>215</sup> Japan cautioned against “the interjection of political elements into GATT activities,” and noted that the contracting parties’ “pragmatic and business[-]like approach” was an important contributor to the GATT’s effective and efficient functioning. Japan expressed hope that this spirit of co-operation would prevail in the GATT going forward. GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 9 (US-86).

<sup>216</sup> New Zealand—which had also imposed economic sanctions on Argentina for reasons similar to those stated by the EC, Canada, and Australia—“expressed doubts about whether the GATT was the appropriate body” for debating the issue that had led to the sanctions.” New Zealand also opined that it “had an inherent right to take such action as a sovereign State” and that New Zealand’s actions “were in conformity with New Zealand’s rights and obligations under the General Agreement.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 9 (US-86).

<sup>217</sup> Norway supported the EC and its member States, Canada, and Australia, in their invocation of Article XXI, and stated that “in taking the measures ... [they] did not act in contravention of the General Agreement.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-86).

<sup>218</sup> Although Romania noted that it did not believe trade restrictions would contribute to solving the problem at issue, it reaffirmed that these problems “should be settled by means of negotiations.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 7–8 (US-86).

<sup>219</sup> Singapore explained that “the wording of Article XXI allowed a contracting party the right to determine the need for protection of its essential security interests.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 7 (US-86).

<sup>220</sup> The United Kingdom emphasized that the measures in question “had originated from a political dispute that went beyond the competence of the GATT and which could not be resolved in the Council.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 11 (US-86).

<sup>221</sup> Zaire observed that “political matters should be dealt with in the appropriate fora” and that it was up to the countries involved “to find an acceptable solution for these problems through discussions.” GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 5 (US-86).

<sup>222</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-86).

contracting party to judge what was necessary to protect its essential security interests in time of international crisis.”<sup>223</sup>

200. Although other contracting parties, such as Argentina and Brazil, argued that the embargo was subject to GATT review, the GATT Council did not attempt to render a decision on the matter at this meeting. Instead, the Chairman emphasized that that “one particular strain of opinion running nearly throughout” the discussions was “the expression of a wish and the keen desire that the matter be settled as quickly as possible.”<sup>224</sup>

201. Similar views were expressed at the next GATT Council meeting,<sup>225</sup> and the CONTRACTING PARTIES ultimately adopted a decision concerning Article XXI in connection with these discussions.<sup>226</sup> That decision calls for contracting parties to inform each other “to the fullest extent possible” of measures taken under Article XXI and states that when such measures are taken, all contracting parties affected by such action retain their full rights under the GATT.<sup>227</sup>

202. Notably, the preamble to this decision twice acknowledges the self-judging nature of Article XXI. First, using language that mirrors the pivotal self-judging phrase of Article XXI, the text emphasizes Article XXI’s importance in safeguarding contracting parties’ rights “when they consider” that security issues are involved.<sup>228</sup> By mirroring the self-judging phrase of Article XXI in this decision, the CONTRACTING PARTIES indicated their agreement that Article XXI is self-judging.

203. Second, the preamble to this decision cautions that “the contracting parties should take into consideration” third-party interests “in taking action in terms of the exceptions provided in Article XXI.” With this phrase, the CONTRACTING PARTIES acknowledged that the decision of whether to take essential security measures, and what measures to take, is within the authority of each contracting party. Accordingly, views expressed in connection with the invocation of Article XXI by the EC, Canada, and Australia and this GATT decision provide further confirmation that Article XXI is self-judging by the acting Member, and that political disputes (which Hong Kong, China, appears to consider the present dispute is) should not be resolved before trade organizations.

---

<sup>223</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-86).

<sup>224</sup> GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 13 (US-86).

<sup>225</sup> See, e.g., GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982), at 13–22 (US-88).

<sup>226</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-52).

<sup>227</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-52).

<sup>228</sup> Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-52).

***d. Views expressed during the United States – Trade Measures Affecting Nicaragua GATT dispute indicate that Article XXI is self-judging, the GATT is not a forum for political disputes, and non-violation nullification or impairment claims are the appropriate recourse for countries affected by measures taken under Article XXI.***

204. Similar views were expressed in 1985, after the United States imposed an embargo prohibiting all imports and exports of goods and services to and from Nicaragua. At a GATT Council meeting, Nicaragua asked the Council to condemn the U.S. measures and request that the United States revoke them immediately.<sup>229</sup>

205. In response, the United States emphasized that when other countries had previously invoked Article XXI, “the United States had seen no basis for contracting parties to question, approve or disapprove the judgement of each contracting party as to what was necessary to protect its essential security interests; and the GATT had never done so.”<sup>230</sup> In this instance, the United States observed, “[i]t was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade organization, and had no competence to judge such matters.”<sup>231</sup> The United States noted further that “GATT had traditionally not become involved in political disputes because it was not the appropriate place to resolve them.”<sup>232</sup>

206. Other delegations also opined that the GATT was not the appropriate forum to discuss political matters and that Article XXI was self-judging.<sup>233</sup> Indeed, even contracting parties that

---

<sup>229</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 2 (June 28, 1985) (US-89).

<sup>230</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-89).

<sup>231</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-89).

<sup>232</sup> Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-89).

<sup>233</sup> See Minutes of Meeting of May 29, 1985, C/M/188, at 10 (June 28, 1985) (describing the statement of Sweden that “it had to be up to each country to define its essential security interests under Article XXI,” although noting that parties should be prudent in exercising their right to take essential security measures; that the U.S. had not shown the necessary prudence in this instance; and that Sweden hoped that “efforts would be undertaken elsewhere with the aim of bringing about a mutually acceptable settlement of this dispute.”); Minutes of Meeting of May 29, 1985, C/M/188, at 11 (June 28, 1985) (US-89) (“Switzerland recognized that Article XXI gave overriding weight to the judgement of the contracting parties invoking the Article.”); *id.* at 12 (June 28, 1985) (describing the statement of Canada that “this was fundamentally not a trade issue, but one which could only be resolved in a context broader than GATT.”); *id.* at 12-13 (describing the statement of Australia that “the United States was permitted under Article XXI of the General Agreement to take action of this kind with no requirement to justify such action.”); *id.* at 13 (describing the statement of the EC that the “GATT had never had the role of settling disputes essentially linked to security” and that “the General Agreement left to each contracting party the task of judging what was necessary to protect its essential security interests.”); *id.* at 13-14 (describing the statement of Norway that it hoped “efforts would be undertaken elsewhere to bring about a mutually acceptable solution of this dispute.”); *id.* at 14 (describing the statement of Iceland that “Iceland did not question the sovereign right of every contracting party to decide whether or when provisions of Article XXI should be invoked,” although it emphasized the necessity that utmost

supported Nicaragua’s position encouraged the United States and Nicaragua to resolve their differences outside the GATT.<sup>234</sup>

207. Following these discussions, a GATT panel was established, but Article XXI was left outside its terms of reference.<sup>235</sup> In its written submissions before the GATT panel, the United States continued to express the view it had taken at the GATT Council meeting, stating that “[b]ecause the U.S. embargo was taken under the Article XXI exception, the U.S. actions cannot be considered a violation of GATT obligations.”<sup>236</sup> The United States also noted, however, that non-violation claims could be available to countries affected by measures that another Member considered necessary for the protection of its essential security interests. As the United States explained, “[i]t could be argued, *as is evident in the negotiating history of Article XXI*, that a measure excepted from GATT obligations by Article XXI may nevertheless be found to cause nullification or impairment in the sense of Article XXIII:1(b) or (c).”<sup>237</sup> That panel concluded that it could not render a decision as to whether the United States was complying with its GATT obligations because the panel was not authorized to examine the U.S. invocation of Article XXI.<sup>238</sup>

208. At a subsequent Council meeting, the United States recommended adoption of the report. As the United States observed, “GATT was not a forum for examining or judging national security disputes. When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations.”<sup>239</sup>

209. The European Communities echoed that:

[I]t understood the position adopted and defended by the United States regarding the invocation of Article XXI. National security was not a matter to be publicly

---

prudence be shown in applying this article, and its hope that “efforts undertaken elsewhere” would resolve this problem in a manner satisfactory to the parties.)

<sup>234</sup> See, e.g., Minutes of Meeting of May 29, 1985, C/M/188, at 7 (June 28, 1985) (describing the statement of Brazil that “[h]is government was convinced that the road towards negotiation, especially the one being pursued through the invaluable efforts of the Contadora Group, was the only one which could lead to a durable solution.”) (US-89); Minutes of Meeting of May 29, 1985, C/M/188, at 8 (June 28, 1985) (describing the statement of Chile “appeal[ing] to the United States and Nicaragua to search for a peaceful solution to their dispute within the context of efforts being made by the Contadora Group”) (US-89).

<sup>235</sup> Minutes of Meeting of March 12, 1986, C/M/196 & C/M/196/Corr.1 (April 2, 1986), at 7 (US-90).

<sup>236</sup> Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986), at 2 (excerpt) (US-91).

<sup>237</sup> Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986), at 2 (excerpt) (US-91) (emphasis added).

<sup>238</sup> See GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, para. 5.3 (US-92).

<sup>239</sup> Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 8 (US-93).

examined or placed in doubt by the parties concerned. The United States alone had the sovereign right to determine its national security interests. Article XXI was a safety valve essential to all contracting parties, and the Community did not want it to be the subject of interpretation, discussion or negotiation either in the Council or in the new round.<sup>240</sup>

210. Although the Council could not adopt the panel’s report without consensus,<sup>241</sup> statements by the GATT contracting parties in the discussions leading up to the panel’s establishment demonstrate that invocations of Article XXI(b) were seen as self-judging and that the GATT was not intended as a forum to discuss political disputes. Views expressed by the United States in the course of the GATT dispute also indicate that non-violation nullification or impairment claims, and not claims of breach, are the appropriate recourse for parties affected by actions that another country considers necessary for the protection of its essential security interests.

***e. Post-Uruguay Round invocations of Article XXI also indicate that the provision is self-judging***

211. Members continued to invoke Article XXI following the conclusion of the Uruguay Round, and their statements and actions continued to indicate that the provision is self-judging. For example, in 1996, Switzerland in its first Trade Policy Review invoked Article XXI to justify its maintenance of minimum stocks of certain agricultural products.<sup>242</sup> The record does not indicate that this assertion was challenged or that Switzerland was asked to either provide a different justification for its actions, or change its behavior, suggesting that Members accepted Article XXI as a justification for Switzerland’s action.

212. In 2000, Nicaragua invoked Article XXI in response to a panel request from Colombia and suggested – in contrast to its prior assertions in its dispute with the United States – that Article XXI was self-judging. Colombia requested the establishment of a panel based on Nicaragua’s imposition of a tax on goods from Colombia and Honduras.<sup>243</sup> Nicaragua stated it had imposed the tax because Colombia and Honduras had ratified a maritime delimitation treaty that it believed infringed its sovereign rights.<sup>244</sup> Nicaragua invoked Article XXI(b)(iii) and the analogous GATS provision, and – though it recognized Colombia’s right to request a panel – stated that “it had been the customary practice in the WTO that the contracting party applying the measure should be the sole judge in matters that concerned its essential security interests, in

---

<sup>240</sup> Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 16 (US-93).

<sup>241</sup> Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 17 (US-93). The panel’s report was never adopted.

<sup>242</sup> Trade Policy Review Body, Trade Policy Review of Switzerland, Minutes of Meeting, May 28-29, 1996, WT/TPR/M/13 (July 3, 1996), para. 78 (US-94).

