

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

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

**November 11, 2021**

## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Hong Kong, China, Fails to Rebut the U.S. Interpretation of Article XXI(b) that It Is Self-Judging.....	4
A.	The Ordinary Meaning of Article XXI(b) of the GATT 1994 Confirms that It Is Self-Judging.....	4
1.	The Language “Which it Considers” Modifies the Subparagraphs.....	5
2.	Reconciling the Authentic Texts of Article XXI(b) under Article 33 of the VCLT Establishes that Article XXI(b) Is Self-Judging.....	10
3.	Interpretation of the Subparagraphs of Article XXI(b) as Self-Judging Reflects the Principle of Effectiveness .....	15
4.	Article XXI(b) Does Not Require an Invoking Member to Identify a Specific Subparagraph .....	18
B.	The Context of Article XXI(b) of the GATT 1994 Supports that It Is Self-Judging.....	19
1.	Article XXI(a) Supports that Article XXI(b) Is Self-Judging .....	19
2.	Article XX Supports that Article XXI(b) Is Self-Judging .....	20
3.	Other WTO Provisions Support that Article XXI(b) Is Self-Judging.....	21
C.	The Object and Purpose of the GATT 1994 Confirms that It Is Self-Judging. ....	22
D.	A Subsequent Agreement Confirms that Article XXI(b) Is Self-Judging. ....	23
E.	Recourse to Supplementary Means of Interpretation Confirms that Article XXI(b) Is Self-Judging.....	26
1.	Materials that Are Proper Supplementary Means of Interpretation Confirm that Article XXI(b) Is Self-Judging. ....	26
2.	Drafting History Related to Non-Violation Nullification or Impairment Claims Supports that Such Claims Are the Appropriate Recourse to Essential Security Actions and the History Supports the Self-Judging Nature of Article XXI(b). ....	29
3.	Internal Documents of the U.S. Delegation Are Not Proper Supplementary Means of Interpretation, and in Any Event Do Not Undermine the Interpretation that Article XXI(b) Is Self-Judging.....	32
III.	Hong Kong, China, Fails to Rebut the U.S. Showing that Article XXI(b) Applies to the Claims under the <i>Agreement on Rules of Origin</i> and the TBT Agreement .....	35

A.	Hong Kong, China, Adopts an Approach that Is Inconsistent with the Customary Rules of Treaty Interpretation. ....	36
1.	The Structure of the WTO Agreement Is Relevant Context and Supports a Finding that Article XXI Applies. ....	37
2.	The Interpretative Approach Suggested by Hong Kong, China, Does Not Reflect Customary Rules of Treaty Interpretation.....	39
3.	Hong Kong, China, Fails to Appropriately Interpret and Apply the Principle of Effectiveness. ....	39
B.	The Interpretation by Hong Kong, China, that Article XXI Does Not Apply Fails to Accord Meaning to Textual Links between the Agreements at Issue. ....	42
C.	Hong Kong, China, Incorrectly Dismisses the Relevance of the Substantive Overlap between the Claims at Issue with Respect to the Measures at Issue.....	44
D.	Hong Kong, China, Fails to Properly Read the “Object and Purpose” of the <i>Agreement on Rules of Origin</i> and the TBT Agreement.....	47
1.	Agreement on Rules of Origin.....	47
2.	The TBT Agreement.....	48
IV.	Hong Kong, China, Has Not Established a Breach of the <i>Agreement on Rules of Origin</i> , the TBT Agreement, or the GATT 1994 .....	49
A.	Hong Kong, China, Has Failed to Establish a Breach of the <i>Agreement on Rules of Origin</i> .....	50
1.	Hong Kong, China, Misconstrues the Scope of the <i>Agreement on Rules of Origin</i> . (U.S. Comments on Responses to Questions 6 through 10) .....	50
a.	Hong Kong, China, Erroneously Argues that Marking Terminology Is a Rule of Origin.....	50
b.	Hong Kong, China, Erroneously Argues that the Agreement on Rules of Origin Requires Specific Outcomes .....	53
2.	Aside from Questions of Scope, Hong Kong, China, Fails to Establish a Breach of Article 2(c) or 2(d) of the <i>Agreement on Rules of Origin</i> . (U.S. Comments on Response to Question 11) .....	55
B.	Hong Kong, China, Has Failed to Establish a Breach of the TBT Agreement.....	55
1.	Hong Kong, China, Fails to Establish that the Measure in Dispute Is a Technical Regulation. (U.S. Comments on Response to Question 12) .....	56
2.	Hong Kong, China, Does Not Make a <i>Prima Facie</i> Showing of Article 2.1 Inconsistency Because It Fails to Make a <i>De Jure</i> Discrimination Claim	

and Moreover Evades Taking into Account the Regulatory Objective of the Disputed Measure. ....	56
a.    The “De Jure” Discrimination Claim by Hong Kong, China, Is Deficient. (U.S. Comments on Response to Question 15).....	56
b.    Hong Kong, China, Evades Addressing the Regulatory Objective of the Disputed Measure. (U.S. Comments on Responses to Questions 14 and 16) .....	59
C.    Hong Kong, China, Has Failed to Establish a Breach of the GATT 1994. (U.S. Comments on Responses to Questions 17 through 19) .....	61
V.    The Only Finding the Panel May Make Consistent with the DSU Is to Note the United States’ Invocation of Article XXI.....	64
A.    Hong Kong, China, Misinterprets the Terms of the DSU in Arguing that They Compel a Panel to Review the Merits of an Essential Security Measure. ....	65
B.    The DSU Provides Recourse to Non-Violation Nullification and Impairment Claims for Essential Security Actions. ....	66
C.    The Only Finding Consistent with the DSU Is to Note the U.S. Invocation of Article XXI(b).....	67
VI.   The Panel Should Begin Its Analysis By Addressing the United States’ Invocation of Article XXI .....	68
VII.  Conclusion .....	69

**TABLE OF REPORTS**

<b>SHORT TITLE</b>	<b>FULL CITATION</b>
<i>Canada – Periodicals (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997
<i>Canada – Wheat Exports and Grain Imports (AB)</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004
<i>Chile – Price Band System (Panel)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
<i>China – Rare Earths (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>Colombia – Textiles (Panel)</i>	Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/R and Add. 1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R and Add. 1
<i>EC – Bananas III (Ecuador) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB/ECU, 24 March 2000
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Commercial Vessels (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R, adopted 20 June 2005
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
<i>EU – Poultry Meat (China)</i>	Panel Report, <i>European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products</i> , WT/DS492/R, adopted 19 April 2017

SHORT TITLE	FULL CITATION
<i>Indonesia – Autos (Panel)</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Korea – Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<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>Thailand – Cigarettes (Philippines) (AB)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011
<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 – Welded Carbon Quality Line Pipe (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<i>Canada – Periodicals (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997
<i>Canada – Wheat Exports and Grain Imports (AB)</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004

## I. INTRODUCTION

1. The United States demonstrated, in its previous submissions and statements in this dispute, that Article XXI(b) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) is self-judging, and that Article XXI(b) applies to the claims under the *Agreement on Rules of Origin* and the *Agreement on Technical Barriers to Trade* (TBT Agreement). WTO Members did not relinquish their inherent right to take action to protect their essential security interests when joining the WTO, and agreeing to disciplines on rules of origin and technical regulations.

2. Notwithstanding the self-judging nature of essential security actions, the United States further explained that 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. The measures challenged by Hong Kong, China, reflect the Presidential determination that Hong Kong, China, “is no longer sufficiently autonomous to justify differential treatment in relation to the People’s Republic of China (PRC or China)” 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>1</sup>

3. In this submission, the United States will focus on arguments made by Hong Kong, China, during the first videoconference with the Panel, and in its written responses to questions from the Panel. Those arguments make clear that the specific outcome that Hong Kong, China, seeks is to have the Panel recommend that the United States withdraw or modify an essential security measure. As the United States will explain, such an outcome is contrary to the treaty provisions at issue, when properly interpreted under the customary rules of treaty interpretation. The WTO is not the appropriate forum for addressing security issues, much less directing governments to withdraw their security measures, and the stability and credibility of the trading system would not be well-served by converting it into such a forum.

4. This has been the position of the United States for over 70 years – contrary to the insinuations by Hong Kong, China. This position was expressed by the U.S. delegate during the 1947 negotiations of the ITO Charter, and has been consistently reiterated since, including in disputes with respect to the invocation of Article XXI(b) by other Members.

5. And, as the United States stated during the first videoconference with the Panel, the United States has long valued the fundamental freedoms and human rights of the people of Hong Kong, China, and considered the continued existence of those freedoms and human rights after the resumption of sovereignty by the People’s Republic of China to be relevant to U.S. interests.<sup>2</sup> The measures at issue reflect those interests. Executive Order 13936, which set forth the determination regarding the autonomy of Hong Kong, China, and the threat that the situation with respect to Hong Kong, China, presents, was issued pursuant to the Hong Kong Policy Act

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<sup>1</sup> Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

<sup>2</sup> See, e.g., Hong Kong Policy Act of 1992, sec. 2 (US-3).

of 1992, the Hong Kong Human Rights Act, the Hong Kong Autonomy Act of 2020, the International Emergency Economic Powers Act, and the National Emergencies Act.<sup>3</sup> As cited in the Executive Order, and in various other U.S. Government documents, this determination followed a series of actions by the People’s Republic of China, including the passage of the National Security Law as a blunt tool to quash democratic dissent, to suppress the freedoms of speech and of the press, and to undermine an independent judiciary.<sup>4</sup> As also illustrated by the United States at the first videoconference, the concerns that formed the bases for the U.S. actions have indeed materialized,<sup>5</sup> and the situation has continued to deteriorate since the Panel last met virtually with the parties at the end of August.<sup>6</sup>

6. In Section II, the United States explains that Hong Kong, China, has failed to rebut the interpretation of Article XXI(b) that it is self-judging. Section II demonstrates that Hong Kong, China, fails to properly interpret Article XXI(b) of the GATT 1994 in accordance with the ordinary meanings of its terms in their context and in light of the object and purpose of the GATT 1994. The argument by Hong Kong, China, that a Member’s invocation of Article XXI(b) is subject to substantive review by a Panel is contrary to the text and grammatical structure of the provision, and does not reflect relevant context. In addition, Hong Kong, China, fails to recognize differences between, and properly reconcile, the English, French, and Spanish texts. Section II shows that the interpretation that best reconciles the three texts commits the determination of whether an action is necessary for the protection of a Member’s security interests in the relevant circumstances to the judgment of that Member. Section II also explains that the interpretation that the applicability of the subparagraphs, like all of Article XXI(b), is self-judging is consistent with the principle of effectiveness. Contrary to the argument by Hong Kong, China, with respect to the interpretation of Article XXI(b), there is no separate principle of effectiveness that requires an outcome different than an interpretation consistent with Articles 31 through 33 of the VCLT. Also contrary to the argument by Hong Kong, China, nothing in Article XXI(b) suggests that a Member invoking the provision must specifically identify which subparagraph of Article XXI(b) it is invoking, or furnish information supporting that invocation

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

<sup>4</sup> See Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2); 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5).

<sup>5</sup> See U.S. Opening Statement, paras. 19-32.