<sup>243</sup> Dispute Settlement Body, Minutes of Meeting of April 7, 2000, WT/DSB/M/78 (May 12, 2000), para. 49-50 (US-95).

<sup>244</sup> Dispute Settlement Body, Minutes of Meeting of April 7, 2000, WT/DSB/M/78 (May 12, 2000), para. 51 (US-95).

particular if such interests could be threatened by any actual or potential danger.”<sup>245</sup> Nicaragua also stated that “Article XXI constituted an exception to the provisions in the GATT with global effect that measures taken under Article XXI could, under no circumstances, constitute a violation of GATT 1994.”<sup>246</sup>

213. In a subsequent meeting (after Colombia again requested a panel), other Members emphasized that Members should be extremely cautious with regard to any measure justified under Article XXI and urged that the dispute be settled outside the WTO.<sup>247</sup> A panel was established in this manner, but apparently never composed.<sup>248</sup>

214. Accordingly, views repeatedly expressed by the GATT Contracting Parties provide further indication that Article XXI(b) is self-judging, that the GATT is not a forum to resolve political disputes, and that non-violation claims of nullification or impairment are the appropriate recourse for parties affected by essential security actions.

**B. THE *RUSSIA – TRAFFIC IN TRANSIT* PANEL ERRED IN DECIDING IT HAD AUTHORITY TO REVIEW A RESPONDING PARTY’S INVOCATION OF ARTICLE XXI.**

215. As the United States has explained above, the text of Article XXI(b), read in its context and in light of the object and purpose of the GATT 1994, establishes that the provision is self-judging. This interpretation is confirmed by supplementary means of interpretation, and reconciliation of the English, French, and Spanish texts likewise results in the same fundamental meaning. In addition, on numerous occasions in which a GATT contracting party invoked its essential security interests, other contracting parties expressed the view that Article XXI(b) is self-judging, and that the GATT is not the appropriate forum in which to resolve disputes over matters of essential security.

216. The United States is aware that the panel in *Russia – Traffic in Transit* found that it had the authority to review multiple aspects of a responding party’s invocation of Article XXI. In this section, the United States explains why the panel in *Russia – Traffic in Transit* erred in reaching that conclusion. That panel’s interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on

---

<sup>245</sup> Dispute Settlement Body, Minutes of Meeting of April 7, 2000, WT/DSB/M/78 (May 12, 2000), para. 58 (US-95).

<sup>246</sup> Dispute Settlement Body, Minutes of Meeting of April 7, 2000, WT/DSB/M/78 (May 12, 2000), para. 60 (US-95).

<sup>247</sup> Dispute Settlement Body, Minutes of Meeting of May 18, 2000, WT/DSB/M/80 (June 26, 2000), paras. 32-34 (US-96) (statements of Japan, Canada, and Honduras).

<sup>248</sup> See *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, DS188, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds188\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds188_e.htm).

“the mere meaning of the words and the grammatical construction of the provision,” but on what it termed the “logical structure of the provision.”

217. Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel’s analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

**1. That panel erred in ignoring the ordinary meaning of the terms of Article XXI, and basing its conclusion instead on the “Logical Structure” of the provision.**

218. Under Article 3.2 of the DSU, the provisions of the GATT 1994 are to be interpreted “in accordance with customary rules of interpretation of public international law.” In failing to base its interpretation on the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision in accordance with customary rules of interpretation, as reflected in Article 31 of the Vienna Convention on the Law of Treaties.

219. The panel described its initial task as:

[T]o interpret Article XXI(b)(iii) of the GATT 1994 in order to determine whether, by virtue of the language of this provision, the power to decide whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements.<sup>249</sup>

220. After reciting the text of Article XXI, the panel did not interpret this provision as the Vienna Convention requires, that is, “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.”<sup>250</sup> The panel acknowledged that the phrase “which it considers” in the chapeau “can be read to qualify... the determination of the matters described in the three subparagraphs of Article XXI(b)”, but the panel gave this plain meaning no interpretive weight. Instead, the panel drew its conclusion despite this “mere meaning of the words and the grammatical construction of the provision,” based on the “logical structure of the provision” – a structure it discussed in three sentences only, the first of which contained its conclusion, and the final two of which contained rhetorical questions only.<sup>251</sup>

221. The entirety of this analysis filled only four short paragraphs:

---

<sup>249</sup> *Russia – Traffic in Transit*, para. 7.58.

<sup>250</sup> Vienna Convention, Article 31(1).

<sup>251</sup> *Russia – Traffic in Transit*, section 7.5.3.1.1.



7.62. Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that “which [the Member] considers necessary for the protection of its essential security interests”.

7.63. The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause “which it considers”. The adjectival clause can be read to qualify only the word “necessary”, i.e. the necessity of the measures for the protection of “its essential security interests”; or to qualify also the determination of these “essential security interests”; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well.

7.64. The Panel starts by testing this last, most extensive hypothesis, i.e. whether the adjectival clause “which it considers” in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). The Panel will leave for the moment the examination of the two other interpretive hypotheses, which bear exclusively on the chapeau.

7.65. As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause “which it considers” qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances. Does it stand to reason, given their limitative function, to leave their determination exclusively to the discretion of the invoking Member? And what would be the use, or *effet utile*, and added value of these limitative qualifying clauses in the enumerated subparagraphs of Article XXI(b), under such an interpretation?<sup>252</sup>

222. As is clear from these four short paragraphs, the panel reached its conclusion without any explanation of what it considered to comprise the “logical structure” of Article XXI. Nor did the panel explain how, consistent with customary rules of interpretation, the logical structure of a provision can operate to alter the ordinary meaning of the terms in that provision. Instead, the panel simply failed to credit the ordinary meaning and grammatical construction of the terms

---

<sup>252</sup> *Russia – Traffic in Transit*, paras. 7.62—7.65.

with any interpretive value. Its rhetorical questions seem almost to second guess the drafters themselves: “But why? Why would they do this?” This is not the task of a panel, however. It is not the task of a panel to determine what *should be*, in its own view, the scope and effect of a provision.

223. Article XXI concerns issues of essential security – matters of the utmost importance to sovereign nations; that go to their very existence. With respect to such matters, the drafters – the representatives of those sovereign nations – must be respected. As the panel understood immediately, the meaning and grammatical construction of the provision “can be read” to vest in each Member the sole determination of what “*it considers necessary* for the protection of *its essential security interests*.” Had it conducted its analysis consistent with customary rules of interpretation, this is the meaning of the provision that the panel in *Russia – Traffic in Transit* would have discerned. That it did not is unfortunate, and is a mistake that this Panel must take care not to repeat.

**2. The Panel’s “Similar Logical Query” into whether the provision “is designed to be conducted objectively” similarly ignores the ordinary meaning of Article XXI.**

224. After reaching its initial conclusion—that under the logical structure of Article XXI, subparagraphs (i) to (iii) qualify and limit Members’ discretion to take essential security measures—the panel examined 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.”<sup>253</sup> In this discussion, the panel stated that it would “focus on” subparagraph (iii) and determine whether “given their nature, the evaluation of these circumstances can be left wholly to the discretion of the Member invoking the provision, or is designed to be conducted objectively, by a dispute settlement panel.”<sup>254</sup>

225. Again, the panel did not indicate the basis on which this “logical query” could lead to a correct interpretation of Article XXI. That is, the panel did not explain why it focused on whether the “subject-matter” or “nature” of subparagraph (iii) “lends itself” to subjective or objective determination.<sup>255</sup> Nor did the panel explain why it ignored the pivotal self-judging language of Article XXI—“it considers necessary”—which indicates that essential security determinations are left to the Members. The panel also left unexplained its conclusion that, despite the text of Article XXI, the result of this inquiry could reveal that the provision is “designed to be conducted objectively.”<sup>256</sup>

226. In fact, the text of Article XXI(a) undermines a premise of the panel’s query. As that provision states “[n]othing in this Agreement shall be construed . . . to require any contracting

---

<sup>253</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>254</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>255</sup> *Russia – Traffic in Transit*, para. 7.66.

<sup>256</sup> *Russia – Traffic in Transit*, para. 7.66.

party to furnish any information the disclosure of which it considers contrary to its essential security interests.” With this language, Article XXI(a) specifically provides that a Member need not provide any information—to a WTO panel or other Members—regarding essential security measures or the Member’s underlying security interests.

227. In light of the plain text of Article XXI(a), there is no basis upon which the determination under Article XXI(b) of what a Member considers necessary for the protection of *its* essential security interests could be designed to be conducted objectively “by a dispute settlement panel”. That is, a panel purporting to review an action under Article XXI may have no facts at all upon which to base its review of what it considers to be “objective” facts. This is because, by design, Article XXI(b) is not subject to review by a WTO panel. In its analysis, the panel fails to address or even acknowledge the limitation set out in Article XXI(a), or the implications that provision would have for determining whether Article XXI(b) is “amenable to objective determination” by a WTO panel.

228. Instead, like its assessment of the “logical structure” of Article XXI(b), the panel’s evaluation of whether the content of the subparagraphs is “amenable to objective determination” proceeds in a wholly conclusory manner. For example, the panel determined—solely based on prior Appellate Body decisions interpreting Article XX(g)—that the phrase “relating to” in Articles XXI(b)(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.”<sup>257</sup>

229. The panel fails to identify the textual and structural differences between the two provisions, including that it is the subparagraphs of Article XX that identify the objectives, or “ends”, of the measures in question, whereas the chapeau of Article XXI(b) already contains the permissible “end” – for the protection of its essential security interests. Subparagraphs (i) and (ii) of Article XXI(b) contain subject matter, “fissionable materials” and “traffic in arms, ammunition and implements of war.”

230. In failing to analyze the text itself, the panel erroneously conflated two very different legal provisions and thereby failed altogether to evaluate the textual relationship between the terms of the chapeau and that of the two subparagraphs. Nonetheless, and without further analysis, the panel concludes that whether a measure “relat[es] to” the situation described in Article XXI(b)(i) and (ii) is “an objective relationship,” and that this relationship is “subject to objective determination.”<sup>258</sup>

231. The panel’s analysis of Article XXI(b)(iii) is similarly insufficient. Again without analyzing the full text, the panel stated that the phrase “taken in time of” “describes the connection between the action and the events of war or other emergency in international relations in that subparagraph,”<sup>259</sup> and that it understands this phrase “to require that the action be taken

---

<sup>257</sup> *Russia – Traffic in Transit*, para. 7.69 (quoting and citing, *US – Shrimp (AB)*, para. 136; *China – Raw Materials (AB)*, para. 355; and *China – Rare Earths (AB)*, para. 5.90).

<sup>258</sup> *Russia – Traffic in Transit*, para. 7.69.

<sup>259</sup> *Russia – Traffic in Transit*, para. 7.70.

during the war or other emergency in international relations.”<sup>260</sup> The panel then pronounced that “[t]his chronological concurrence is also an objective fact, amenable to objective determination.”<sup>261</sup> In reaching this conclusion, the panel did not examine the ordinary meanings of these terms, nor did the panel examine their context, as customary rules of interpretation require.

232. Instead, in the following paragraph, the panel 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.”<sup>262</sup> 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.”<sup>263</sup>

233. Only after reaching these conclusions does the panel point to dictionary definitions of the terms “war” and “international relations,” or review the context provided by the references to “fissionable materials” and “traffic in arms, ammunition and implements of war” in Article XXI(b)(i) and (ii).<sup>264</sup> The panel does not rely on these definitions, however, but opines instead 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.”<sup>265</sup>

234. Further, the panel stated that the reference to “war” in Article XXI(b)(iii) and the matters addressed in Article XXI(b)(i) and (ii) “suggest that political or economic differences between Members are not sufficient, of themselves to constitute an emergency in international relations for purposes of subparagraph (iii).”<sup>266</sup> The panel proceeded to opine, again without citation or textual analysis, that:

Indeed, it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be ‘emergencies in international relations’ within the meaning of subparagraph (iii) unless they give rise

---

<sup>260</sup> *Russia – Traffic in Transit*, para. 7.70.

<sup>261</sup> *Russia – Traffic in Transit*, para. 7.70.

<sup>262</sup> *Russia – Traffic in Transit*, para. 7.71.

<sup>263</sup> *Russia – Traffic in Transit*, para. 7.71 (emphasis added).

<sup>264</sup> *Russia – Traffic in Transit*, paras. 7.72—7.74.

<sup>265</sup> *Russia – Traffic in Transit*, para. 7.74.

<sup>266</sup> *Russia – Traffic in Transit*, para. 7.75.

to defence and military interests, or maintenance of law and public order interests.<sup>267</sup>

235. 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 (as noted above in Section III.A.2.a.v) appears in the Treaty on the Functioning of the European Union (TFEU) and Agreement on the European Economic Area (EEA) but *not* in the GATT 1994. Based on this view, the panel concludes, again, that “the existence of an emergency in international relations is an objective state of affairs,” and therefore that determining whether a measure was taken “in time of” an “emergency in international relations” under Article XXI(b)(iii) is “an objective fact, subject to objective determination.”<sup>268</sup>

236. Given the profound implications of its interpretation, the panel’s cursory treatment of the text of Article XXI(b) is startling, and should raise serious concerns for all Members, regardless of their posture in a particular dispute. According to the panel, there cannot be an emergency in international relations if the situation does not – as “objectively” determined by a WTO panel – “give rise to defence and military interests, or maintenance and public order interests.”

237. It is difficult to imagine on what basis a WTO panel could conclude that political or economic conflicts between states “could sometimes be considered urgent or serious *in a political sense*, but will not be emergencies in international relations unless they give rise to defence and military interests, or maintenance of law and public order interests.” While the United States agrees that such interests would be implicated by some emergencies in international relations, if they were perceived to do so by the Member in question, the text contains no indication that a Member’s “essential security interests” would be so limited, nor is any identified by the panel.

238. It also is difficult to imagine how a WTO panel might make an “objective determination” of the existence of such a state of affairs unless the Member in question were to provide a panel with information regarding the details of the situation and the nature of its essential security concerns – information which, as already discussed, is not required to be provided by the Member.

239. Article XXI(b)(iii), again, reads in full as follows:

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... taken in time of war or other emergency in international relations[.]

---

<sup>267</sup> *Russia – Traffic in Transit*, para. 7.75.

<sup>268</sup> *Russia – Traffic in Transit*, para. 7.77.

240. Under the panel’s own reading, the relationship between the chapeau and subparagraph iii requires that “the action be taken *during* the war or other emergency in international relations.”<sup>269</sup> Subparagraph (iii) does not begin with the phrase “relating to” certain “interests”, as the first and second subparagraphs do. Rather, the relationship between the action and the matters identified in subparagraph iii, as the panel found, is a temporal one. Nothing in the text or structure of the text provides otherwise. Therefore, there was no basis for the panel to use the subject matter of the other two subparagraphs to find that the facially broad terms of subparagraph (iii) in fact refer to a very limited set of circumstances.

241. Subparagraphs (i) and (ii) are textually distinct from subparagraph (iii). When read together with the chapeau, they state that:

Nothing in this Agreement shall be construed... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests...

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

242. That is, based on the text of those subparagraphs, the phrase “relating to” modifies the text of the chapeau. In contrast, as already discussed, subparagraph (iii) does not contain the same language. It states that the actions covered are those “which [the Member] considers necessary for the protection of its essential security interests... taken in time of war or other emergency in international relations.” In other words, when a war or other emergency in international relations exists, a Member’s essential security interests are understood to be implicated. The Member need not consider that either its action or its interests “relate to” any particular subject matter.

243. Thus, while the drafters provided some guidance with respect to the types of security interests contemplated under subparagraphs (i) and (ii) in the absence of a war or other emergency in international relations, they chose not to do so for subparagraph (iii). The panel’s interpretation would alter that balance, and significantly curtail the scope of Article XXI, reading into subparagraph (iii) in particular a meaning not reflected in the terms of that provision.

244. Moreover, contrary to the *Russia – Traffic in Transit* panel’s statements, 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. As described above at Section III.A.1, the text of Article XXI, in context and in the light of the agreement’s object and purpose, makes clear that it

---

<sup>269</sup> *Russia – Traffic in Transit*, para. 7.70.

is for WTO Members—not a panel—to determine what essential security measures they consider necessary. The *Russia – Traffic in Transit* panel’s contrary conclusion was based on an analysis that was wholly inconsistent with the text of Article XXI, in context.

**3. That Panel erred in finding that interpreting Article XXI to be self-judging would be inconsistent with the object and purpose of the WTO Agreement.**

245. In addition, the *Russia – Traffic in Transit* panel’s decision is inconsistent with the object and purpose of the GATT 1994 and other covered agreements. As an initial matter, the panel did not, as the Vienna Convention requires, interpret the treaty “in the light of its object and purpose.”<sup>270</sup> Instead, having concluded that Article XXI(b)(iii) contained “objective” requirements, the panel examined “whether the object and purpose of the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) also supports an interpretation of Article XXI(b)(iii) which mandates an objective review of the requirements of subparagraph (iii).”<sup>271</sup> Using the object and purpose in this manner, to determine whether they “also support[]” a pre-established interpretation of treaty text, is not consistent with customary rules of interpretation.

246. Moreover, the panel’s object and purpose analysis is wholly inadequate. That analysis is contained in a single paragraph of its decision, as follows:

7.79. Previous panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade. At the same time, the GATT 1994 and the WTO Agreements provide that, in specific circumstances, Members may depart from their GATT and WTO obligations in order to protect other non-trade interests. For example, the general exceptions under Article XX of the GATT 1994 accord to Members a degree of autonomy to adopt measures that are otherwise incompatible with their WTO obligations, in order to achieve particular non-trade legitimate objectives, provided such measures are not used merely as an excuse to circumvent their GATT and WTO obligations. These concessions, like other exceptions and escape clauses built into the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements. It would be entirely contrary to the security and predictability of the multilateral

---

<sup>270</sup> Vienna Convention, Article 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

<sup>271</sup> *Russia – Traffic in Transit*, para. 7.78.

trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member’s GATT and WTO obligations to a mere expression of the unilateral will of that Member.<sup>272</sup>

247. In this analysis, the panel identifies only a general object and purpose of the GATT and WTO agreements based on statements by “[p]revious panels and the Appellate Body,” rather than referring to the agreements themselves. The panel then discusses the exceptions at Article XX—which differ substantially from the exceptions at Article XXI, as noted above at paragraphs 36 to 37—and suggests that the exceptions in both Article XX and XXI allow “a degree of flexibility” for Members’ non-trade interests.

248. In the next sentence, without offering support from the GATT or other WTO agreements, the panel concludes that “[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements” to interpret Article XXI as a “potestative condition” that “subject[ed] the existence of a Member’s GATT and WTO obligations to a mere expression of the unilateral will of that Member.”<sup>273</sup>

249. At no point does the panel grapple with the text of Article XXI, the ordinary meaning of which the panel must examine to interpret its terms. Given the nature and importance of the essential security exceptions at Article XXI—which are clearly distinguished from, for example, the interests at issue in the exceptions at Article XX—the panel’s cursory treatment of the object and purpose of the treaty is not sufficient or persuasive.

250. Moreover, contrary to the panel’s conclusion, the self-judging nature of Article XXI—and the ability of Members, as they consider necessary, to impose trade restrictions to protect essential security interests—was part of the bargain struck by the GATT Contracting Parties and WTO Members. Although trade flows could be decreased by Members’ decisions to impose essential security measures they considered necessary, this situation is specifically contemplated in the WTO agreements, and it is for WTO Members—not a WTO panel—to decide how to address such developments.

#### **4. That Panel erred in its interpretation of the negotiating history of Article XXI(b).**

251. The *Russia – Traffic in Transit* panel’s decision is also inconsistent with the negotiating history of Article XXI, as described in Section III.A.2.a above. Not only did the panel reach incorrect conclusions regarding the negotiating history of Article XXI(b), but the panel relied on materials that are not properly considered part of the negotiating history of this provision.

---

<sup>272</sup> *Russia – Traffic in Transit*, para. 7.79 (footnotes omitted).

<sup>273</sup> *Russia – Traffic in Transit*, para. 7.79.



252. The panel incorrectly concluded that the drafts struck a “balance” in which “the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the [ITO] Charter.”<sup>274</sup> In reaching this erroneous conclusion, the panel apparently misconstrued Australia’s statement at a July 1947 meeting during the negotiation of the ITO charter. As described in more detail above, at this meeting Australia sought to ensure that “a Member’s rights under Article 35(2) will not be impinged upon,” by measures that a member considered necessary for the protection of its essential security interests.<sup>275</sup>

253. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.<sup>276</sup> If the members were unable to resolve the matter, the draft permitted referral to the ITO, which could decide whether to authorize the affected member to suspend benefits under the charter.<sup>277</sup> After receiving this

---

<sup>274</sup> *Russia – Traffic in Transit*, para. 7.98.

<sup>275</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (US-30). *See also* Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 4-5 (July 24, 1947) (US-31) (“During the discussion the Delegate for Australia stated that it should be clear that the terms of Article 94 [on essential security] would be subject to the provisions of paragraph 2 of Article 35. On being assured that this was so he stated that he did not wish to make any reservation.”).

<sup>276</sup> Article 35(2) stated in full:

If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter. If no such adjustment can be effected, the matter may be referred to the Organization, which shall, after investigation, and, if necessary after consultation with the Economic and Social Council of the United Nations and any appropriate intergovernmental organizations, make appropriate recommendations to the Members concerned. The Organization, if it considers the case serious enough to justify such action, may authorize a Member or Members to suspend the application to any other Member or members of such specified obligations or concessions under this Chapter as may be appropriate in the circumstances. If such obligations or concessions are in fact suspended. Any affected Member shall then be free, not later than sixty days after such action is taken, to withdraw from the Organization upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Organization.

Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-23).

<sup>277</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment - New York Draft - E/PC/T/34 March 5, 1947, Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 28 (US-23).

assurance that a member’s rights to bring a non-violation claim under Article 35(2) would be preserved, Australia withdrew its objection to the draft ITO charter’s essential security provision.

254. The withdrawal of Australia’s reservation confirms the understanding that Members affected by essential security measures would have recourse to non-violation nullification or impairment procedures – that is, Members would have recourse to consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.<sup>278</sup> Contrary to the *Russia – Traffic in Transit*’s conclusion, however, the withdrawal of Australia’s reservation does *not* indicate that members intended that essential security actions could be reviewed on the ground that the actions taken were inconsistent with the Charter, or that a member’s judgment about what it considered necessary for the protection of its essential security interests could be questioned.

255. This understanding of Australia’s July 1947 statement is supported by numerous subsequent statements by other negotiating partners. As described above at paragraphs 72 to 78, in early 1948, negotiators made numerous statements confirming that non-violation nullification or impairment procedures were understood as the recourse for members affected by essential security measures.