<sup>6</sup> See *Hong Kong University orders removal of Tiananmen Square massacre statue*, The Guardian (October 8, 2021) available at <https://www.theguardian.com/world/2021/oct/09/hong-kong-university-orders-removal-of-tiananmen-square-massacre-statue> (US-197); *China Loyalty Oath Drives 72% of Hong Kong Councilors From Seats*, Bloomberg News (October 21, 2021) available at <https://www.bnnbloomberg.ca/china-loyalty-oath-drives-72-of-hong-kong-councilors-from-seats-1.1670020?fr=operanews> (US-198); *Amnesty International to close Hong Kong offices due to national security law*, The Guardian (October 25, 2021) available at <https://www.theguardian.com/world/2021/oct/25/amnesty-international-to-close-hong-kong-offices-due-to-national-security-law> (US-199); *Hong Kong police tell marathon runners to cover up ‘political’ clothing and tattoos*, The Guardian (October 25, 2021) available at <https://www.theguardian.com/world/2021/oct/25/hong-kong-police-tell-marathon-runners-to-cover-up-political-clothing-and-tattoos> (US-200). The United States continuously monitors and provides regular updates on arrests, charges, and convictions under the National Security Law on the U.S. Consulate General *Bearing Witness* webpage at <https://hk.usconsulate.gov/bearing-witness/>.



for review by a panel. Section II also explains that the negotiating history supports the interpretation that Article XXI(b) is self-judging, and that negotiators understood that non-violation nullification and impairment claims are the appropriate recourse for a Member aggrieved by another Member's essential security measure.

7. Section III demonstrates that Article XXI(b) applies to the claims under the *Agreement on Rules of Origin* and the *Agreement on Technical Barriers to Trade* (TBT Agreement). Section III explains that, contrary to the interpretative approach advocated by Hong Kong, China, an interpretation based on the customary rules of treaty interpretation establishes that Article XXI(b) applies. In Section III, the United States explains that the structure of the WTO Agreement is relevant context for purposes of the customary rules of treaty interpretation. Hong Kong, China, errs in dismissing that context, which establishes that Article XXI(b) applies. The United States further explains that, contrary to the arguments by Hong Kong, China, the interpretation that Article XXI(b) applies is consistent with the principle of effectiveness, and is established by textual links between the agreements at issue and the GATT 1994, in their context, and in light of the respective agreement's object and purpose. Section III also demonstrates that the overlapping nature of the claims at issue is relevant context in applying the customary rules of treaty interpretation, and also establishes that Article XXI(b) applies to the claims at issue in this issue.

8. Section IV responds to the written answers by Hong Kong, China, to the Panel's questions regarding the merits of the claims by Hong Kong, China under the *Agreement on Rules of Origin*, TBT Agreement, and GATT 1994.<sup>7</sup> Those views are without prejudice to the U.S. position regarding Article XXI(b).

9. Section V explains that the only finding that the Panel may make consistent with its terms of reference and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) is to note the U.S. invocation of Article XXI. Neither the function of a panel under Article 11 of the DSU – nor any other provision of the DSU – renders a Member's determination under Article XXI(b) subject to second-guessing by a panel. In the context of this dispute, as the United States has explained, the Panel conducts an objective assessment, and addresses the matter at issue, by noting the U.S. invocation of Article XXI(b), and interpreting Article XXI(b) as self-judging, consistent with the customary rules of treaty interpretation. Provisions of the DSU confirm the balance negotiators struck in the text of Article XXI(b), and reflect the concerns regarding the sensitive nature of essential security issues.

10. Section VI addresses the order of analysis that the Panel should adopt in this dispute. Contrary to the assertions by Hong Kong, China, there is no legally mandated order of analysis. However, as explained in Section IV, due to the self-judging nature of Article XXI(b), the sole

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<sup>7</sup> As the Panel is aware, the United States has invoked Article XXI(b) of the GATT 1994 with respect to the measures at issue. The U.S. position, as explained in its First Written Submission and during the first substantive meeting, as well as in its own written responses to the Panel's questions, is that, in light of the invocation, the Panel need not, and should not, reach the merits of the claims by Hong Kong, China.

finding that the Panel may make in this dispute is to note the Panels’ recognition that the United States has invoked its essential security interests. As such, the United States suggests that the Panel should begin by addressing the U.S. invocation of Article XXI(b).

## **II. HONG KONG, CHINA, FAILS TO REBUT THE U.S. INTERPRETATION OF ARTICLE XXI(B) THAT IT IS SELF-JUDGING**

11. 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, as discussed in Sections II.A, II.B, and II.C, below. 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), as explained in Sections II.D and II.E, respectively.

### **A. THE ORDINARY MEANING OF ARTICLE XXI(B) OF THE GATT 1994 CONFIRMS THAT IT IS SELF-JUDGING.**

12. 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.” 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 the United States has explained in prior submissions, 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.

13. None of the arguments presented by Hong Kong, China, to the contrary is supported by the text of Article XXI(b) or by customary rules of interpretation under public international law, as discussed below. Its arguments therefore fail to rebut the U.S. interpretation of Article XXI(b) as self-judging.

14. As discussed in Section II.A.1, the ordinary meaning of the terms of Article XXI(b) establishes that, contrary to the arguments by Hong Kong, China, the word “considers” qualifies all the terms in the chapeau and the subparagraph endings of Article XXI(b). The text of subparagraph ending (iii) also supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging.

15. As described in Section II.A.2, reconciliation of the English, French, and Spanish texts of Article XXI(b) establishes that the essential security exception is self-judging. Hong Kong, China, fails to acknowledge differences among the texts. Under the interpretation that best reconciles the text, the phrase “which it considers” modifies the entirety of the chapeau and the subparagraph endings.

16. As described in Section II.A.3, the interpretation that the applicability of the subparagraphs, like all of Article XXI(b), is self-judging is consistent with the principle of effectiveness. Contrary to the arguments by Hong Kong, China, with respect to the interpretation of Article XXI(b), there is no separate principle of effectiveness that requires an outcome different than an interpretation consistent with Articles 31 through 33 of the VCLT.

17. Finally, as set forth in Section III.A.4, Hong Kong, China, is wrong when it argues that a responding Member must identify a specific subparagraph of Article XXI(b) to invoke its right take measures for the protection of its essential security interests.

### **1. The Language “Which it Considers” Modifies the Subparagraphs**

18. In its First Written Submission, and in its responses to Panel questions, the United States explained that the ordinary meaning of the terms in Article XXI(b) establishes the self-judging nature of the essential security exception. The clause beginning with “which it considers” follows the word “action” and describes the situation which the Member “considers” to be present when it takes such an “action”. Because the relative clause describing the action begins with “which it considers”, the other elements of this clause are committed to the judgment of the Member taking the action.

19. The argument by Hong Kong, China, artificially separates the terms in the single relative clause that begins with the phrase “which it considers necessary” and ends at the end of each subparagraph. Hong Kong, China, is effectively asking the Panel to restructure Article XXI and read into it text that is not there. Such alteration of the text is inconsistent with the customary rules of interpretation, and the approach advocated by Hong Kong, China, should be rejected.

20. According to Hong Kong, China, the subjective element of the chapeau does not extend to the subparagraph endings because the subparagraph endings modify “action.” Specifically, Hong Kong, China, argues that the third subparagraph is not a part of a single relative clause that begins with “which it considers”. Rather, Hong Kong, China, considers that the words that follow “its essential security interests” are part of a noun phrase with the word “action”.<sup>8</sup> Hong Kong, China, further argues that “[a]ll three subparagraphs evidently serve the same function in relation to the chapeau” and that, as such, the three subparagraphs must modify the term “action”.<sup>9</sup> Hong Kong, China, also asserts that the language that is qualified by “which it considers” is subject to review as to whether the invoking Member has acted in good faith.<sup>10</sup> The interpretation proffered by Hong Kong, China, is unsupported by the text and the grammatical structure of Article XXI(b).

21. Under the construction offered by Hong Kong, China, the noun phrase, which consists of a noun and its modifier, is separated such that the noun (“action”) and its modifier (“relating to fissionable materials or the materials from which they are derived”) are separated by a relative clause consisting of twelve words (“which it considers necessary to protect its essential security interests”).<sup>11</sup>

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<sup>8</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 145.

<sup>9</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 147.

<sup>10</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 150.

<sup>11</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 145.

22. This position ignores English grammar rules, in particular the rule that a modifier follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.<sup>12</sup> In Article XXI(b), the dependent clause begins with a relative pronoun – “which” – so this dependent clause is also called a relative clause.<sup>13</sup> Relative clauses “postmodify nouns”.<sup>14</sup> Thus, here, the dependent/relative clause modifies the noun “action.” The dependent/relative clause therefore describes what action the Member may take regardless of the obligations under the Agreement: for instance, “any action which it considers necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived.”

23. To avoid this grammatical issue, Hong Kong, China, suggests that Article XXI(b) should be read as if the language of the subparagraphs does not follow “which it considers”. Specifically, Hong Kong, China, suggests that “if Article XXI(b)(iii) were drafted as a stand-alone provision, it would read: ‘Nothing in this Agreement shall be construed to prevent any contracting party from taking any action in time of war or other emergency in international relations which it considers necessary for the protection of its essential security interests’”.<sup>15</sup> Of course, this is not what Article XXI(b) says. The rewrite proposed by Hong Kong, China, transforms the structure of Article XXI(b) – removing a portion of the relative clause from the main text of Article XXI(b) and placing it after the subparagraph endings as opposed to before the subparagraph endings. In this rewrite, Hong Kong, China, appears to acknowledge that its own interpretation of Article XXI(b) does not reflect the English text as written.

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<sup>12</sup> U.S. Responses to Questions from the Panel, paras. 225 (citing ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (“Relative clauses postmodify nouns (‘the house that I own’), pronouns (‘those who trust me’), and nominal adjectives (‘the elderly who are sick.’) (US-191), 262; *see also* MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-194) (“[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies” and “[u]sage problems with phrases occur most often when a modifying phrase is not placed close enough to the word or words that it modifies.”); HARPER’S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-195) (“adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify.”).

<sup>13</sup> THE CLASSIC GUIDE TO BETTER WRITING 69 (Rudolf Flesch & A. H. Lass, HarperPerrenial, 1996) (“Who and which are called relative pronouns and introduce relative clauses... The point is that by using who or which you have made an independent clause into a relative or dependent clause—a group of words that can’t stand by itself.”) (emphasis in the original) (US-192); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 94 (4th ed. 1999) (defining “relative clause” as “[a] clause introduced by a relative pronoun, such as who, which, that, or by a relative adverb, such as where, when, why.”)(emphasis in the original) (US-201).

<sup>14</sup> ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (“Relative clauses postmodify nouns (‘the house that I own’), pronouns (‘those who trust me’), and nominal adjectives (‘the elderly who are sick.’) (US-195); THE CLASSIC GUIDE TO BETTER WRITING 69 (Rudolf Flesch & A. H. Lass, HarperPerrenial, 1996) (“Who and which are called relative pronouns and introduce relative clauses... The point is that by using who or which you have made an independent clause into a relative or dependent clause—a group of words that can’t stand by itself.”) (emphasis in the original) (US-192).

<sup>15</sup> Responses of Hong Kong, China, to Questions from the Panel, n.103.

24. Hong Kong, China, is also incorrect that each of the subparagraph endings must modify the same terms in the chapeau of Article XXI(b). Hong Kong, China, fails to provide any explanation or point to any linguistic sources to support its argument. English grammar permits the subparagraphs of Article XXI(b) to modify different terms in the chapeau, particularly as these subparagraphs are not connected by a conjunction, such as the coordinating conjunction “or”, to demonstrate alternatives, or the conjunction “and”, to suggest cumulative situations. Accordingly, each subparagraph must be considered separately for its relation to the chapeau of Article XXI(b).