256. Indeed, the panel ignored multiple statements in the negotiating history that explicitly state matters of essential security are within the judgment of the governments concerned, and that non-violation nullification or impairment claims are the appropriate recourse for members affected by such actions. For example:

- In a July 1947 meeting, the U.S. delegate observed that in situations such as times of war, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are.”<sup>279</sup>
- In the same meeting, the Chairman stated “in defence of the text,” that, when the ITO was in operation, “the atmosphere inside the ITO will be the only efficient guarantee against abuses” of the essential security exception.<sup>280</sup>

---

<sup>278</sup> Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-23).

<sup>279</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-30).

<sup>280</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-30).

- A November 1947 summary of the draft ITO charter states that the essential security exceptions would permit members to do “whatever they think necessary to protect their essential security interests relating to” the circumstances presented in that provision.<sup>281</sup>
- In January 1948, a representative from India “expressed some doubt” about whether “the bona fides of an action allegedly coming within [the essential security exception] could be questioned.”<sup>282</sup>
- Also in January 1948, the ITO charter negotiators declined to incorporate an explicit reference to nullification or impairment into the essential security provision.<sup>283</sup> As the United States noted at the time, a reference to nullification or impairment in the essential security provision was “unnecessary” in light of the existing text.<sup>284</sup>
- Around the same time, a Working Party of ITO negotiators decided to retain the non-violation provision based on their conclusions that essential security actions “*would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members,” and that “[s]uch other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter*, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.”<sup>285</sup>

257. The panel’s failure to grapple with such explicit statements by the negotiators of the provision that became Article XXI renders its analysis insufficient and unpersuasive.

---

<sup>281</sup> United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35 (US-29).

<sup>282</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), at 3 (US-42).

<sup>283</sup> The suggestion in question, if adopted, would have added the following text to the essential security exception of the ITO charter: “If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate; provided that where the action is taken under paragraph 1(d) of this Article the procedure set forth in Chapter VIII of this Charter shall not apply until the United Nations has made recommendations on or otherwise disposed of the matter.” United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1—2 (US-41).

<sup>284</sup> United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948) (US-42).

<sup>285</sup> United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-39).

258. Furthermore, in its analysis, the panel placed significant reliance on discussions of the essential security provision that were internal to the U.S. government at the time Article XXI was drafted.<sup>286</sup> As noted above at Section III.A.3.b.i, such discussions are not properly viewed as preparatory work of the treaty within the meaning of Article 32 of the Vienna Convention because they were not in the public domain or even in the hands of all the parties at the relevant time. The *Russia – Traffic in Transit* panel’s consideration of such materials as supplementary means of interpretation is legal error and a significant departure from not only the previous procedures of prior WTO panels and the Appellate Body, but also other international tribunals.<sup>287</sup> Moreover, these documents do not support the panel’s conclusion that the essential security exception is subject to review by a WTO panel; rather, they confirm that Article XXI(b) is self-judging.

### **5. That Panel’s flawed conclusions appear results-driven.**

259. In sum, the *Russia – Traffic in Transit* panel’s decision that it had authority to review multiple aspects of a Member’s invocation of the essential security exception is incorrect. The panel failed to interpret Article XXI(b) as a whole, and even its understanding of Article XXI(b)(iii) is inconsistent with that text, in its context. The panel also misconstrued certain aspects of the negotiation process, and erroneously relied on documents that are not properly considered preparatory work for the GATT.

260. Given the *Russia – Traffic in Transit* panel’s failure to perform a proper analysis under the Vienna Convention and the overall conclusory nature of the panel’s analysis, that panel’s interpretation of Article XXI appears to have been driven, not by the text, but by the result apparently sought by the panelists. In fact, that panel appeared to be attempting to prejudge the U.S. measures at issue in this dispute in setting out certain considerations that did not arise in the dispute before it.

261. Under DSU Article 7.1, the DSB charged the panel with making only those findings that would assist the DSB in making the recommendation to bring a WTO-inconsistent measure into conformity with the covered agreements. The panel determined that it was for Russia to demonstrate that its invocation of Article XXI fell within the bounds of that provision. Because Russia had provided no substantive explanation for its invocation – consistent with Russia’s view that the panel lacked the authority to review the invocation – the panel’s analysis could (and should) have ended there.<sup>288</sup> Nor was it necessary for the panel to note—after stating it had

---

<sup>286</sup> *Russia – Traffic in Transit*, paras. 7.89—7.91 and notes 168 to 174.

<sup>287</sup> See above paragraphs 85 to 86.

<sup>288</sup> *Russia – Traffic in Transit*, para. 7.112 (“Russia, in its first written submission, refers to an emergency in international relations that occurred in 2014, which led Russia to take various actions, including imposing the measures at issue. Russia affirms that the events constituting the emergency in international relations are well known to Ukraine and that this dispute raises issues concerning politics, national security and international peace and security. It also explains that one reason for formulating its invocation of Article XXI(b)(iii) in such general terms is that it is trying to ‘keep the issues such as wars, insurrections, unrests, international conflicts outside the scope of the WTO which is not designed for resolution of such crises and related matters.’”) (citations omitted).

rejected Russia’s argument that the panel lacked jurisdiction to review Russia’s invocation of Article XXI(b)(iii)—that the panel also rejected the U.S. argument that Russia’s invocation of Article XXI(b)(iii) was not justiciable.<sup>289</sup>

262. Similarly, the panel’s lengthy discussion of whether “political or economic conflicts” could constitute “emergencies in international relations” within the meaning of Article XXI(b)(iii)<sup>290</sup> was wholly superfluous, in light of the panel’s subsequent reference to the UN-recognized “armed conflict” between Russia and Ukraine in finding that the requirements of Article XXI(b)(iii) were satisfied in that dispute.<sup>291</sup> The panel report therefore gives the impression of desiring to make pronouncements on the bounds of Article XXI not for purposes of resolving the dispute before it but in order to influence the results of other disputes.

263. This impression of the *Russia – Traffic in Transit* panel report as results-oriented has unfortunately been reinforced by public comments by the Chair of the panel. That panelist has been quoted in the press opining on the likelihood of success if the United States were to invoke Article XXI in relation to certain possible actions. The *Russia – Traffic in Transit* Chair pronounced that it would be “very difficult” for the United States to defend potential auto tariffs under Article XXI(b). The Chair stated that he would not “take such a case” on, “not only on moral aspects” but also “because I think it would be very difficult to make it prevail.”<sup>292</sup>

264. These comments are highly regrettable and call into question the objectivity and impartiality of the *Russia – Traffic in Transit* panel. For a panelist to opine on the “moral aspects” of possible action by a Member and to speculate on the likelihood of success of a dispute challenging that action damages the integrity of the WTO dispute settlement system.

265. The *Russia – Traffic in Transit* panel’s report is erroneous and misguided. That panelists might not agree with a Member’s particular determination regarding what it considers necessary for the protection of its essential security interests cannot alter that panel’s task under Article 7.1 of the DSU or the rights of Members under Article XXI(b). In analyzing Article XXI(b) without

---

<sup>289</sup> *Russia – Traffic in Transit*, para. 7.103 (“Consequently, Russia’s argument that the Panel lacks jurisdiction to review Russia’s invocation of Article XXI(b)(iii) must fail. The Panel’s interpretation of Article XXI(b)(iii) also means that it rejects the United States’ argument that Russia’s invocation of Article XXI(b)(iii) is “nonjusticiable”, to the extent that this argument also relies on the alleged totally “self-judging” nature of the provision.”)

<sup>290</sup> *Russia – Traffic in Transit*, para. 7.75 (“[T]he reference to “war” in conjunction with “or other emergency in international relations” in subparagraph (iii), and the interests that generally arise during war, and from the matters addressed in subparagraphs (i) and (ii), suggest that political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii).”).

<sup>291</sup> *Russia – Traffic in Transit*, para. 7.122 (“There is evidence before the Panel that, at least as of March 2014, and continuing at least until the end of 2016, relations between Ukraine and Russia had deteriorated to such a degree that they were a matter of concern to the international community. By December 2016, the situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict.”) (citations omitted).

<sup>292</sup> Tom Miles, *Adjudicator says any security defense of U.S. auto tariffs at WTO ‘very difficult’*, REUTERS BUSINESS NEWS (May 27, 2019), <https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX117> (US-97).

the appropriate rigor and respect for the text required, the *Russia Transit* panel did the parties, and WTO Members, a disservice.<sup>293</sup>

**C. THE EXCEPTION UNDER ARTICLE XXI OF THE GATT 1994 APPLIES TO THE CLAIMS UNDER THE *AGREEMENT ON RULES OF ORIGIN*.**

266. The structure of the WTO Agreement as a whole demonstrates that the essential security exception of Article XXI of the GATT 1994 applies to the multilateral agreements on trade in goods, including the *Agreement on Rules of Origin*, as explained below. To conclude otherwise would suggest that negotiators believed that the essential security exception applied to the fundamental disciplines in the GATT 1994—including with respect to marks of origin in Article IX—but not to the elaborations upon those disciplines as set out in the other trade-in-goods agreements, including with respect to the rules of origin used to administer a marking requirement.

267. In addition, as discussed in detail below, the *Agreement on Rules of Origin* includes multiple textual references to the GATT 1994, which make clear that the *Agreement on Rules of Origin* applies to rules of origin used in commercial policy instruments disciplined by the GATT 1994, and that Members retain discretion under the *Agreement on Rules of Origin* to take action to protect their essential security interests under Article XXI. The object and purpose and negotiating history confirm the close link between the *Agreement on Rules of Origin* and the measures it disciplines, and the GATT 1994 and the GATT-disciplined measures that rules of origin administer. Indeed, Hong Kong, China, acknowledges the link between the *Agreement on Rules of Origin* and the GATT 1994, as it acknowledges that its claims of breach of Article 2(d) of the *Agreement on Rules of Origin* are “essentially the same” as its claims of breach of Articles I:1 and IX:1 of the GATT 1994 (as well as Article 2.1 of the TBT Agreement).<sup>294</sup>

**1. The structure of the WTO Agreement shows that the essential security exception applies to the Multilateral Agreements on Trade in Goods, including the *Agreement on Rules of Origin*.**

268. The starting point for establishing that the essential security exception applies to the *Agreement on Rules of Origin* is to examine the structure of the WTO Agreement as a whole.

---

<sup>293</sup> To date, the *Russia – Traffic in Transit* panel remains the only panel to have attempted to interpret the essential security exceptions. While the panel in *Saudi Arabia – Protection of IPRs* addressed a Member’s invocation of the security exception in the TRIPS agreement, that panel merely “transposed” the *Russia – Traffic in Transit* panel’s analysis. *Saudi Arabia – Protection of IPR*, para. 7.243. Simply transposing the approach of a prior panel is not consistent with the function of panels as set out in the DSU, and the *Saudi Arabia – Protection of IPRs* panel did not engage in any interpretive effort that could be examined by this Panel for assistance in its own interpretive exercise. The *Saudi Arabia – Protection of IPRs* panel’s report is also erroneous for the same reasons set out above at Section III.B. In two other recent disputes in which Article XXI was invoked—*Russia – Pigs (21.5)* and *UAE – Goods, Services, and IP rights*—WTO panels have suspended their work late in the proceedings at the request of the complainant. See Communication from the Panel, *Russia – Pigs (EU) (Article 21.5) (Panel)*, WT/DS475/24 (Jan. 31, 2020); Communication from the Panel, *UAE – Goods, Services, and IP rights*, WT/DS526/6 (Jan. 19, 2021).

<sup>294</sup> See HKC First Written Submission, paras. 58, 66.

The Marrakesh Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking.<sup>295</sup> The core multilateral substantive obligations are contained in Annex 1. In particular, Annex 1A consists of the Multilateral Agreements on Trade in Goods (including the *Agreement on Rules of Origin* and the *Agreement on Technical Barriers to Trade*), Annex 1B consists of the *General Agreement on Trade in Services* (GATS), and Annex 1C consists of the *Agreement on Trade Related Aspects of International Property Rights* (TRIPS). The essential security exception applies to each of Annexes 1A, 1B, and 1C.

269. In particular, in Annex 1A, Article XXI of the GATT 1994 provides as follows:

“Nothing in this Agreement shall be construed

- a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”<sup>296</sup>

270. In Annex 1B, paragraph 1 of Article XIV bis of the GATS provides as follows:

1. Nothing in this Agreement shall be construed:

- (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

---

<sup>295</sup> Article II, Agreement Establishing the World Trade Organization.

<sup>296</sup> Article XXI, GATT 1994.

- (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
  - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”<sup>297</sup>

271. And in Annex 1C, Article 73 of the TRIPS provides as follows:

“Nothing in this Agreement shall be construed:

- (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”<sup>298</sup>

272. Within Annex 1A, the Multilateral Agreements on Trade in Goods, the first agreement listed is the GATT 1994. Of course, the GATT 1994 is a successor to the GATT 1947. The GATT 1947, and the slightly modified GATT 1994, contain the essential security exception in their respective Article XXIs. The remaining agreements in the Annex 1A (including the *Agreement on Rules of Origin* and the TBT Agreement) are the product of negotiations in the Uruguay Round, undertaken with the purpose of elaborating upon the disciplines in the GATT 1994 and related matters involving trade in goods. None of the remaining agreements has an

---

<sup>297</sup> Article XIV bis, para. 1, General Agreement on Trade in Services.

<sup>298</sup> Article 73, Agreement on Trade-Related Aspects of Intellectual Property Rights.



article repeating the GATT 1947/1994 essential security exception, and these agreements only contain a few scattered references to the essential security exception.<sup>299</sup>

273. Two possibilities arise from this structure. The first, which the United States submits is plainly correct, is that the negotiators understood that the GATT 1947/1994 essential security exception applies to the new agreements on trade in goods contained in Article 1A. The other possibility is that for some reason, the negotiators believed that the essential security exception applied to the fundamental disciplines in the GATT 1994, but not to the elaborations upon those disciplines as set out in the other trade-in-goods agreements. This second interpretation is untenable as a matter of logic or common sense.

274. The General Interpretative Note to Annex 1A supports the interpretation that the GATT 1994 essential security exception applies to the new trade-in-goods agreements. The note provides:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.

The note addresses possible conflicts between the GATT 1994 and the new agreements in Annex 1A; in doing so, the note confirms that the negotiators viewed the new agreements as addressing the same topics as the GATT 1994. Further, in providing that the new agreements prevail in the event of conflict, the drafters were reflecting the general rule that more specific provisions prevail over general provisions. Thus, the interpretive note confirms that the new trade-in-goods agreements were viewed as an elaboration upon the disciplines in the GATT 1994.

275. In addition, the interpretation that the GATT 1994 essential security exception applies throughout Annex 1A is fully consistent with conflict rule set out in the interpretive note. In particular, none of the new trade-in-goods agreements contains a provision stating that the GATT 1994 Article XXI exception is inapplicable to the obligations under those agreements.

276. It is not the case that the negotiators thought that in 1994, as compared to when the GATT was agreed to in 1947, essential security was no longer an over-riding concern. To the contrary, when the parties decided to extend disciplines to new areas—services, and intellectual property—the new agreements contain the essential security exception.

277. Further, it is not the case that negotiators thought that basic disciplines should be subject to the essential security exception, but not more detailed or elaborated exceptions. First, no

---

<sup>299</sup> For example, Article I.10 of the *Agreement on Import Licensing Procedures* applies Article XXI of GATT 1994. And Article 3 of the *Agreement on Trade-Related Investment Measures* states that all exception in the GATT 1994 apply, “as appropriate.”

logical rationale exists for such distinction, nor in most cases can the distinction even be made. Rather, substantial overlap exists between the disciplines in the GATT 1994 and the new Uruguay Round Agreements on trade in goods. Second, in the new areas—Annex 1B services and Annex 1C intellectual property—the essential security exception applies to every obligation—whether fundamental or more detailed. No rationale would point to a different intent for obligations with respect to trade in goods.

278. With these considerations in mind, the United States would highlight that the following scenario resulting from the second interpretation is untenable. The United Nations asks WTO Members to take actions in pursuance of their obligations under the United Nations Charter for the maintenance of international peace and security; those actions would be inconsistent with obligations under the GATT 1994, the *Agreement on Rules of Origin*, and the GATS. Under the second interpretation, WTO Members would respond that they can take actions that are inconsistent with the GATT 1994 and GATS in order to meet their obligations to maintain international peace and security, but cannot take any actions in contravention of the *Agreement on Rules of Origin*. An interpretation of the WTO Agreement that reaches this outcome is unsupported.

279. In order to find that the essential security exception expressed in GATT 1994 applies to the specific trade-in-goods agreements (Rules of Origin, and TBT), or even the specific claims brought by Hong Kong, China, the specific trade-in-goods agreements (Rules of Origin, and TBT), or even the specific claims brought by Hong Kong, China, it is helpful to examine the specific ties between the *Agreement on Rules of Origin* and TBT Agreement and the GATT 1994, as well as the specific claims brought by Hong Kong, China. The following sections show the strong tie between these agreements and the GATT 1994, further supporting that the GATT 1994 essential security exception applies. And with regard to the specific claims at issue, Hong Kong, China acknowledges that its claims of breach of Article 2(d) of the *Agreement on Rules of Origin* and Article 2.1 of the TBT Agreement are “essentially the same” as its claims of breach of Articles I:1 and IX:1 of the GATT 1994.<sup>300</sup>

**2. The *Agreement on Rules of Origin* provides disciplines tied to the implementation of the GATT 1994, thus indicating the applicability of the GATT 1994’s essential security exception.**

280. The *Agreement on Rules of Origin* is strongly linked to the GATT 1994, as shown throughout the text of the Agreement, and this reflects that rules of origin are used to administer commercial instruments disciplined by the GATT 1994. The relevant provisions are found in: Article 1, which sets out the scope of the Agreement with reference to eight different articles of the GATT 1994; Article 2(b), which confirms that rules of origin disciplined by the *Agreement on Rules of Origin* are linked to “commercial policy” instruments disciplined by the GATT; and

---

<sup>300</sup> See HKC First Written Submission, paras. 58, 66.

Articles 7 and 8, which provide for the application of consultation and dispute settlement provisions under the GATT 1994, as elaborated by the DSU.<sup>301</sup>

281. The connection between the *Agreement on Rules of Origin* and the GATT 1994 is particularly firm in the context of this dispute, in which Hong Kong, China, is challenging an origin marking requirement under Article IX of the GATT 1994. As noted above, Hong Kong, China, itself acknowledges the link between the *Agreement on Rules of Origin* and the GATT 1994, as it describes its claims of breach of Article 2(d) of the *Agreement on Rules of Origin* as “essentially the same” as its claims of breach of Articles I:1 and IX:1 of the GATT 1994 (as well as Article 2.1 of the TBT Agreement).

***a. The Agreement on Rules of Origin includes multiple textual links to the GATT 1994.***

282. The provisions of the *Agreement on Rules of Origin* must be read in light of the object and purpose of the Agreement, as set forth in the Preamble, which confirms that Article XXI is available to defenses of claimed breaches of the Agreement. The Preamble includes multiple references to the GATT 1994, and in light of that link the Agreement aims to increase transparency, predictability, and consistency in the preparation and application of rules of origin, and ultimately to harmonize rules of origin. That is, the Preamble confirms that while the Agreement establishes certain principles with respect to rules of origin, at least until completion of the Harmonized Work Program provided for in Part IV of the Agreement, it does not constrain a Member’s discretion in a way that would prevent it from acting to protect its essential security interests.

283. In the “Definitions and Coverage” provisions in Part I of the *Agreement on Rules of Origin*, Article 1.1 defines “rules of origin” for purposes of the agreement with reference to the GATT 1994: “For purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.”

284. Article 1.2 further establishes the linkage to the GATT 1994, providing that “[r]ules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. Each of these underlying GATT 1994 provisions is subject to the

---

<sup>301</sup> See *China – Rare Earths (AB)*, para. 5.74 (determining whether GATT 1994 Article XX applies to obligations under China’s Accession Protocol by analysing “whether there is an objective link between an individual provision in China’s Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements”).

GATT 1994 essential security exception; logic dictates that the associated rules of origin would be subject to the same provision.

285. The United States also notes that Article 1.2 states that the agreement also applies to rules of origin in relation to government procurement. Although this dispute does not involve an issue under the Agreement on Government Procurement (GPA), the United States observes that the GPA, like the GATT 1994, has an essential security exception.<sup>302</sup>

286. Article 2(b) of the *Agreement on Rules of Origin* also confirms the connection between the GATT 1994 and the availability of Article XXI of the GATT 1994 as a defense to breaches of the *Agreement on Rules of Origin*. Article 2(b) provides that rules of origin may not be used pursue trade objectives “notwithstanding the measure or instrument of commercial policy to which they are linked.” The ordinary meaning of the term “commercial” is “engaged in commerce; of, pertaining to, or bearing on commerce.”<sup>303</sup> The *Dictionary of Trade Policy Terms* further explains, “The drafters of the GATT thought of commercial policy as the subjects covered in Part II of the GATT which includes, among others, national treatment, anti-dumping and countervailing duties, customs valuation, import and export fees and formalities, marks of origin, quantitative restrictions, subsidies, state trading enterprises, safeguards, and consultations and dispute settlement.”<sup>304</sup> Thus, Article 2(b) confirms that rules of origin disciplined by the *Agreement on Rules of Origin* are linked to “commercial policy” instruments disciplined by the GATT, as provided in Article 1.2.

287. In addition, Articles 7 and 8 of the *Agreement on Rules of Origin* provide that the provisions of Articles XXII and XXIII of the GATT 1994, respectively, as elaborated and applied by the Dispute Settlement Understanding, are applicable to the *Agreement on Rules of Origin*.<sup>305</sup> This is yet another link to the GATT 1994. Whereas Article XXII of the GATT 1994 provides Members the opportunity to consult with another Members on “any matter affecting the operation of this Agreement,” Article XXIII:1 provides for three situations in which a Member “consider[s] that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded.” The first situation—which Hong Kong, China, has argued is relevant in this dispute—is when there is a “failure of another [Member] to carry out its obligations under this Agreement.”

288. For purposes of Article 8 of the *Agreement on Rules of Origin*, which provides that the provisions of Article XXIII shall be followed “mutatis mutandis,” the reference to “its obligations under this Agreement” in Article XXIII:1 include the substantive provisions of both

---

<sup>302</sup> Article III:1, Agreement on Government Procurement (“Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.”).

<sup>303</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 451 (US-98).