25. The argument by Hong Kong, China, that each of the subparagraphs must modify “action” does not reflect the ordinary meaning of the English text of Article XXI(b). As the United States has explained, under the ordinary meaning of the English text of Article XXI(b), the subparagraph endings (i) and (ii) modify the phrase “essential security interests”; each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken.<sup>16</sup> This is because, as the United States has explained,<sup>17</sup> under English grammar rules, a participial phrase, which functions as an adjective,<sup>18</sup> normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies. In fact, a common mistake in English grammar is the use of “misplaced modifier,” which is “a word, phrase, or clause that is placed incorrectly in a sentence, thus distorting the meaning.”<sup>19</sup>

26. The final subparagraph ending provides that a Member may take any action which it considers necessary for the protection of its essential security interests “taken in time of war or other emergency in international relations.” It does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. In this case, the drafters departed from typical English usage in placing the modifier next to “its essential security interests” as opposed to “action.” However, this departure does not mean that subparagraphs (i) and (ii) should be – or, as Hong Kong, China, suggests, must be – read in a manner that is inconsistent with English grammar rules, or that subparagraph (iii) is not self-judging.<sup>20</sup> As just

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<sup>16</sup> U.S. First Written Submission, paras. 43-46; U.S. Responses to Questions from the Panel, paras. 262-263.

<sup>17</sup> U.S. Responses to Questions from the Panel, para. 262.

<sup>18</sup> MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) (“A participial phrase includes a participle and functions as an adjective.”) (US-194).

<sup>19</sup> The Merriam-Webster’s Guide to Punctuation and Style provides that “[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies” and “[u]sage problems with phrases occur most often when a modifying phrase is not placed close enough to the word or words that it modifies.” MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-194). The Harper’s English Grammar also provides that “adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify.” HARPER’S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-195).

<sup>20</sup> 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

noted, the subparagraphs of Article XXI(b) are not connected by a conjunction, such as “and” or “or”, that would suggest they modify the same term in the chapeau. Rather, the chosen text of this provision suggests that the drafters saw each subparagraph ending as having a different meaning, and structured them accordingly.

27. As the United States has noted, Hong Kong, China, seeks to cleave the single relative clause beginning with “which it considers”, and read into Article XXI(b) the clause “and which relates to” in the beginning of subparagraphs (i) and (ii), and “and which is taken in time of” in the beginning of subparagraph (iii).<sup>21</sup> But there are no words before any of the subparagraphs to indicate a break in the single relative clause or to introduce a separate condition. The drafters could have added an introductory clause before the subparagraph endings to indicate that these were intended to be conditions separate from the “which it considers” clause. The drafters *did* add such a clause in other provisions, such as Article XX(i) and Article XX(j), which use the phrase “provided that.” Such a clause is absent from Article XXI(b), however, indicating that the text should be read as a single clause, and not as introducing separate conditions.

28. In arguing that the subparagraphs of Article XXI(b) are not self-judging, Hong Kong, China, also appears to attach significance to the finding of the panel in the *Russia – Traffic in Transit* dispute that the existence of circumstances of the subparagraphs are capable of “objective determination”.<sup>22</sup> However, the text of Article XXI(b) reserves that determination to the judgment of the person (or Member) making that decision. In addition, as the United States explained in its First Written Submission,<sup>23</sup> the panel in *Russia – Traffic in Transit* concluded 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>24</sup> based on the language in non-WTO treaties. The United States notes that, while professing support for the approach of the *Russia – Traffic in Transit* panel with respect to the “objective” review of the Article XXI(b) subparagraphs on the one hand, Hong Kong, China, has indicated that it would be inappropriate for this Panel to consider treaties outside the WTO framework in interpreting the ordinary meaning of Article XXI(b) on the other hand.<sup>25</sup>

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relations. *See* U.S. First Written Submission, paras. 45-46; U.S. Responses to Questions from the Panel, paras. 262-263.

<sup>21</sup> U.S. Responses to Questions from the Panel, para. 260.

<sup>22</sup> *Russia – Traffic in Transit (Panel)*, paras. 7.69, 7.71, 7.77; Opening Statement of Hong Kong, China, para. 35; Responses of Hong Kong, China, to Questions from the Panel, paras. 138, 149, 165, 184.

<sup>23</sup> U.S. First Written Submission, paras. 135, 235.

<sup>24</sup> *Russia – Traffic in Transit*, para. 7.77.

<sup>25</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 252-253. In its First Written Submission, the United States pointed out that the negotiators of the Uruguay Round, with knowledge of the existence of alternative approaches to security exceptions in such non-GATT/WTO agreements, rejected proposals to change the terms of Article XXI, incorporated into the GATS and TRIPS security exceptions language identical to Article XXI,

29. In addition, the suggestion by Hong Kong, China, that Article XXI(b) is not self-judging in that the principle of “good faith” requires a Panel to review whether a Member has acted in good faith in invoking Article XXI<sup>26</sup> is inconsistent with the ordinary meaning of Article XXI(b), as well as with the DSU. The interpretation proposed by Hong Kong, China, would rewrite Article XXI(b) to insert the text, and impose the requirements, of the chapeau of Article XX. As the United States has explained, the chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs – that a measure shall not be applied in a manner which constitutes a means of “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade,” both of which concepts aim to address applying a measure inconsistently with good faith.<sup>27</sup> Again, Hong Kong, China, is effectively asking the Panel to read into Article XXI text that is not there.

30. A claim in WTO dispute settlement must be based in the provisions of the covered agreements, interpreted in accordance with the customary rules of interpretation. Article 3.2 of the DSU provides that the terms of the covered agreements must be interpreted in accordance with customary rules of interpretation; that is, they must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Nothing in the DSU otherwise provides for the application by a panel of a “principle of good faith”.

31. In this dispute, the United States has invoked the security exception under Article XXI(b). As the United States has explained, Article XXI(b), when interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose, reserves to the Member the judgment of what it considers necessary to protect its essential security interests under Article XXI(b), such that the Panel cannot second-guess the Member’s determination. There is no plausible argument that the United States sets out this interpretation in bad faith. As the United States has demonstrated, the U.S. interpretation of Article XXI in this dispute reflects the consistent interpretation of the United States for over 70 years, and is consistent with the statements of numerous other WTO

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and declined to include in the DSU text that would require a change to the longstanding approach to Article XXI as self-judging. U.S. First Written Submission, paras. 123-134.

<sup>26</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 150, 157.

<sup>27</sup> See *US – Gasoline (AB)*, p. 25 (“‘Arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that ‘disguised restriction’ includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of ‘disguised restriction.’ We consider that ‘disguised restriction’, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to ‘arbitrary or unjustifiable discrimination’, may also be taken into account in determining the presence of a ‘disguised restriction’ on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”).

Members throughout the history of the GATT and WTO. Therefore, the Panel would have no basis to find that the U.S. interpretation is not made in good faith.

## **2. Reconciling the Authentic Texts of Article XXI(b) under Article 33 of the VCLT Establishes that Article XXI(b) Is Self-Judging**

32. In its First Written Submission, the United States identified certain differences between the Spanish text of Article XXI(b) of the GATT 1994, on the one hand, and the English and French texts, on the other hand. In particular, compared to the English and French versions, the Spanish version includes the word “relativas” that is preceded by a comma at the end of the chapeau, and the words “a las” are included in subparagraph (iii). The United States explained, with respect to the Spanish text, that, because the word “relativas” appears in a feminine plural construction, it cannot modify the masculine plural noun “intereses” but must modify the feminine plural noun “medidas”—the word corresponding to “action” in the English text and “mesures” in the French text.<sup>28</sup>

33. As the United States further explained, although the U.S. interpretation that subparagraphs (i) and (ii) modify “interests” (intérêts) and subparagraph (iii) refers back to “action” (“mesures”) is based on the English text and reflects the most natural reading of its terms and grammatical structure, and the French version is consistent with this version, the three texts can be reconciled as provided under Article 33 of the VCLT.<sup>29</sup> The most appropriate way to reconcile the textual differences between the English and French subparagraph texts on one hand, and the Spanish subparagraph text on the other – specifically the different relationship between the subparagraph endings and the chapeau terms – is to interpret Article XXI(b) such that all three subparagraph endings refer back to “any action which it considers”.<sup>30</sup> This reading is consistent with the Spanish text; and also – while less in line with rules of grammar and conventions – is a reading permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase “which it considers” modifies the entirety of the chapeau and the subparagraph endings.

34. Hong Kong, China, argues that there is no need to reconcile the different language versions of Article XXI(b) because, in its view, each of the subparagraphs modify the term “action”, and are not qualified by the “which it considers” language. Hong Kong, China, relies on prior panel reports and the existence of the comma in the Spanish text to seek to establish that there is a break in the clause that begins with “which it considers”, thereby making the subparagraphs not qualified by “which it considers”.<sup>31</sup> However, Hong Kong, China, fails to account for the clear differences between the Spanish text of Article XXI(b), and the English and

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<sup>28</sup> U.S. First Written Submission, para. 165. Hong Kong, China, acknowledges that this interpretation of the English and French texts is plausible.

<sup>29</sup> U.S. First Written Submission, paras. 166-167, 180-187.

<sup>30</sup> U.S. First Written Submission, paras. 178-188.

<sup>31</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 240.



French texts of Article XXI(b) (as well as the English, French, and Spanish texts of the security exceptions in the GATS and the TRIPS Agreement).

35. The VCLT expressly contemplates that there might be differences in authentic texts. Acknowledging those differences does not equate to challenging the authenticity of a text, contrary to the suggestion by Hong Kong, China. Rather, it is part of the process of treaty interpretation, and an effort to give meaning to all authentic texts.

36. Article 33(4) of the VCLT provides that “when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” In applying this rule, the *Chile – Price Bands (AB)* report found that it is not appropriate to use two language versions to adopt a meaning different from the ordinary meaning of the third language version rather than reconciling them.<sup>32</sup>

37. This approach is consistent with the ILC’s statement that “[t]he existence of more than one authentic text clearly introduces a new element – comparison of the texts – into the interpretation of the treaty. But it does not involve a different system of interpretation.”<sup>33</sup> The ILC instructed: “the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules of interpretation of treaties.”<sup>34</sup> It further explained:

“The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, travaux préparatoires, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.”<sup>35</sup>

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<sup>32</sup> Finding error in the panel’s interpretation of one provision, the report states: “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.’” *Chile – Price Band System (AB)*, para. 271.

<sup>33</sup> *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-12).

<sup>34</sup> *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-12).

<sup>35</sup> *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-12).

38. This means that – rather than interpreting the English and French texts according to the grammar and structure of the Spanish text and thereby interpreting them inconsistently with their ordinary meaning, as Hong Kong, China, argues – under Article 33 of the VCLT, the meaning that best reconciles the Spanish text with the English and French texts should be adopted.