<sup>304</sup> *Dictionary of Trade Policy Terms*, 5<sup>th</sup> edn., W. Goode (ed.) (Cambridge University Press, 2007), at 83 (US-99).

the *Agreement on Rules of Origin* and the GATT 1994. As discussed above, a Member has the right to invoke Article XXI of the GATT 1994 in response to a claim that there is a “failure . . . to carry out its obligations” – in this case, under both the *Agreement on Rules of Origin* and the GATT 1994. A further link is provided by the first sentence of Article 1.1 of the DSU, which provides that “[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultations and dispute settlement provisions listed in Appendix 1.” Appendix 1 includes the agreements in Annex 1A to the WTO Agreement, which in turn include both the GATT 1994 and the *Agreement on Rules of Origin*. Both Article XXIII of the GATT and Article 8 of the *Agreement on Rules of Origin* are “consultations and dispute settlement provisions” under the DSU to be read together and subject to Article XXI. The overall structure of the WTO Agreement, as discussed above, indicates that essential security exception applies to the Annex 1A multilateral agreements on trade in goods, including the *Agreement on Rules of Origin*.

***b. The Agreement on Rules of Origin provides members with discretion, including to take actions to protect their essential security interests.***

289. The structure of the *Agreement on Rules of Origin*, and the distinct disciplines that apply before and after completion of the work program for the harmonization of rules of origin, provide discretion to Members, including to take action to protect their essential security interests, and further confirm the availability of Article XXI of the GATT 1994 as a defense. Article 2 of the *Agreement on Rules of Origin* establishes transitional provisions – that is, disciplines that apply “[u]ntil the work programme for the harmonization of rules of origin set out in Part IV is completed.” Article 3, in turn, establishes disciplines that apply “upon the implementation of the results of the harmonization work programme [in Part IV].” The Harmonized Work Program has not been completed.<sup>306</sup>

290. Under this basic structure, while Members will be subject to more prescriptive disciplines upon completion of the Harmonized Work Program—including applying specific rules of origin as provided in Part IV—in the meantime (that is, at present) they retain a degree of discretion, as provided in Article 2. As explained by the panel in *United States – Textiles Rules of Origin*:

“With regard to the provisions of Article 2 at issue in this case – subparagraphs (b) through (d) – we note that they set out what rules of origin should not do: rules of origin should not pursue trade objectives directly or indirectly; they should not themselves create restrictive, distorting or disruptive effects on international trade; they should not pose unduly strict requirements or require the fulfilment of a condition unrelated to manufacturing or processing; and they should not discriminate between other Members. These provisions do not prescribe what a Member must do. By setting out what Members

---

<sup>306</sup> See Report (2020) of the Committee on Rules of Origin to the Council on Trade in Goods, G/L/1378 (23 Nov. 2020), para. 4 (“Discussions on this work programme, mandated under Part IV of the Agreement, have been stalled since 2007. Members held different views regarding the implications of adopting harmonized non-preferential rules of origin for other trade policy measures. These ‘core policy issues’ were described in the 2013 Report of the CRO to the Council for Trade in Goods (G/L/1047). Members continue to hold different views regarding the need to finalize or not the HWP.”) (US-100).

cannot do, *these provisions leave for Members themselves discretion to decide what, within those bounds, they can do.*<sup>307</sup>

291. Thus, Articles 2 and 3 and Part IV of the *Agreement on Rules of Origin*—in particular, the degree of discretion Members maintain during the transition period, in contrast to the period after adoption of the Harmonized Work Program—confirm that the Agreement preserves a Member’s right to take action which it considers necessary to protect its essential security interests.<sup>308</sup>

### 3. Supplementary means of interpretation confirm that Article XXI applies.

292. Although not necessary for purposes of interpreting the *Agreement on Rules of Origin* in this dispute, supplementary means of interpretation confirm that Members (at the time of the Uruguay Round, Contracting Parties) understood the close link between the GATT and rules of origin. In 1988, for example, at the request of the Negotiating Group on Non-Tariff Measures, the Secretariat prepared a background note on the “administration of rules of origin, related GATT provisions and past discussion on the subject in the GATT.”<sup>309</sup> The note indicates, among other points: “The General Agreement includes various provisions which foresee the necessity of rules of origin, although it allows the contracting parties to apply their own systems and does not specify how systems are to be applied.”<sup>310</sup> With respect to Article IX, entitled “Marks of Origin,” the note states, “If marks of origin are to be used, some rule for identifying origin will be required.”<sup>311</sup>

293. In 1989 and 1990 a number of proposals were subsequently made with respect to potential disciplines on rules of origin. Discussions in the negotiating group regarding the coverage of a potential *Agreement on Rules of Origin* indicate that the contracting parties considered the extent to which it should apply only to rules of origin subject to GATT provisions or more broadly. A synopsis prepared by the Secretariat at the request of the negotiating group summarizes points made with respect to the coverage of the negotiations, including that:

“Negotiations should cover all products, programmes and policies which involve rules of origin subject to GATT disciplines, including trade carried out under all preferential arrangements such as GSP and free-trade areas, but excluding government procurement because this was not an area currently covered by GATT disciplines. . . .

---

<sup>307</sup> *United States – Textiles Rules of Origin* (panel), paras. 6.23-6.24 (internal citations omitted) (emphasis added).

<sup>308</sup> The panel in *United States – Textiles Rules of Origin* expressly accounted for this discretion in presenting its analysis of whether the measures at issue in that dispute were inconsistent with Article 2: “[W]e will bear in mind that, while during the post-harmonization period Members will be constrained by the result of the harmonization work programme, during the transition period, Members retain considerable discretion in designing and applying their rules of origin.” *United States – Textiles Rules of Origin*, para. 6.25 (panel).

<sup>309</sup> Rules of Origin: Background Note by the Secretariat, MTN.GNG/NG2/W/12 (21 June 1998) (US-101).

<sup>310</sup> Rules of Origin: Background Note by the Secretariat, MTN.GNG/NG2/W/12 (21 June 1998), para. 13 (US-101).

<sup>311</sup> Rules of Origin: Background Note by the Secretariat, MTN.GNG/NG2/W/12 (21 June 1998), para. 14 (US-101).

A uniform set of rules of origin should be developed for all purposes and all sectors and should cover dumping and government procurement as well as tariff preferences. . . .

Work on harmonization of rules of origin should only address non-preferential rules, because preferential rules were concerned with conditional m.f.n., whereas non-preferential rules related to the principle of unconditional m.f.n. treatment provided for in Article I of the GATT.”<sup>312</sup>

Thus, the negotiators of the *Agreement on Rules of Origin*, in discussing the scope of the potential agreement, specifically considered that it should cover rules of origin “subject to GATT disciplines,” as well as the extent to which it should cover rules beyond those disciplines, such as government procurement. They understood the *Agreement on Rules of Origin* as linked to the GATT 1994.

**4. The claims in this dispute confirm the link between the GATT 1994 and the *Agreement on Rules of Origin*, and the availability of Article XXI(b).**

294. With regard to the specific claims at issue, Hong Kong, China, itself acknowledges the link between the *Agreement on Rules of Origin* and the GATT 1994. Hong Kong, China, states that its claims of breach of Article 2(d) of the *Agreement on Rules of Origin* are “essentially the same” as its claims of breach of Articles I:1 and IX:1 of the GATT 1994 (as well as Article 2.1 of the TBT Agreement),<sup>313</sup> and requests further that the Panel exercise judicial economy with respect to its GATT 1994 claims.<sup>314</sup> All of the claims by Hong Kong, China, challenge the determination with respect to the autonomy of Hong Kong, China, in Executive Order 13936. The crux of the claims by Hong Kong, China, is that the origin marking requirement breaches Articles 2(c) and 2(d) of the *Agreement on Rules of Origin*, as well as Articles I:1 and IX:1 of the GATT 1994 (and Article 2.1 of the TBT Agreement) is that the United States applies a condition of “sufficient autonomy” with respect to goods of Hong Kong, China.<sup>315</sup>

---

<sup>312</sup> Points Made in Relation to Rules of Origin, Synopsis by the Secretariat, Revision, MTN.GNG/NG2/W/54/Rev. 1 (13 Mar. 1990) at 18 (US-102).

<sup>313</sup> See HKC First Written Submission, paras. 66, 68.

<sup>314</sup> See HKC First Written Submission, paras. 68-69.

<sup>315</sup> With respect to Article 2(c), see HKC First Written Submission, para. 40 (“[T]he United States has ‘require[d] the fulfilment of a certain condition not related to manufacturing or processing’, i.e. the possession of what the United States considers to be ‘sufficient autonomy’ from the People’s Republic of China, as a prerequisite for a determination that Hong Kong, China is the country of origin of goods manufactured or processed within the customs territory of Hong Kong, China. This imposition of a condition unrelated to manufacturing or processing as a prerequisite for a determination of the country of origin is inconsistent with Article 2(c) of the ARO.). With respect to Article 2(d), see *id.* at para. 48 (“The United States does not apply the ‘sufficient autonomy’ condition to goods of other Members for the purpose of determining their country of origin. The United States therefore “discriminate[s] between other Members” in respect of the rules of origin that the United States applies to imports, in contravention of Article 2(d).”).

With respect to Article I:1 of the GATT 1994, see HKC First Written Submission, para. 84 (“The ‘sufficient autonomy’ condition is a condition relating to the country of origin of products that the United States has invoked as

295. Just as the origin marking requirement is subject to an exception to claims under Articles I:1 and IX:1 as an action taken to protect U.S. essential security interests under Article XXI of the GATT 1994, so too is this action subject to an exception to the same substantive claims under the *Agreement on Rules of Origin*. To consider otherwise would suggest that, while a Member could invoke the exception under Article XXI of the GATT 1994 for a measure that it considers necessary to protect its essential security interests in relation to commitments under Articles I, II, III, VI, IX, XI, XIII, and XIX of the GATT 1994, the rules of origin used to apply those measures could nonetheless be found to breach the *Agreement on Rules of Origin* with no regard for the Member’s essential security interests at issue. Such a finding would not only undermine the self-judging nature of the Article XXI exception, but also appear to mean that a Member would have no defense under the *Agreement on Rules of Origin* for essential security measures.

296. By insisting that the United States must assign what Hong Kong, China, considers to be the “correct” origin,<sup>316</sup> Hong Kong, China, appears to seek a finding that the *Agreement on Rules of Origin* not only disciplines how Members determine the country of origin, but also obligates Members to recognize particular claims of sovereignty or territory. Hong Kong, China, would require an importing Member agree with an exporting Member’s claims as to territorial boundaries, for purposes of its origin marking requirements. Put simply, this is not a determination that WTO Members agreed to assign to dispute settlement panels.

---

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)”). With respect to Article IX:1 of the GATT 1994, see HKC First Written Submission, para. 72 (“[T]he measures at issue accord less favourable treatment to goods of Hong Kong, China in respect of marking requirements because the United States does not determine the country of origin of goods imported from Hong Kong, China in the same manner that it determines the country of origin of like products imported from other Members”). With respect to Article 2.1 of the TBT Agreement, see HKC First Written Submission, para. 58 (“the United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of ‘sufficient autonomy’ from the People’s Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members). The United States has applied that condition to determine that goods imported from the customs territory of Hong Kong, China have an origin of the People’s Republic of China, and consequently requires goods imported from Hong Kong, China to be marked as goods of ‘China’.”).

<sup>316</sup> See, e.g., HKC First Written Submission, paras. 4, 7, 30. Curiously, Hong Kong, China, attempts to argue its case by analogizing the relationship between Hong Kong, China, and the People’s Republic of China to the relationship between Guinea-Bissau and Guinea. See *id.* at 30. The United States does not understand those relationships to be analogous.



**D. THE EXCEPTION UNDER ARTICLE XXI OF THE GATT 1994 APPLIES TO THE CLAIMS UNDER THE TBT AGREEMENT**

**1. The structure of the WTO Agreement and textual references within the TBT Agreement confirm that essential security measures are not reviewable under the TBT Agreement, and this understanding is further confirmed by negotiating history.**

297. As the United States explained in Section III.C.1, the structure of the WTO Agreement as a whole shows that the GATT 1994 essential security exception applies to the Annex 1A Multilateral Agreement on Trade in Goods, including the *Agreement on Rules of Origin*. That explanation applies with equal force to the TBT Agreement. Below, Section III.D.1 discusses the specific provisions within the TBT Agreement that set forth strong and explicit links to the GATT 1994 and the essential security exception in GATT 1994 Article XXI. Section III.D.2 demonstrates that the negotiating history of the TBT Agreement confirms that essential security measures are unreviewable by the TBT Agreement. Section III.D.3 explains that the link between the TBT Agreement and the GATT 1994 is particularly strong in this dispute, given the overlap between the discrimination claims under Article 2.1 of the TBT Agreement and Articles I:1 and IX:1 of the GATT 1994 – an overlap that Hong Kong, China itself acknowledges.

**2. Multiple provisions of the TBT Agreement link the Agreement to the GATT 1994 and essential security considerations.**

298. Several provisions in the TBT Agreement refer to the GATT 1994 and essential security, including the preamble, Article 2.1 (and the corresponding analog in Article 5.2.1 covering conformity assessment procedures), Article 10.8.3, Article 14, and Annex 1.1. These provisions, when read in light of the object and purpose of the Agreement, confirm that the essential security exception of Article XXI of the GATT 1994 applies to the TBT Agreement.

*The Preamble*

299. The provisions in the TBT Agreement must be read in light of the object and purpose of the TBT Agreement as provided in the preamble. The second recital establishes a specific textual link<sup>317</sup> between the TBT Agreement and the GATT 1994, stating that, “*Members . . . [d]esiring to further the objectives of GATT 1994.*” Broadly speaking, the TBT Agreement should be interpreted in a manner that is consistent with the GATT 1994. Otherwise, the TBT Agreement would not be in furtherance of the GATT 1994 objectives.

300. With respect to essential security, the seventh recital of the preamble to the TBT Agreement unambiguously states, “*Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest.*” The seventh recital does

---

<sup>317</sup> See *China – Rare Earths (AB)*, para. 5.74 (determining whether GATT 1994 Article XX applies to obligations under China’s Accession Protocol by analysing “whether there is an objective link between an individual provision in China’s Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements”).

not refer to any qualification or condition with respect to a Member’s right to take measures to protect its essential security interests. Like Article XXI(b), the seventh recital reflects that measures taken to protect a Member’s essential security interests are not subject to additional requirements or scrutiny.<sup>318</sup> As explained above in Section III.A.1, it is “its” essential security interests—the Member’s in question—that the action is taken for the protection of; as such, it is the judgment of the Member that is relevant. A WTO panel cannot substitute its judgment for that of the Member.

301. In contrast, the sixth recital, which provides immediate context for the seventh recital, provides a list of certain types of measures that Members are not prevented from taking, “subject to” certain requirements. In particular, the sixth recital reflects that measures for certain, non-security, purposes “are not [to be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.”

302. In this respect, the contrast between the sixth and seventh recitals reflects an important difference between Articles XX and XXI of the GATT 1994.<sup>319</sup> That is, while the former subjects a measure qualifying as “necessary” to a further requirement of, essentially, non-discrimination, and in turn to review in a possible dispute settlement proceeding, the latter provision is self-judging as to what actions are necessary for a Member to protect its essential security measures.

#### *Annex 1.1*

303. Annex 1.1 of the TBT Agreement provides the definition of a technical regulation, and the second sentence of the definition identifies “marking” as an example of a requirement that might be a technical regulation.<sup>320</sup> At the same time, Article IX of the GATT 1994 specifically disciplines origin marking requirements. That is, while the TBT Agreement imposes disciplines on technical regulations, standards, and conformity assessment procedures, each of which might address a range of subjects, Article IX of the GATT 1994 imposes disciplines specifically on marks of origin.<sup>321</sup> This confirms that, to the extent that a technical regulation provides for

---

<sup>318</sup> While the recital does not use the phrase “action which it considers necessary,” the preamble is a “recognition” that Members may not be prevented from taking certain measures; the preamble does not itself establish an obligation with respect to essential security measures. Moreover, as discussed below, the negotiating history demonstrates that this recital provides further support that Article XXI is unreviewable and need not be “in accordance with the provisions of this Agreement.”

<sup>319</sup> *Supra* Section III.A.1.b.ii.

<sup>320</sup> “[Technical regulation] may also include or deal exclusively with . . . marking . . . requirements . . .” TBT Agreement, Annex 1.1.

<sup>321</sup> Although Hong Kong, China, appears to concede that Article IX of the GATT 1994 deals more specifically with marks of origin, it nonetheless asserts that the Panel should consider its TBT claims before the GATT 1994 claims. HKC First Written Submission, para. 69. However, Hong Kong, China’s order of analysis argument with respect to Article IX is based on its assertion that Article IX “does not address the rules of origin that Members must use in the

origin marking that is disciplined under Article IX of the GATT 1994, Article XXI of the GATT 1994 is available as an exception to both commitments, and a defense for a claimed breach of both the GATT 1994 and the TBT Agreement. Indeed, this is consistent with the object and purpose of the TBT Agreement, as reflected in the second and seventh recitals. The link between the GATT 1994 and the TBT Agreement is particularly clear in the circumstances of this dispute, given that the measure that Hong Kong, China, claims to breach the TBT Agreement is also claimed to breach Article IX of the GATT.<sup>322</sup>

### *Article 2.1*

304. Article 2.1 of the TBT Agreement sets forth MFN and national treatment obligations that are similar to that provided by Articles I and III:4 of the GATT 1994. Specifically, to establish a breach of Article 2.1, the complainant must prove three elements: (i) that the measure at issue is a technical regulation; (ii) that the imported and domestic products are “like”; and (iii) that the treatment accorded to imported products is less favorable than that accorded to like domestic products or like products from other countries.<sup>323</sup> In this way, with respect to the issue of discriminatory treatment, Article 2.1 mirrors Articles I:1 and III:4 of the GATT 1994.<sup>324</sup> That is, if a measure is a “technical regulation” within the meaning of the TBT Agreement, the measure must not provide less favorable treatment to imported products than to like domestic products, or to like imports of another Member. This parallel is consistent with the object and purpose of the TBT Agreement, as reflected in the second recital in the preamble that the TBT Agreement furthers the objective of the GATT 1994.

305. The overlap between the disciplines of Article 2.1 of the TBT Agreement and Articles I and III:4 of the GATT 1994 confirms that Article XXI applies to Article 2.1 of the TBT Agreement just as it applies to Article I and III of the GATT 1994. This is especially true when read in light of the object and purpose of the TBT Agreement provided in the seventh recital. To conclude otherwise would suggest that a Member would not be able to defend a measure taken to protect its essential security interests, simply because it is a technical regulation. As explained

---

application of origin marking requirements.” *Id.*, para. 68. This statement does not establish that the TBT Agreement addresses more specifically the measures or claims at issue in this dispute.

<sup>322</sup> See HKC First Written Submission, paras. 58, 66.

<sup>323</sup> *US – Clove Cigarettes (AB)*, para. 87; *US – Tuna II (Mexico) (AB)*, para. 202.

<sup>324</sup> Article III:4 requires a complainant to demonstrate that (1) the measures at issue is either a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; (2) the imported and domestic products are “like;” and (3) the law or regulation provides to imported products treatment less favorable than that accorded to like domestic products. See, e.g., *Korea – Beef (Panel)*, para. 617. Article I:1 requires a complainant to demonstrate : (1) that the measure falls within the scope of Article I:1; (2) that the measure confers an “advantage, favour, privilege, or immunity” to some “product originating in or destined for any other country”; (3) that the products at issue are “like products”; and (4) that the advantage is not “accorded immediately and unconditionally to the like product originating in . . . the territories of all other Members.” See *EC – Seal Products (AB)*, para. 5.86.

above in Section III.C.1, the structure of the WTO Agreement does not suggest that negotiators made such a distinction.

*Article 10.8.3*

306. Article 10, “Information About Technical Regulations, Standards and Conformity Assessment Procedures”, sets forth disciplines regarding transparency and provision of information with respect to technical regulations, standards, and conformity assessment procedures. In turn, Article 10.8.3 refers specifically to essential security with respect to the disclosure of information. This reference confirms that, as discussed below, the negotiators of the TBT Agreement did not intend for the agreement to “supplement” or “replace” essential security concerns.<sup>325</sup>

307. This explicit reference to the GATT 1994 further confirms the understanding that essential security measures are not subject to the disciplines of the TBT Agreement, especially when read in light of the object and purpose of the TBT Agreement provided in the seventh recital. As discussed in Section III.A.1, the language of Article XXI(a) of the GATT 1994, and similarly the language of Article 10.8.3, implies that the factual considerations and basis that form the actions under Article XXI(b) may not be tested.

*Article 14*

308. Like Articles 7 and 8 of the *Agreement on Rules of Origin*, Article 14 of the TBT Agreement references GATT 1994 and the DSU. Specifically, Article 14 of the TBT Agreement states:

Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

309. As explained above with respect to Articles 7 and 8 of the *Agreement on Rules of Origin*, both Article XXIII of the GATT and Article 14 of the TBT Agreement are “consultations and dispute settlement provisions” under the DSU to be read together, and subject to Article XXI. This is further confirmed by the object and purpose of the TBT Agreement, as provided in the seventh recital.

**3. The negotiating history of the TBT Agreement supports the understanding that essential security measures are not reviewable under the TBT Agreement.**

310. The negotiating history of the TBT Agreement confirms that Article XXI of the GATT 1994 applies to obligations TBT Agreement. This history, which dates back to the Tokyo

---

<sup>325</sup> See Section III.D.2. (discussing the negotiator’s intent with respect to reconciling TBT disciplines with provisions within the GATT).

Round, demonstrates that Article XXI was explicitly considered to be included in the preamble, and that negotiators considered that essential security actions under Article XXI indeed need not be “in accordance with the provisions” of the TBT Agreement.

311. Prior to the negotiation and completion of the TBT Agreement in the Uruguay Round, an earlier agreement on technical barriers to trade was negotiated as part of the Tokyo Round in 1979.<sup>326</sup> The Tokyo Round Agreement on Technical Barriers to Trade, also known as the “Standards Code,” was one of a number of plurilateral agreements reached in the Tokyo Round. The seventh recital as it appears in the TBT Agreement was included in the Standards Code.<sup>327</sup>

312. In December 1971, a “Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade” was circulated among the Drafting Group on Standards, a sub-group under the Working Group 3 on Standards created by the Committee on Industrial Products.<sup>328</sup> While this draft did not contain any text for a preamble, it noted that four points should be included in any preamble.<sup>329</sup> The first point was that the preamble should note “{t}he purpose of the Code,” and with respect to the second point the draft stated:

A statement emphasizing that the Code in no way interferes with the responsibility of governments for the safety, health and welfare of their people or for the protection of the environment in which they live. It merely seeks to minimize the effect of such actions on international trade. *Refer to Articles XX and XXI of the General Agreement.*<sup>330</sup>

313. Therefore, Tokyo Round Standards Code negotiators contemplated that the preamble should “refer” to the exception articles of the GATT, specifically Articles XX and XXI. This supports the interpretation that the seventh recital of the preamble reflects Article XXI of the GATT.