39. As the United States explained in its First Written Submission, the GATT 1994 is authentic in English, French, and Spanish, while the text of Parts I through III of the GATT 1947 was authentic only in English and French (Part IV was authentic in English, French, and Spanish).<sup>36</sup> During the Uruguay Round, some negotiators sought to establish an authentic Spanish text of Parts I through III of the GATT 1947, and 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.<sup>37</sup> 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.<sup>38</sup> The only change with respect to Article XXI(b) between the informal translation in 1955 in *Instrumentos Básicos y Documentos Diversos (IBDD)*, volume 1, and the GATT 1994 was the correction replacing “desintegrables” with “fisionables”.<sup>39</sup>

40. It appears that, notwithstanding the rectification process in 1994, some Members subsequently recognized discrepancies between the English, French, and Spanish texts. Members discussed this issue, following proposals by Chile, in 2002 and 2003, but without reaching a resolution.<sup>40</sup> In 2011, the WTO Secretariat held a Workshop on the Concordance of

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<sup>36</sup> U.S. First Written Submission, n.105.

<sup>37</sup> WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-77).

<sup>38</sup> WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-77).

<sup>39</sup> 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).

<sup>40</sup> See Proposal to Remove and Avoid Inconsistencies in the Texts of the WTO Agreements, Communication from Chile, WT/GC/W/473 (3 May 2002) (“Over the years a number of discrepancies have been detected between the different versions which alter, in some cases radically, the meaning and scope of the provisions in question .”) (US-202); General Council, Minutes of Meeting Held on 13-14 May 2002, WT/GC/M/74 (1 July 2002), paras. 66-80 (US-203) (reflecting, among others, the statement by the delegate from Chile, “In Chile, the Spanish version of these legal texts had been approved by the Parliament, incorporated in its national legal system and implemented as national law. Thus, the problem was whether the legal texts applied by Chile were really those that governed international trade relations, and whether they really reflected what WTO Members had negotiated and approved.”; the delegate from Colombia, “If the three languages were to retain equal force in the organization, the exercise proposed by Chile was indispensable. It was clear that unless this was done, the English version of the texts would be increasingly used, to the detriment of the texts in the other two languages.”); Proposal to Remove and Avoid Inconsistencies in the Texts of the WTO Agreements, Communication from Chile, WT/GC/W/489 (31 January 2003) (US-204)); General Council, Minutes of Meeting Held in the Centre William Rappard on 10 February 2003,

Multilingual Legal Texts, which was followed by subsequent meetings between WTO Members and the WTO Language Services and Documentation Division (LSDD).<sup>41</sup> The workshop discussions highlighted the fact that issues with the translation of the covered agreements continue to exist, including with respect to “simple errors” and “different placement of words.”<sup>42</sup>

41. The Secretariat staff in LSDD proposed procedures for correcting errors in legal texts.<sup>43</sup> Those procedures begin with recognition that there are “linguistic discrepancies between the English text and the Spanish and/or French versions of the Agreements contained in the Uruguay Round Final Act” and that “[t]hese discrepancies are exclusively the result of translation problems.”<sup>44</sup> They further provide that “[t]he UN procedure for the rectification of errors could be employed, as was agreed should be done in 1994 for the correction of the linguistic discrepancies in the French and Spanish texts of the GATT 1947” and that “[i]t should be noted that those texts too were authentic and that nevertheless on pragmatic grounds it was agreed that the original (or in any case, the reference text) was the English.”<sup>45</sup> The statement is accompanied by the following footnote: “The Spanish version of Parts I-III of the GATT 1947, which was translated subsequently, is not authentic, but was taken virtually entirely from the Havana Charter, of which an authentic version in Spanish did exist.”<sup>46</sup>

42. With respect to the prior panel reports that Hong Kong, China, cites in support of its position that there is no need to reconcile the English, French, and Spanish texts,<sup>47</sup> as the United States noted in its First Written Submission and during the first videoconference with the Panel, the panel in *Saudi Arabia – Measures Concerning the Protection of IPRs* merely “transposed” the *Russia – Traffic in Transit* panel’s analysis.<sup>48</sup> Simply transposing the approach of a prior panel, however, is not consistent with the function of panels as set out in the DSU. Furthermore,

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WT/GC/M/78 (7 March 2003), at paras. 141-154 (discussing Proposal to Remove and Avoid Inconsistencies in the Texts of the WTO Agreements, Communication from Chile, WT/GC/W/489 (31 January 2003)) (US-205).

<sup>41</sup> Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at 525 (2012) (US-206).

<sup>42</sup> Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at 531-535 (2012) (US-206). All of the examples of “simple errors” involve Spanish text that is not congruent with the English and French texts.

<sup>43</sup> Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at App. 1 (2012) (US-206).

<sup>44</sup> Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at App. 1 (2012) (US-206).

<sup>45</sup> Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at App. 1 (2012) (US-206).

<sup>46</sup> Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at App. 1 (2012) (US-206).

<sup>47</sup> Responses of Hong Kong, China, para. 249.

<sup>48</sup> U.S. First Written Submission, n.93.

as the United States explained in Section III.B. of its First Written Submission, there were numerous errors in the analysis of *Russia – Traffic in Transit* panel report. The *Saudi Arabia – Measures Concerning the Protection of IPRs* panel report is erroneous for the same reasons. As such, neither report appears to provide any additional relevant guidance to the Panel in this dispute with respect to the interpretation of Article XXI(b), including reconciliation of the texts.

43. Moreover, the assertion that reconciliation is uncalled for with respect to Article XXI(b) ignores plain differences between the texts. Hong Kong, China, appears to rely exclusively on the existence of a comma in the Spanish text to seek to establish that there is a break in the relative clause beginning with “which it considers” (“que estime”), thereby making the subparagraphs not qualified by “which it considers”.<sup>49</sup> However, Hong Kong, China, fails to acknowledge: 1) first, that there is no such comma in either the English or the French texts, which are also authentic texts; 2) perhaps because of the inclusion of the comma and “relativas” in the chapeau, subparagraph (iii) refers to a distinct measure or action from the action referred to in the chapeau itself, which is not mentioned in either the English or the French texts; and 3) the Spanish texts of the security exception of the GATS and the TRIPS Agreement do not include these differences.

44. With respect to the first point, as the United States has noted,<sup>50</sup> there is no language in the English text that suggests a break in the relative clause beginning with “which it considers”. There is likewise no such language in the French text. Rather, as discussed above, Hong Kong, China, suggests rewriting Article XXI(b) so that the language of the subparagraphs directly follows “action”, or reading the words “and which” prior to the subparagraphs. This interpretation of Article XXI(b) does not reflect the English text as written.

45. With respect to the second point, the United States notes that, under the interpretation by Hong Kong, China, that the subparagraphs are not self-judging, the assessment under Article XXI(b) would be *different* under the Spanish text than under the English and French texts. That is, in light of the inclusion of “a las” in the Spanish text, a Member invoking Article XXI(b) with respect to action that it considers necessary to protect its essential security interests taken in time of war or other emergency relations would (according to the interpretation offered by Hong Kong, China) need to identify a separate set of measures to which that action related under the Spanish text. In contrast, neither the English nor French text of Article XXI(b) – nor any language text of Article XIV**bis** of the GATS or Article 73 of the TRIPS Agreement – would require the identification of an additional measure. And it is not clear on what basis a panel would review an “invocation” of Article XXI(b)(iii), which Hong Kong, China, characterizes as “objectively reviewable”,<sup>51</sup> in light of this textual difference that Hong Kong, China, glosses over.

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<sup>49</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 240.

<sup>50</sup> See *supra*, Section II.A.1.; U.S. Responses to Questions from the Panel, paras. 226, 260.

<sup>51</sup> Opening Statement of Hong Kong, China, paras. 38-40; Responses of Hong Kong, China, to Questions from the Panel, paras. 149, 170.

46. Finally, and as the United States discussed in its First Written Submission, the text and structure of the Spanish texts of the GATS and the TRIPS Agreements do not include the comma and *relativas* in the chapeau, and the “a las” in subparagraph (iii). Rather, they are structured like the English and French texts of those agreements, as well as the English and French texts of the GATT 1994. As the United States has explained,<sup>52</sup> 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).

47. 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. There is no reason to consider that the GATT 1994, GATS, and TRIPS security exceptions, that are written almost identically in three languages, were meant to be understood according to one, slightly different language version of one agreement. Rather, contrary to the suggestions by Hong Kong, China, it is logical not to attach a difference in meaning 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).

48. As the United States has explained, the interpretation that best reconciles the textual differences between the English and French subparagraph texts on one hand, and the Spanish subparagraph text on the other – specifically the different relationship between the subparagraph endings and the chapeau terms – as provided for by Article 33 of the VCLT, leads to the same fundamental meaning: that Article XXI(b) 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. 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).

### **3. Interpretation of the Subparagraphs of Article XXI(b) as Self-Judging Reflects the Principle of Effectiveness**

49. Hong Kong, China, submits that the interpretation that the subparagraphs of Article XXI(b) are self-judging must be rejected in favor of a principle of effectiveness that is not itself provided for in the principles of treaty interpretation. Article 3.2 of the DSU provides that the dispute settlement system serves “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”, which are reflected in Articles 31 through 33 of the VCLT. As the United States explained in its opening statement during the first videoconference with the Panel, Article 31 of the VCLT itself embodies the principle of effectiveness.<sup>53</sup> That is, with respect to the interpretation of Article

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<sup>52</sup> U.S. First Written Submission, paras. 172-177.

<sup>53</sup> U.S. Opening Statement, paras. 50-54.

XXI(b) (as for any provision), there is no separate principle of effectiveness that requires an outcome different than an interpretation consistent with Articles 31 through 33.

50. As the United States has explained, the text of Article XXI(b) itself establishes that the applicability of the subparagraphs is committed to the judgment of an invoking Member. That is, the text of Article XXI(b) establishes that it is for each Member to determine what action it considers necessary for the protection of its essential security interests relating to the items set forth in subparagraph endings (i) and (ii), or in time of war or other emergency in international relations as set forth in subparagraph ending (iii). There is no basis to reject that interpretation and read into those provisions language that is not there, simply to achieve a desired result, as Hong Kong, China, seeks.

51. In particular, Hong Kong, China, suggests that the subparagraphs must be found not to be self-judging so as to prevent Members from “circumvent[ing] their treaty obligations under the GATT 1994 by disguising discriminatory measures as ‘essential security interests’.”<sup>54</sup> This outcome-driven approach is one that the International Law Commission rejected in declining to include a separate rule on effectiveness in the VCLT that would have required an interpreter to give a treaty “the fullest weight and effect”.<sup>55</sup> The ILC specifically noted that including such a separate rule “might encourage attempts to extend the meaning of treaties illegitimately on the basis of the principle of ‘effective interpretation’.”<sup>56</sup>

52. The ILC’s conclusion is consistent with conclusions stated in Oppenheim’s International Law. As stated in Oppenheim, “[t]he absence of a full measure of effectiveness may be the direct result of the inability of the parties to reach agreement on fully effective provisions; in such a case the court cannot invoke the need for effectiveness in order in effect to revise the treaty to make good the parties’ omission. The doctrine of effectiveness is thus not to be thought of as justifying a liberal interpretation going beyond what the text of the treaty justifies.”<sup>57</sup>

53. Put simply, there is no basis to reject an interpretation that reflects the principles of treaty interpretation in order to reach a particular result. That is, there is no basis to reject the proper interpretation of Article XXI(b) based on its terms – that it is self-judging – simply to make it reviewable, as Hong Kong, China, insists.

54. With respect to the claim by Hong Kong, China, that, because of the possibility that it perceives of abuse, the GATT 1994 cannot have “appropriate effects” if Article XXI(b) is self-

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<sup>54</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 157.

<sup>55</sup> Third Report on the Law of Treaties, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1964, vol. II, at 53 (US-139) (italics added).

<sup>56</sup> Draft Articles on the Law of Treaties with Commentaries (1966), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-12).

<sup>57</sup> OPPENHEIM’S INTERNATIONAL LAW, vol. I at 1280-1281 (Robert Jennings & Arthur Watts eds, 9th ed. 1992) (US-207).

judging,<sup>58</sup> Hong Kong, China, seeks to read into Article XXI(b) language regarding discrimination and disguise that are *not* found in that provision – but are provided for in Article XX, as the United States has explained.<sup>59</sup> The argument by Hong Kong, China, fails to give effect to the different language in the different exceptions.

55. In addition, this assertion by Hong Kong, China, presumes that, absent panel review of the merits of essential security measures, a Member has no recourse with respect to another Member’s essential security actions. This is incorrect. As the United States has explained, Members have recourse under the DSU with respect to another Member’s essential security actions. To the extent that Members were concerned with potential abuses of Article XXI(b), they provided for non-violation nullification or impairment claims as an avenue to address such perceived abuses. In pursuing a non-violation nullification or impairment claim, the complaining Member need not make a showing of breach. A successful claim would result in authorization to take countermeasures.<sup>60</sup> As the United States discussed in its First Written Submission, negotiators understood that a panel could review not whether an essential security measure “complies” with Article XXI, but whether a Member’s benefits have been nullified or impaired by an essential security measure and assess the level of any such nullification or impairment.<sup>61</sup>

56. In addition, the fact that a treaty reserves judgment to a party itself does not render the treaty language “mere suggestions”, or “superfluous”, as Hong Kong, China, suggests. By serving to guide a Member’s exercise of its rights under Article XXI(b), the subparagraphs inform a Member’s decision-making when it is considering action to protect its essential security interests. In the experience of the United States, governments do consider the implications of proposed actions with respect to their trade agreements, without being motivated solely by the threat of WTO litigation. This is not a meaningless exercise, and – contrary to the assertions by Hong Kong, China – the subparagraphs, like other WTO provisions that do not provide a role for panel review,<sup>62</sup> are not useless in this regard.

57. Indeed, in its response to Question 47,<sup>63</sup> the United States observed that many, if not most, international obligations are undertaken without being subject to review by an arbitral body.<sup>64</sup> The United States does not agree with the premise that, in the WTO context or

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<sup>58</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 157.

<sup>59</sup> See U.S. First Written Submission, para. 56; U.S. Responses to Questions from the Panel, paras. 10, 110.

<sup>60</sup> See U.S. Responses to Questions 65 and 67.

<sup>61</sup> See U.S. First Written Submission, paras. 91-106.

<sup>62</sup> See U.S. Response to Questions from the Panel, paras. 199-204 (citing Article 7.3 of the Agreement on Textiles and Clothing, Article IX:6 of the GATT 1994, Articles 3.7 and 4.3 of the DSU, and Annex A(5) of the SPS Agreement).

<sup>63</sup> U.S. Responses to Questions from the Panel, paras. 217-223.

<sup>64</sup> See *e.g.*, U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (US-177); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S.

otherwise, governments disregard treaty language simply because it does not provide for such review.

#### **4. Article XXI(b) Does Not Require an Invoking Member to Identify a Specific Subparagraph**

58. Hong Kong, China, suggests that the Panel need not interpret Article XXI(b) in this dispute because the United States has not identified a specific subparagraph of Article XXI(b) that it considers applicable, or established a *prima facie* case that such a subparagraph applies.<sup>65</sup> However, Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member’s right to take any action which it considers necessary for the protection of its essential security interests. Hong Kong, China, cites nothing in the text of Article XXI(b) that suggests one specific subparagraph must be invoked.

59. As the United States has explained, the single relative clause in Article XXI(b) that follows “action” begins with the phrase “which it considers necessary” and ends at the end of each subparagraph, and describes the situation which the Member “considers” to be present when it takes such an “action”. Because the relative clause describing the action begins with “which it considers”, the other elements of this clause are committed to the judgment of the Member taking the action.

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

61. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked. This understanding is supported by the text of Article XXI(a), which confirms that Members are not required “to furnish any information the disclosure of which it considers contrary to its essential security

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137 (US-178); U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (US-179); U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3 (US-180); Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 (US-181); U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163 (US-182); U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 (US-183); Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15 (US-184); U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (US-185); Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 1511 U.N.T.S. 3 (US-186); International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203 (US-187); U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (US-188); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (US-189).

<sup>65</sup> Opening Statement of Hong Kong, China, para. 40; Responses of Hong Kong, China, to Questions from the Panel, para. 170.



interests.” A Member invoking Article XXI(b) may nonetheless choose to make information available to other Members. Indeed, the United States has made plentiful information available in relation to its challenged measures, as well as provided that information in the course of this dispute. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.<sup>66</sup>

## **B. THE CONTEXT OF ARTICLE XXI(B) OF THE GATT 1994 SUPPORTS THAT IT IS SELF-JUDGING.**

62. Under Article 3.2 of the DSU and the customary rules of treaty interpretation, the Panel must interpret the terms of the GATT 1994 according to their ordinary meaning, in their context and in light of the object and purpose of the GATT 1994. As the United States has explained in prior submissions, the context of Article XXI(b) – in particular, Articles XXI(a) and XXI(c) and Article XX of the GATT 1994, as well as a number of other WTO provisions – supports the understanding that Article XXI(b) is self-judging. The interpretations of this context offered by Hong Kong, China, to the contrary are incorrect, as discussed below.

### **1. Article XXI(a) Supports that Article XXI(b) Is Self-Judging**

63. Hong Kong, China, appears to suggest that Article XXI(a) is not relevant context because the United States has not invoked Article XXI(a) in this dispute, and that in any event Article XXI(a) does not support an interpretation that Article XXI(b) is self-judging because information regarding a Member’s invocation of Article XXI(b) will “generally” be publicly available and panels have means to deal with sensitive information.<sup>67</sup> Hong Kong, China, is incorrect with respect to both assertions.

64. Regardless of whether a Member has invoked Article XXI(a) in a particular dispute, or what public information is available about the measures challenged, the circumstances of a particular dispute do not alter the meaning of the terms of either Article XXI(a) or Article XXI(b). The United States has not argued that Article XXI(a) is a means of evading obligations. Rather, as set forth in its First Written Submission,<sup>68</sup> the United States has recognized that Article XXI(a) is the immediate context for understanding the ordinary meaning of Article

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<sup>66</sup> As the United States explained in its response to Question 48, the term “emergency” in subparagraph ending (iii) supports this interpretation. The term “emergency” in subparagraph ending (iii) – which can be defined as “a serious, unexpected, and often dangerous situation requiring action” – whether there is an emergency is a subjective determination by nature. *See* The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-193). A panel that determines that a challenged action is not “taken in time of war or other emergency in international relations” is making a judgment about what constitutes, for that Member, a war or an “emergency in international relations.” Such an assessment necessarily puts the Panel in a position where it must undertake the type of analysis – for example, of the political and security relationships between Members, of the geopolitical situation involved, and other issues – a WTO panel is not suited to undertake.

<sup>67</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 164-165.

<sup>68</sup> U.S. First Written Submission, paras. 50-51.

XXI(b), and interpreted Article XXI(b) in its context consistent with customary rules of interpretation.

65. 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 an interpretation of Article XXI(b) that could undermine the effectiveness of Article XXI(a). And, to the extent that Hong Kong, China, considers that a Member could be compelled to furnish information to satisfy what it considers to be the burden of proof under Article XXI(b) because a panel might develop procedures to handle “sensitive” information,<sup>69</sup> this is directly contrary to the text of Article XXI(a), which states that Members shall not be required to *furnish any information* they consider contrary to their essential security interests.<sup>70</sup>

## **2. Article XX Supports that Article XXI(b) Is Self-Judging**

66. Hong Kong, China, argues that certain similarities between Articles XX and XXI(b) – in particular, the term “relating to” and the fact that both provisions include a chapeau followed subparagraphs – suggest that the analysis of previous reports regarding Article XX apply to the interpretation of Article XXI(b), and that the subparagraphs of Article XXI(b) are subject to objective review. This argument ignores key differences between Articles XX and XXI. As the United States has explained, Article XX is different from Article XXI in key respects, and those differences confirm that Article XXI(b) is self-judging.<sup>71</sup>

67. In both Article XX and Article XXI, the sentence begins in the chapeau and ends at the end of each subparagraph ending. However, while there may be surface-level similarities between Article XX and Article XXI, there are numerous important textual differences between the provisions. The Panel’s analysis should account for those differences.

68. First, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau – “any action which it considers necessary for the protection of its essential security interests.” As the United States has explained, the requirement for applicability of Article XXI(b) is that the Member taking the action must consider that action necessary for the protection of its essential security interests. In Article XX, the subparagraphs themselves contain the operative language regarding the relationship between the measure taken and the Member’s objective (for example, “necessary to”, “relating to”, or “essential to” the

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<sup>69</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 165.

<sup>70</sup> Emphasis added.

<sup>71</sup> U.S. First Written Submission, paras. 53-57, 228-230; U.S. Responses to Questions from the Panel, paras. 112-113.

relevant objective), and none of the Article XX subparagraphs use the phrase “which it considers” to introduce the word that establishes that relationship. That is, the subparagraphs of Article XX indicate on what basis a Member may avail itself of the exception – for example, when the measure at issue is “necessary to protect public morals”.

69. In addition, the chapeau of Article XX includes an additional non-discrimination requirement. Under this structure, then, a Member: 1) may take a measure that is necessary to protect public morals, for example, but only if 2) that measure does not arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade. These two substantive obligations in the text led the Appellate Body to its statement that the “structure and logic of Article XX” suggests a two-step analysis.

70. The “structure and logic” of Article XXI is fundamentally different. By its terms, Article XXI(b) does not permit a panel to substitute its judgment for that of a WTO Member as to whether an action is necessary for that Member to protect its essential security interests.

### **3. Other WTO Provisions Support that Article XXI(b) Is Self-Judging**

71. Hong Kong, China, argues that other WTO provisions do not support that Article XXI(b) is self-judging because those provisions are not self-judging. However, Hong Kong, China, fails to acknowledge the text of those provisions.

72. Hong Kong, China, claims that Article 3.7 of the DSU is not entirely self-judging based on the *Peru – Agricultural Products (AB)* report, which cites the *EC – Bananas (Article 21.5) (AB)* report. Putting aside the specific circumstances of those disputes, as the United States has explained, the text of Article 3.7 provides no basis for a panel to opine on whether or not a Member has exercised its judgment “before bringing a case”, but it provides guidance for a Member’s exercise of its rights under the DSU.<sup>72</sup>

73. With respect to Articles 22.3(c), 26.1, and 26.2 of the DSU, Hong Kong, China, asserts that those provisions are not entirely self-judging, and therefore Article XXI(b) is not entirely self-judging, either. Hong Kong, China, seeks to analogize the express language of Article 22.3(c) that limits the exercise of a Member’s discretion, and the language of Articles 26.1 and 26.2 that provides for panel or Appellate Body review, with the subparagraphs of Article XXI(b), which does not include such language.

74. As the United States has explained – unlike the “it considers” language in GATT 1994 Article XXI(b) – the phrase “that party considers” in Article 22.3(c) of the DSU is preceded by mandatory language in the chapeau (“the complaining party shall apply the<sup>73</sup> 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 Article 22.3(c) provides that the judgment whether to suspend concessions or other obligations resides with the

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<sup>72</sup> U.S. First Written Submission, para. 59; U.S. Responses to Questions from the Panel, para. 200.