314. Even prior to the Tokyo Round, the GATT Committee on Industrial Products created a working group on non-tariff barriers to examine, among other things, standards as a non-tariff barrier to trade, in particular “disparities in existing legislation or regulations, disparities in future legislation or regulations, lack of mutual recognition of testing, unreasonable application

---

<sup>326</sup> THE TOKYO ROUND Statement by GATT Director-General, and Publication of Agreements, April 12, 1979, at 22-23 (GATT/1234) (US-105); Tokyo Round Agreement on Technical Barriers to Trade (LT/TR/A/5) (US-106).

<sup>327</sup> Tokyo Round Agreement on Technical Barriers to Trade (LT/TR/A/5), preamble (US-106).

<sup>328</sup> GATT BODIES AND OTHER ENTITIES *available at* <https://docs.wto.org/gtd/GattTree.aspx?pagename=GATTBodiesTree&langue=e&dadid=418> (US-107)

<sup>329</sup> Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade: Contents of Revised Draft Prepared for Consideration by the Drafting Group on 11 January, 1972 (Spec(71)143) (US-108).

<sup>330</sup> Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade: Contents of Revised Draft Prepared for Consideration by the Drafting Group on 11 January, 1972 at 3 (Spec(71)143) (emphasis added) (US-108).

of standards, packaging, labelling and marking regulations.”<sup>331</sup> The working group recognized that the most-favored-nation principle needed to be reconciled with any code covering standards.<sup>332</sup> More specifically, the working group considered the general exceptions of Article XX of the GATT 1947 as “being relevant” to the context of the issue of standards and regulations serving as a barrier to trade.<sup>333</sup>

315. The 1970 report of the working group on technical barriers to trade to the GATT Committee on Trade in Industrial Products noted:

The following Articles of the General Agreement were referred to as being relevant to the subject: III, VIII, IX, X, XI:2(b), XIII (with reference to Article XI), XX, and more generally, Articles XXII and XXIII.

...

It was suggested by one delegation that the code or guidelines might also deal with those areas where there was difficulty in reconciling the objective of maintaining adequate standards with the most-favoured-nation principle. It was also suggested that such a code or guidelines should supplement rather than replace existing GATT provisions such as those in Article XX.<sup>334</sup>

The report suggests that, while the working group had been considering the need to reconcile the most-favored-nation principle with the goal of maintaining standards, as well as the idea that a standards code should “supplement” the general exceptions in Article XX of the GATT, it did not similarly consider the Article XXI exception as needing to be “supplemented.” This confirms that the Article XXI exceptions are not meant to be reconciled with the TBT Agreement, reflecting that measures under that exception need not be “in accordance with the provisions” of the TBT Agreement.

316. Ultimately, the recital in the Tokyo Round Standards Code read, “*Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest.” The language of this recital was not changed during the negotiation of the TBT Agreement in the Uruguay Round.

---

<sup>331</sup> Report on Working Group 3 on Non-Tariff Barriers: Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade), para. 1 (COM.IND/W/41) (US-109)

<sup>332</sup> See Report on Working Group 3 on Non-Tariff Barriers: Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade), para. 13 (COM.IND/W/41) (“it was felt desirable that the contracting parties draw up a set of principles or ground rules on standardization. The form to be given to such principles, whether a code or guidelines . . . .”) (US-109)

<sup>333</sup> Report on Working Group 3 on Non-Tariff Barriers: Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade), para. 3 (COM.IND/W/41) (US-109)

<sup>334</sup> Report on Working Group 3 on Non-Tariff Barriers: Examination of Items in Part 3 of the Illustrative List (Standards Acting as Barriers to Trade), para. 3, 16 (COM.IND/W/41) (US-109).

317. In contrast, the phrasing of what is now the sixth recital of the TBT Agreement was changed in the Uruguay Round. The recital in the Tokyo Round Standards Code did not include the phrase “in accordance with this agreement.” It read:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.<sup>335</sup>

The language that now appears at the end of the sixth recital in the TBT Agreement, “in accordance with the provisions with this Agreement,” was added to what became the sixth recital during the Uruguay Round.<sup>336</sup>

318. Accordingly, the negotiating history of the TBT Agreement supports the interpretation that the preamble of the GATT 1994 refers to a Member’s right to act to protect its essential security interests as provided in Article XXI of the GATT. It was understood even prior to the Uruguay Round that drafters never intended to “supplement” the provisions of Article XXI in the context of an agreement disciplining technical barriers to trade. Negotiators did not seek to qualify their recognition of a Member’s right to take action as provided for in Article XXI during the Uruguay Round, declining to add language that essential security measures be “in accordance with the provisions of this Agreement.”

#### **4. The claims in this dispute confirm the link between the GATT 1994 and the TBT Agreement, and the availability of Article XXI(b).**

319. With regard to the specific claims at issue, as with the *Agreement on Rules of Origin*, Hong Kong, China, itself acknowledges the link between the TBT Agreement and the GATT 1994. Hong Kong, China, states that its claims of breach of Article 2.1 of the TBT Agreement are “essentially the same” as its claims of breach of Articles I:1 and IX:1 of the GATT 1994,<sup>337</sup> and requests further that the Panel exercise judicial economy with respect to its GATT 1994 claims.<sup>338</sup> All of the claims by Hong Kong, China, challenge the determination with respect to the autonomy of Hong Kong, China, in Executive Order 13936. The crux of the claims by Hong Kong, China, is that the origin marking requirement breaches Articles 2.1 of the TBT Agreement, as well as Articles I:1 and IX:1 of the GATT 1994 (and Article 2.1 of the TBT

---

<sup>335</sup> Tokyo Round Agreement on Technical Barriers to Trade (LT/TR/A/5), preamble (US-109).

<sup>336</sup> Compare MTN/NTM/w/92/Rev.3 (US-110) with MTN/NTM/W/192/Rev.4 (US-111).

<sup>337</sup> See HKC First Written Submission, paras. 58, 66.

<sup>338</sup> See HKC First Written Submission, paras. 68-69.

Agreement) is that the United States applies a condition of “sufficient autonomy” with respect to goods of Hong Kong, China.<sup>339</sup>

320. Just as the origin marking requirement is subject to an exception to claims under Articles I:1 and IX:1 as an action taken to protect U.S. essential security interests under Article XXI of the GATT 1994, so too is this action subject to an exception to the same substantive claims under the TBT Agreement. There is no logical basis to conclude that an origin marking requirement subject to Article IX of the GATT 1994 could be defended under as an action taken to protect essential security interests under Article XXI, but only if that marking requirement is not a technical regulation. Indeed, by arguing that a “requirement to mark an imported product with its country of origin” is by definition a technical regulation,<sup>340</sup> Hong Kong, China, would deprive a Member from taking action to protect its essential security interests with respect to origin marking requirements – effectively undoing the availability of Article XXI for Article IX claims. The structure of the WTO Agreement, as well as the text of the TBT Agreement, indicate that the negotiators of the TBT Agreement and the GATT 1994 did not intend such a result.

**E. IN LIGHT OF THE SELF-JUDGING NATURE OF ARTICLE XXI OF THE GATT 1994, THE SOLE FINDING THAT THE PANEL MAY MAKE CONSISTENT WITH ITS TERMS OF REFERENCE UNDER ARTICLE 7.1 OF THE DSU IS TO NOTE THE INVOCATION OF ARTICLE XXI**

321. The DSB has established the Panel’s terms of reference under Article 7.1 of the DSU.<sup>341</sup> Under these standard terms of reference, the DSB has tasked the Panel: (1) “[t]o *examine*” the matter – that is, to “[i]nvestigate the nature, condition or qualities of (something) by close

---

<sup>339</sup> With respect to Article I:1 of the GATT 1994, *see* HKC First Written Submission, para. 84 (“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)”). With respect to Article IX:1 of the GATT 1994, *see* HKC First Written Submission, para. 72 (“[T]he measures at issue accord less favourable treatment to goods of Hong Kong, China in respect of marking requirements because the United States does not determine the country of origin of goods imported from Hong Kong, China in the same manner that it determines the country of origin of like products imported from other Members”). With respect to Article 2.1 of the TBT Agreement, *see* HKC First Written Submission, para. 58 (“the United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of ‘sufficient autonomy’ from the People’s Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members). The United States has applied that condition to determine that goods imported from the customs territory of Hong Kong, China have an origin of the People’s Republic of China, and consequently requires goods imported from Hong Kong, China to be marked as goods of ‘China’.”)

<sup>340</sup> HKC First Written Submission, paras. 51-52.

<sup>341</sup> *United States – Origin Marking Requirement*, Constitution of the Panel Established at the Request of Hong Kong, China, Note by the Secretariat, WT/DS597/6 (WT/DS597/6).



inspection or tests”<sup>342</sup>; and (2) to “make such *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreement.<sup>343</sup>

322. DSU Article 11 confirms this dual function of a panel. Article 11 of the DSU states that the “function of panels” is to “assist the DSB in discharging its responsibilities” under the DSU itself and the covered agreements. Article 11 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,” and “such other *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”

323. In this dispute, the Panel has been tasked by the DSB to examine the matter and to make such findings as may lead to a recommendation to bring a WTO-inconsistent measure into conformity with the WTO Agreement. Article 11 reflects this function of examination and making such findings. In order to make the “objective assessment” that may lead to findings to assist the DSB to make recommendations, the Panel is to make “an objective assessment of the facts of the case” and “of the applicability of and conformity with the relevant covered agreements.” In the context of this dispute, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. And that objective assessment of Article XXI(b) leads to the understanding that the sole finding that the Panel may make is to recognize the Member’s invocation of Article XXI(b).

324. The panel objectively assesses the facts of the case by noting that the responding Member has invoked Article XXI(b). The panel objectively assesses the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and—once it has done so and determined Article XXI(b) to be self-judging—finding Article XXI(b) applicable. Nothing in the DSU—including Article 11 of the DSU—requires otherwise.

325. This result is consistent with DSU Article 19. Article 19.1 provides that “recommendations” are issued “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement” and are recommendations “that the Member concerned bring the measure into conformity with the agreement.” DSU Article 19.2 clarifies that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement.”

326. 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). Thus, the sole finding that the Panel may make—consistent with its terms of reference and the DSU—is to note in the Panel’s report that the United States has invoked its

---

<sup>342</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870 (US-11).

<sup>343</sup> Emphasis added.

essential security interests. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b).

327. The understanding that the sole finding by the panel that the responding Member invokes Article XXI(b) is equally applicable to the claims with respect to the *Agreement on Rules of Origin* and the TBT Agreement. As explained in Sections III.C and III.D above, Article XXI(b) is available as a defense to claimed breaches of the *Agreement on Rules of Origin* and the TBT Agreement.

**F. THE PANEL SHOULD BEGIN ITS ANALYSIS BY ADDRESSING THE INVOCATION BY THE UNITED STATES OF ARTICLE XXI**

328. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel’s determination. Therefore, contrary to the assertion by Hong Kong, China, that the Panel “must begin its analysis” with the claims under the *Agreement on Rules of Origin*, then the TBT Agreement, and then the GATT 1994,<sup>344</sup> the Panel may consider the issues presented in any order that it sees fit. Whatever the Panel’s internal ordering of its analysis, as the United States has explained, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole *finding* that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has invoked Article XXI. No additional findings concerning the claims raised by Hong Kong, China, in its submissions would be consistent with the DSU, in light of the text of Article XXI(b). Accordingly, the Panel should begin by addressing the invocation by the United States of Article XXI(b).

**IV. CONCLUSION**

329. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.

---

<sup>344</sup> HKC First Written Submission, para. 69.