<sup>73</sup> U.S. First Written Submission, para. 62.

party in question, the provision expressly limits that discretion by imposing an obligation to apply certain principles and procedures.<sup>74</sup>

75. Similarly, Articles 26.1 and 26.2 of the DSU make the judgment of a Member expressly subject to review through dispute settlement.<sup>75</sup> Article 26.1 provides that 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.<sup>76</sup> 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 determines that” –was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).<sup>77</sup> 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.”

76. In attempting to equate the subparagraphs of Article XXI(b) with the “additional check” on a Member’s discretion provided for by express language in Articles 22.3(c), 26.1, and 26.2 of the DSU, Hong Kong, China, overlooks the fact that Members did not agree to such language in Article XXI(b). The language of Article XXI(b) contrasts with other provisions in which Members agreed to empower an adjudicator to decide whether a Member could plausibly arrive at a certain conclusion. Accordingly, the context provided by these provisions confirms that an adjudicator cannot assume for itself the authority to second-guess the determination of a Member as to the necessity of its action for the protection of its essential security interests.

77. The interpretation that Article XXI(b) is self-judging is also consistent with the DSU, as the United States has explained, and discusses in more detail in Section V.

### **C. THE OBJECT AND PURPOSE OF THE GATT 1994 CONFIRMS THAT IT IS SELF-JUDGING.**

78. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging, as the United States explained in its First Written Submission.<sup>78</sup> The Preamble of the GATT 1994 provides, among other things, that the GATT 1994 sets forth “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other

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<sup>74</sup> In the *EC – Bananas* arbitration, conformity with the obligation (“shall apply the following principles and procedures”) was viewed as permitting review of the decision to take action. *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 51-61.

<sup>75</sup> U.S. First Written Submission, paras. 63-64.

<sup>76</sup> Emphasis added.

<sup>77</sup> Emphasis added.

<sup>78</sup> U.S. First Written Submission, paras. 65-66.

barriers to trade.”<sup>79</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.

79. Hong Kong, China, claims that the *Russia – Traffic in Transit* panel correctly analyzed the object and purpose of the GATT 1994 in determining that Article XXI(b) is not entirely self-judging. However, as the United States explained in its First Written Submission,<sup>80</sup> that panel identified 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 concluded – without offering support from the GATT or other WTO agreements – 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>81</sup> Such an approach is not consistent with the customary rules of treaty interpretation.

80. Moreover, as the United States has further explained, the security and predictability of the multilateral trading system is not well-served by converting it into a forum for security issues.<sup>82</sup> Nor would such an effort, in the words of the preamble to the WTO Agreement, contribute to a “more viable and durable multilateral trading system”. The GATT 1994 makes available a claim through which an affected Member may seek to maintain the level of “reciprocal and mutually advantageous arrangements”, that is, a non-violation nullification and impairment claim. Such a claim permits a Member concerned by another Member’s essential security measure to rebalance concessions *without* requiring a dispute settlement panel to substitute its judgment for that of the latter Member as to what actions are necessary to protect its essential security interests and in which circumstances. Thus, contrary to the assertions by Hong Kong, China, the object and purpose of the GATT 1994 establishes that Article XXI(b) is self-judging.

#### **D. A SUBSEQUENT AGREEMENT CONFIRMS THAT ARTICLE XXI(B) IS SELF-JUDGING.**

81. Hong Kong, China, argues that neither the the 1949 decision by the GATT contracting parties pursuant to the *United States Export Measures* dispute, nor the the Decision Concerning Article XXI of the General Agreement (the 1982 Decision), is a subsequent agreement within the

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<sup>79</sup> GATT 1994, pmb1.

<sup>80</sup> U.S. First Written Submission, paras. 245-250.

<sup>81</sup> *Russia – Traffic in Transit*, para. 7.79.

<sup>82</sup> U.S. First Written Submission, paras. 66, 105-106; U.S. Opening Statement, paras. 67-68; U.S. Closing Statement, paras. 7, 11-14; U.S. Responses to Questions from the Panel, paras. 269-271.

meaning of Article 31(3)(a) of the VCLT. Hong Kong, China, further asserts that both decisions support its interpretation of Article XXI(b).<sup>83</sup> While the United States agrees that the 1982 Decision is not a subsequent agreement, the assertions by Hong Kong, China, are otherwise incorrect.

82. The Panel should take into account the subsequent agreement reflected in the *United States Export Measures* decision regarding the self-judging nature of Article XXI(b). The context in which the interpretation was adopted by the GATT Council supports this argument.

83. Under the GATT 1947, Article XXIII:2 provided that the CONTRACTING PARTIES themselves, acting jointly, had to deal with any dispute between individual contracting parties. The disputes in the very early years of GATT 1947 were decided by rulings of the Chairman of the GATT Council.<sup>84</sup> Later, they were referred to working parties composed of representatives from all interested contracting parties.<sup>85</sup> These working parties were soon replaced by panels made up of three or five independent experts.<sup>86</sup>

84. It is in the context of Article XXIII that Czechoslovakia sought an interpretation of Article XXI. Specifically, 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. As discussed further in the U.S. First Written Submission, various parties expressed the view that Article XXI(b) is self-judging, and the GATT Council held that, in light of the U.S. invocation of Article XXI, the United States had not failed to carry out its obligations under the GATT.<sup>87</sup>

85. Article 31(3)(a) of the Vienna Convention does not require a subsequent agreement on interpretation to be adopted by consensus of all the parties to an agreement. 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) refers to “the parties.” What is relevant, therefore, is whether the parties have reached agreement pursuant to the decision-making rules that they have agreed for purposes of that agreement. As discussed in the U.S. First Written Submission,<sup>88</sup> the interpretation in *United States Export Measures* was adopted by the GATT Council in accordance with the rules in place at that time, which required a majority vote of representatives present and voting at the GATT Council meeting.

86. Hong Kong, China, is incorrect to assert that finding that the *United States Export Restrictions* interpretation is a subsequent agreement would mean that all WTO panel and

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<sup>83</sup> Responses of Hong Kong, China, to Questions 56 and 61.

<sup>84</sup> WTO, *A Handbook of the WTO Dispute Settlement System*, at 327 (2nd edn. 2017) (US-208).

<sup>85</sup> WTO, *A Handbook of the WTO Dispute Settlement System*, at 327 (2nd edn. 2017) (US-208).

<sup>86</sup> WTO, *A Handbook of the WTO Dispute Settlement System*, at 327 (2nd edn. 2017) (US-208).

<sup>87</sup> U.S. First Written Submission, paras. 70-75.

<sup>88</sup> U.S. First Written Submission, para. 76.

Appellate Body reports would be “subsequent agreements”. The non-binding nature of such reports is established by the text of the WTO Agreement; as the United States has noted, the WTO Agreement explicitly reserves to the Ministerial Conference and General Council the “exclusive authority” to adopt “authoritative interpretation” of a provision of the covered agreements.<sup>89</sup> However, such procedures had not been elaborated or agreed in 1951 when Czechoslovakia requested the GATT contracting parties to consider its claims. As just noted, the interpretation in *United States Export Measures* was adopted by the GATT Council in accordance with the rules in place at that time, and the decision was not a recommendation by a panel or a Working Party that was later adopted by the parties.<sup>90</sup>

87. The fact that in the context of that dispute the United States chose to provide information regarding the export measures at issue does not establish that the United States considered that the text of Article XXI(b) compelled it do so, as Hong Kong, China, infers.<sup>91</sup> As the United States has explained, while a Member invoking Article XXI(b) may choose to make information available to other Members, the text of Article XXI(b) does not require it to do so.<sup>92</sup>

88. Whereas the Czechoslovakia decision pertains to an actual application of Article XXI, and the application of Article XXI, along with Article XXIII, resulted in an “agreement” among the parties that the United States had not failed to carry out its obligations under the GATT,<sup>93</sup> the 1982 Decision is neither an agreement among the parties regarding the interpretation of the treaty (the GATT 1994), nor regarding application of its provisions. However, as explained in the U.S. response to Question 61, as a decision under Article I(b) of the GATT 1994 or Article XVI:1 of the WTO Agreement, the Panel may take it into account to the extent relevant to this dispute.

89. The 1982 Decision supports the interpretation that Article XXI(b) is self-judging, contrary to the assertions by Hong Kong, China, otherwise. 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.

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<sup>89</sup> U.S. Responses to Questions from the Panel, para. 109 (citing *Marrakesh Agreement Establishing the World Trade Organization*, Article IX:2; DSU, Article 3.9).

<sup>90</sup> The *Japan-Alcoholic Beverages II (AB)* report correctly observed that panel reports adopted under the GATT 1947 do not constitute “decisions of the CONTRACTING PARTIES to GATT 1947” under paragraph 1(b)(iv) of the GATT 1994 or “decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947” within Article XVI:1 of the WTO Agreement as a different procedure under Article XXV had been developed in GATT practice. See *Japan – Alcoholic Beverages II (AB)*, at 14.

<sup>91</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 201-202.

<sup>92</sup> U.S. Responses to Questions from the Panel, para. 268.

<sup>93</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).

Second, the decision recognizes that “in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected.” With this phrasing, the Contracting Parties acknowledged that the decision of whether to take essential security measures, and what measures to take, is within the authority of each contracting party.

**E. RECOURSE TO SUPPLEMENTARY MEANS OF INTERPRETATION CONFIRMS THAT ARTICLE XXI(B) IS SELF-JUDGING.**

90. As the United States demonstrated in its First Written Submission, while not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that Article XXI(b) of the GATT 1994 is self-judging.<sup>94</sup> While Hong Kong, China, takes the position that recourse to what might be considered proper supplementary means of interpretation – that is, the official, published negotiating history – is not necessary,<sup>95</sup> Hong Kong, China, suggests that the Panel may nonetheless rely on the internal documents of a single delegation to confirm its interpretation that Article XXI(b) is not self-judging.<sup>96</sup> Hong Kong, China, misunderstands both the materials that are properly considered negotiating history, and the internal documents, as discussed below.

91. In particular, as explained in Section II.E.1, materials that are proper supplementary means of interpretation under the VCLT confirm that Article XXI(b) is self-judging. Hong Kong, China, misconstrues certain ITO negotiating materials, and fails to acknowledge other materials, including the Uruguay Round negotiating history, in arguing to the contrary. In Article II.E.2, the United States explains that those negotiating materials further confirm that non-violation nullification and impairment claims are the appropriate recourse with respect to concerns regarding another Member’s essential security measures. As discussed in Section II.E.3, while rejecting the relevance of proper negotiating history, Hong Kong, China, nonetheless suggests that the Panel should rely on internal documents of a single delegation in the interpretative exercise. There is no basis in the customary rules of treaty interpretation for such an approach, and in any event Hong Kong, China, is incorrect to argue that those materials support an interpretation that Article XXI(b) is self-judging.

**1. Materials that Are Proper Supplementary Means of Interpretation Confirm that Article XXI(b) Is Self-Judging.**

92. First, the assertion by Hong Kong, China, that GATT/ITO negotiating history confirms that Article XXI(b) is not self-judging is incorrect. As the United States explained in its First Written Submission, the negotiating history of the GATT/ITO,<sup>97</sup> as well as of the Uruguay

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<sup>94</sup> U.S. First Written Submission, paras. 79-122.

<sup>95</sup> Responses of Hong Kong, China, to Panel Questions, paras. 204-205.

<sup>96</sup> See Responses of Hong Kong, China, to Panel Questions, paras. 209-218.

<sup>97</sup> U.S. First Written Submission, paras. 81-105. The United States notes that the interpretive value of the negotiating history is not diminished merely because the GATT 1947 and the Havana Charter were different agreements than the GATT 1994. On the contrary, the text of Article XXI was retained – unchanged and in its



Round, confirms that Article XXI(b) 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.

93. Hong Kong, China, asserts that the negotiating history indicates that Article XXI(b) is not self-judging based on a partial quote from the July 1947 session.<sup>98</sup> The United States described this session in full in its First Written Submission. As explained, during that session, after responding that the exception would not “permit anything under the sun” but that there must be some latitude for security measures, the U.S. delegate continued to state, “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>99</sup> This is consistent with the U.S. view expressed in this dispute, namely that the reference in Article XXI(b)(iii) to “taken in 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 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).

94. As the United States also discussed in its First Written Submission, the Chairman made a statement “in defence of the text” during those discussions, and recalled the context of the essential security exception as part of the ITO charter.<sup>100</sup> The Chairman’s statement directly addresses questions of potential abuse; 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>101</sup> That is, the parties would not have the ability to

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entirety – when incorporated into the GATT 1994; moreover, statements by the original negotiators of Article XXI were publicly available for decades before the Uruguay Round negotiators made the specific decision to retain Article XXI in the GATT 1994, as well as to incorporate security exceptions with the same self-judging terms in GATS and TRIPS. Numerous WTO panels and the Appellate Body have consulted the negotiating history of the ITO charter in prior disputes. *See, e.g., Japan – Alcoholic Beverages II (AB)*, para. 51 and note 52; *Canada – Periodicals (AB)*, at 34; *United States – Welded Carbon Quality Line Pipe (AB)*, para. 175 & note 171; *EC – Commercial Vessels (Panel)*, para. 7.67 & note 205; *EU – Poultry Meat (China)*, para. 7.357; *Indonesia – Autos (Panel)*, para. 5.164.

<sup>98</sup> *See Responses of Hong Kong, China, to Panel Questions*, para. 205-208.

<sup>99</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).

<sup>100</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>101</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).

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.

95. And, during the same July 1947 meeting, in response to a question from the Chairman as to whether the drafters agreed that actions taken pursuant to the essential security exception “should not provide for any possibility of redress”, the U.S. delegate observed that such actions “could not be challenged in the sense that it could not be claimed that the Member was violating the Charter”<sup>102</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>103</sup> – which, at the time, 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>104</sup> This is entirely consistent with the U.S. position regarding the interpretation of Article XXI(b) in this dispute.

96. In claiming that the negotiating history does not support the interpretation that Article XXI(b) is self-judging, Hong Kong, China, fails to engage with the entirety of the July 1947 discussions – as well as with the remainder of the negotiating history of the GATT 1947 and the ITO Charter.

97. Hong Kong, China, likewise does not offer any analysis with respect to the Uruguay Round negotiations to support its assertion. As the United States discussed in its First Written Submission and in its responses to the Panel's questions,<sup>105</sup> negotiators' discussions during the Uruguay Round also confirm the interpretation that Article XXI(b) is self-judging. In Uruguay Round negotiations on the GATT 1947, Article XXI was initially among the provisions proposed for review, and amendments were proposed – including proposals that would have limited Members' discretion when taking action under that provision.<sup>106</sup> However, negotiators declined to revise Article XXI, and the provision was left unchanged in the GATT 1994.

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<sup>102</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) (emphasis added).

<sup>103</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>104</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>105</sup> U.S. First Written Submission, paras. 107-108; U.S. Responses to Questions from the Panel, paras. 131-132.

<sup>106</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).

## **2. Drafting History Related to Non-Violation Nullification or Impairment Claims Supports that Such Claims Are the Appropriate Recourse to Essential Security Actions and the History Supports the Self-Judging Nature of Article XXI(b).**

98. In arguing that the availability of a non-violation nullification or impairment claim is irrelevant to the interpretation of whether Article XXI(b) is entirely self-judging, Hong Kong, China, further asserts that the negotiating history simply “indicates that the Contracting Parties considered a finding that an inconsistent measure is justified under Article XXI(b) would not preclude a finding of non-violation nullification or impairment.”<sup>107</sup>

99. The negotiating history does not support this characterization by Hong Kong, China. Rather, as discussed in the U.S. First Written Submission, the negotiating history demonstrates that negotiators understood that essential security measures could not be adjudged to be “wrong” in the sense that they violated obligations of the treaty, but that non-violation claims could provide a means to address concerns regarding another government’s essential security actions. For example:

- As noted above, in a July 1947 exchange during a meeting of the ITO negotiating committee, in response to a question from the Chairman regarding the possibility of redress with respect to essential security actions, the U.S. delegate stated that actions that a Member considered necessary to protect its essential security interests “could not be challenged in the sense that it could not be claimed that the Member was violating the Charter” – indicating the view that essential security actions could not be found to breach the Charter.<sup>108</sup> However, the U.S. delegate also stated, that “redress of some kind under Article 35” of the ITO Charter would be available.<sup>109</sup> 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>110</sup>

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<sup>107</sup> See Responses of Hong Kong, China, to Panel Questions, paras. 250-251. See also Brazil’s Responses to Panel Question 55; Canada’s Responses to Panel Question 55.

<sup>108</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>109</sup> See 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 (emphases added) (US-30).

<sup>110</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).

- A distinction between what are now known as breach claims and non-violation claims was introduced into the negotiations by Australia in June 1947.<sup>111</sup> Australia set out several “main purposes” for its proposal, including “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.*”<sup>112</sup> This statement seems to acknowledge that in some instances breach claims would not be “appropriate”, but that other types of claims could still be available. Australia’s proposal was revised and incorporated into a draft of the GATT 1947 on July 24, 1947,<sup>113</sup> and was adopted into the draft ITO Charter on August 22, 1947.<sup>114</sup>
- A 1948 report by a Working Party – after the distinction between breach claims and non-violation claims had been adopted into the ITO Charter (as well as the GATT 1947) – indicates that the members “considered that [paragraph 89(b), in 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>115</sup> Subparagraph (b) set out non-violation claims (while subparagraph (a) set out breach claims). The report explained that Members whose benefits had been nullified or impaired by an essential security action “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*

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<sup>111</sup> U.S. First Written Submission, para. 95.

<sup>112</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); *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>113</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>114</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, 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>115</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).

- the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.<sup>116</sup>
- In 1948, drafters declined to include an amendment to Article 94 (the essential security exception) regarding the suspension of concessions. The United States stated at the time that the amendment was “unnecessary” because it was “in effect a *repetition of paragraph (b)* of Article 89.”<sup>117</sup> At the time, as noted in the previous bullet, 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>118</sup> Neither the UK nor any other representative disagreed with the U.S. statement regarding Article 89(b).
  - During the Uruguay Round, the Negotiating Group on GATT Articles rejected proposals to amend Article XXI in a manner that would have limited Members’ discretion when taking action under that provision.<sup>119</sup> In these discussions, which took place in June 1988, some Members 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>120</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>121</sup>
  - Also during the Uruguay Round, in light of what it described as “disappointing” experiences with dispute settlement under the GATT 1947, including its 1985 dispute

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<sup>116</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>117</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>118</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>119</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>120</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>121</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).

with the United States in which the United States invoked Article XXI,<sup>122</sup> Nicaragua proposed to the Negotiating Group on Dispute Settlement, 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>123</sup> At a meeting shortly thereafter Nicaragua, negotiators of the DSU discussed a variety of topics, including “GATT Article XXI and its review by a GATT panel.”<sup>124</sup> Minutes from that meeting suggest that negotiators did not discuss Nicaragua’s proposal in a substantive way. 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. And Nicaragua’s proposal was not incorporated into the DSU.

100. Contrary to the characterization by Hong Kong, China, this drafting history makes clear that nullification or impairment claims, rather than breach claims, are the means of recourse for parties affected by essential security measures – and in turn confirms the ordinary meaning of Article XXI(b), that it is self-judging.

**3. Internal Documents of the U.S. Delegation Are Not Proper Supplementary Means of Interpretation, and in Any Event Do Not Undermine the Interpretation that Article XXI(b) Is Self-Judging.**

101. Although Hong Kong, China, maintains that recourse to the negotiating history of the Uruguay Round and the GATT/ITO is not necessary, it suggests that the Panel should consider certain internal documents of the U.S. delegation. Those documents (unlike the published negotiating history) include only internal discussions of one delegation, and were not in the public domain and not accessible to other parties during the negotiations to which they relate.<sup>125</sup> Hong Kong, China, nonetheless claims those documents constitute “circumstances of the conclusion” of the GATT 1947 within the meaning of Article 32 of the Vienna Convention, and may be taken into account.<sup>126</sup>

102. None of the arguments that Hong Kong, China, makes relating to these internal documents has a basis in the covered agreements or the Vienna Convention. As discussed in

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<sup>122</sup> Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-57).

<sup>123</sup> Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-57).

<sup>124</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>125</sup> U.S. First Written Submission, paras. 139-140.

<sup>126</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 209.

detail below, internal government disagreements do not undermine official public statements, which establish the common intention of the parties. And in any event, a majority of the U.S. negotiators agreed the text was self-judging as drafted in July 1947, as the last line of the July 1947 memorandum responding to internal proposals indicates. Moreover, the U.S. delegation was not commenting on the current text of Article XXI(b); the language of the security exception was further revised before the GATT 1947 was adopted.

103. Hong Kong, China, suggests that, because the initial text proposal that would become Article XXI of the GATT 1947 was put forward by the United States, the U.S. internal deliberations regarding that proposed text are “particularly relevant”.<sup>127</sup> However, it is usually – if not always – the case that draft text is originally proposed by one delegation, or a small number of delegations, for consideration by other delegations. If the original intent of a single delegation were given special weight, notwithstanding the negotiation and further development of that text by all parties, there could be no “common intention of the parties.” Indeed, this argument would have the effect of undermining the ordinary meaning of the text, as negotiated and agreed by all of the relevant delegations, where one party’s original intention might differ from the result of the negotiations of the parties as a whole. Such a result is unsupported by the text of the covered agreements or customary rules of interpretation under international law.

104. In suggesting that the Panel should consider documents that were not available to the negotiating parties in interpreting a provision of the WTO Agreement, Hong Kong, China, ignores that the *Russia – Traffic in Transit* panel’s misguided approach in considering these documents 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.<sup>128</sup> As the United States explained in its First Written Submission, for example, prior reports 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.<sup>129</sup>

105. Putting aside the fact that it would be legal error to consider the internal documents at issue, statements in internal meetings by certain members of the U.S. delegation do not negate the numerous official public statements by U.S. representatives that they viewed the essential

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<sup>127</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 215.

<sup>128</sup> See also *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.”).

<sup>129</sup> *EC – IT Products*, paras. 7.576-7.577; *EC – Chicken Cuts (AB)*, paras. 282-309; see also *Chile – Price Band System (Panel)*, footnote 596 (“We believe that Article 32 of the Vienna Convention allows us to use such documents, to which all GATT Contracting Parties had access before and during the negotiations of the Uruguay Round, as a supplementary means of interpretation.”).

security exception as self-judging, contrary to the claims by Hong Kong, China.<sup>130</sup> That individual members of the U.S. delegation (or other delegations) may have disagreed at certain points in a negotiation is unsurprising; that is the normal course of policy development within a government. Such disagreements are resolved internally, and the government position ultimately presented to other negotiating parties is that government's official position in the negotiations. Such official statements of a government need not, and likely will not, reflect a unanimous view of all members of the delegation, or the personal views of the individuals presenting the government's position. It is these official statements made in public to other negotiators, however, that can be used to establish the common intention of the parties – not statements that reflect only internal discussions and deliberations of a single negotiating party.

106. Moreover, as the United States has explained in its First Written Submission, these U.S. internal documents – when viewed as a whole and in context – confirm that Article XXI(b) was understood by the majority of the U.S. delegation to be self-judging as then currently drafted, both as to whether certain action was “necessary” and as to the appropriate relationship between the action and other elements of the provision.<sup>131</sup> The final conclusion of an internal U.S. memorandum discussing these competing views (which Hong Kong, China, ignores in its discussion) was that under the then-existing text “the U.S. can justify such security measures *as it may contemplate as ‘relating to’* one of the listed subjects.”<sup>132</sup>

107. Finally, after these internal discussions occurred, the text of the essential security exception was revised in two ways to emphasize its self-judging nature.<sup>133</sup> First 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>134</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

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<sup>130</sup> Responses of Hong Kong, China, to Panel Questions, paras. 214-215.

<sup>131</sup> U.S. First Written Submission, paras. 144-158.

<sup>132</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).

<sup>133</sup> U.S. First Written Submission, para. 159.

<sup>134</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).



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>135</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>136</sup>

108. In short, the drafting history of Article XXI(b) confirms the ordinary meaning of the terms – namely, that the provision is self-judging, and makes clear that nullification or impairment claims, rather than breach claims, are the means of recourse for parties affected by essential security measures. Internal documents of the U.S. delegation are not appropriate means of supplementary interpretation under the VCLT. However, the internal documents at issue, when viewed as a whole and in context, confirm that Article XXI(b) was understood by the majority of the U.S. delegation to be self-judging as then currently drafted.

### **III. HONG KONG, CHINA, FAILS TO REBUT THE U.S. SHOWING THAT ARTICLE XXI(B) APPLIES TO THE CLAIMS UNDER THE *AGREEMENT ON RULES OF ORIGIN* AND THE TBT AGREEMENT**

109. Under Article 3.2 of the DSU, provisions of the covered agreements are to be interpreted “in accordance with customary rules of interpretation of public international law.” Article 31(1) of the VCLT states, “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 light of its object and purpose.” The United States explained, in its First Written Submission and in its responses to questions from the Panel, that application of those rules demonstrates that Article XXI(b) applies to the claims at issue under the *Agreement on Rules of Origin* and the TBT Agreement.

110. Hong Kong, China, fails to interpret the plain text of the covered agreements in their context in asserting that Article XXI does not apply to the claims at issue. As the United States explains in this section, Hong Kong, China, does not address in any meaningful way either the context served by the single undertaking structure of the WTO Agreement or the textual linkages

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<sup>135</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>136</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).

that, as the United States has shown, support the conclusion that Article XXI applies to the claims at issue.

111. In Section III.A, the United States demonstrates that Hong Kong, China, fails to recognize the single undertaking structure of the WTO Agreement by adopting an approach that is not consistent with the customary rules of treaty interpretation as the basis for its erroneous conclusion that Article XXI(b) does not apply to the claims at issue. In Section III.A.1, the United States reemphasizes that the structure of the WTO Agreement, which Hong Kong, China, fails to consider, is relevant context under the customary rules of treaty interpretation. In Section III.A.2, the United States explains that the interpretative approach suggested by Hong Kong, China, with respect to the question of applicability has no basis in the customary rules of treaty interpretation. In Section III.A.3, the United States explains that Hong Kong, China, fails to properly interpret and apply the principle of effectiveness as a result of its flawed interpretative approach. In Section III.B, the United States shows that Hong Kong, China, fails to acknowledge the textual links between the agreements at issue. In Section III.C, the United States explains that because Hong Kong, China, does not take into account the context of the treaty structure, it fails to recognize the overlapping nature of its substantive claims with respect to the measures at issue. In Section III.D, the United States demonstrates that Hong Kong, China, fails to properly take into account the “object and purpose” of the *Agreement on Rules of Origin* and the TBT Agreement in its interpretation of the terms in those specific agreement on the issue of Article XXI applicability.

**A. HONG KONG, CHINA, ADOPTS AN APPROACH THAT IS INCONSISTENT WITH THE CUSTOMARY RULES OF TREATY INTERPRETATION.**

112. As the United States explained in its First Written Submission,<sup>137</sup> proper application of the customary rules of treaty interpretation establishes that Article XXI(b) applies to the claims under the *Agreement on Rules of Origin* and the TBT Agreement. The textual links of each agreement to the GATT 1994, in their context – especially the structure of the WTO Agreement – and in light of the object and purpose of the WTO Agreement<sup>138</sup> as a whole and of each respective agreement establish that Article XXI(b) applies.

113. Hong Kong, China, attempts to dismiss both the context provided by the structure of the WTO Agreement, as well as the textual links between the *Agreement on Rules of Origin* and the TBT Agreement, respectively, and the GATT 1994. Rather, Hong Kong, China, suggests that the question of applicability of Article XXI(b) to a non-GATT agreement can be reduced to the question of whether Article XXI(b) is expressly incorporated in that agreement, or the other

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<sup>137</sup> See U.S. First Written Submission, Sections III.C and III.D.

<sup>138</sup> The fourth recital of the preamble to the WTO Agreement states, “*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.”

agreement includes language that incorporates the exception “by necessary implication”.<sup>139</sup> The arguments by Hong Kong, China, are not based in the customary rules of treaty interpretation.

**1. The Structure of the WTO Agreement Is Relevant Context and Supports a Finding that Article XXI Applies.**

114. First, Hong Kong, China, attempts to dismiss the relevance of the structure of the WTO Agreement as context by mischaracterizing the U.S. explanation regarding applicability as simply an argument that the *Agreement on Rules of Origin* and TBT Agreement “relate in some way to trade in goods.”<sup>140</sup> The U.S. explanation, however, does not rely solely on the fact that these agreements all relate to goods, but rather on the single undertaking structure established by the text of the WTO Agreement, and consideration of the structure of a treaty as context is provided for in the customary rules of treaty interpretation.

115. As the United States explained in its First Written Submission, the Marrakesh Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking.<sup>141</sup> The core multilateral substantive obligations are contained in Annex 1: Annex 1A consists of the Multilateral Agreements on Trade in Goods, including the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement; Annex 1B includes the GATS; and Annex 1C includes the TRIPS Agreement. The inclusion of the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement in a single annex is therefore a **legal structure**, not merely a function of those agreements each “relating in some way to trade in goods” as misstated by Hong Kong, China.

116. The customary rules of treaty interpretation provide for taking into account the structure of the treaty as context, as the United States explained in the first videoconference with the Panel.<sup>142</sup> Some commentary has even noted that the “systemic structure of a treaty is . . . of *equal importance* to the ordinary linguistic meaning of the words used. . . .”<sup>143</sup> The United States observes further that past panel and Appellate Body reports have taken the structure of the WTO Agreement into account as context.<sup>144</sup> As cited by the Panel in Question 21, the report in *China – Rare Earths (AB)* noted that “due account [be] taken of the overall architecture of the WTO system as a single package of rights and obligations” when interpreting individual provisions of the multilateral trade agreements.<sup>145</sup> Although Hong Kong, China, cites to the same phrase in its opening statement and response to the Panel’s questions as part of its

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<sup>139</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 74-75.

<sup>140</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 90.

<sup>141</sup> Article II, Agreement Establishing the World Trade Organization.

<sup>142</sup> U.S. Opening Statement, paras. 37-38.

<sup>143</sup> U.S. Oral Statement, para. 38 (quoting US-138).

<sup>144</sup> See, e.g., *Canada – Periodicals (Panel)*, para. 5.16; *China – Rare Earths (AB)*, para. 5.51.

<sup>145</sup> *China – Rare Earths (AB)*, para. 5.74.

arguments,<sup>146</sup> it attempts to dismiss the relevance of the structure of the WTO Agreement as simply the equivalent of saying that the Annex 1A agreements “relate in some way to trade in goods”. As a result, Hong Kong, China, does not undertake any consideration of the structure (or “overall architecture of the WTO system”) as part of its interpretative approach.

117. In contrast, the United States has set forth an interpretation that accounts for the structure of the WTO Agreement. Treaty interpretation is a holistic examination;<sup>147</sup> examining the structure of the WTO Agreement as a whole is a starting point for establishing that the essential security exception applies to the covered agreements at issue.<sup>148</sup>

118. As the United States has explained, the structure of the WTO Agreement in no way suggests that Members considered essential security a concern for the disciplines of the Annex 1B and 1C agreements with respect to services and intellectual property, respectively, but not a concern for the Annex 1A agreements with respect to goods. Nor does logic suggest any reason that essential security should be less of a concern for trade in goods than for trade in services or intellectual property. 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. The structure of the WTO Agreement – and logic – suggest that the GATT 1947/1994 essential security exception likewise applies to the new agreements on trade in goods contained in Article 1A.<sup>149</sup>

119. Therefore, the structure of the WTO Agreement does not support a finding that the essential security exception necessarily only applies to those Annex 1A agreements that expressly incorporate it, as Hong Kong, China, suggests. The United States illustrated the absurdity of such a finding in a hypothetical in its First Written Submission and in its opening statement at the first videoconference.<sup>150</sup>

120. In addition, Hong Kong, China, errs in suggesting that the analysis of applicability of the essential security exception under Article XXI must be identical to that of applicability of Article XX.<sup>151</sup> Hong Kong, China, bases its assertion only on the inclusion of “Nothing in this Agreement” in both exceptions. However, this overlooks textual differences between Articles XX and XXI themselves, as well as differences in the structure of the WTO Agreement with respect to those exceptions. As the United States explained in its response to Question 21 and in

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<sup>146</sup> Oral Statement by Hong Kong, China, para. 22; Responses of Hong Kong, China, to Questions from the Panel, para. 79.

<sup>147</sup> U.S. Responses to Questions from the Panel, para. 117.

<sup>148</sup> U.S. First Written Submission, para. 268.

<sup>149</sup> See U.S. First Written Submission, paras. 268-278.

<sup>150</sup> U.S. First Written Submission, para. 278; U.S. Opening Statement, para. 48.

<sup>151</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 80.

the U.S. First Written Submission, those differences are relevant context for the Panel’s analysis of the applicability of Article XXI(b) to the claims at issue in this dispute.<sup>152</sup>

## **2. The Interpretative Approach Suggested by Hong Kong, China, Does Not Reflect Customary Rules of Treaty Interpretation.**

121. Hong Kong, China, suggests that the question of whether Article XXI(b) applies to the claims under the *Agreement on Rules of Origin* and the TBT Agreement can be reduced to two questions: whether the non-GATT agreement expressly incorporates the essential security exception, or encompasses it by “necessary implication”.<sup>153</sup> Hong Kong, China, is incorrect.

122. Neither the customary rules of treaty interpretation, nor the past reports on which Hong Kong, China, seeks to rely, support the use of this type of two-part analysis, or otherwise limit the applicability of Article XXI to those two circumstances. With respect to the “necessary implication” standard suggested by Hong Kong, China, as the United States explained in its responses to Panel questions, this language is not treaty text, nor a standard set forth in the customary rules of treaty interpretation.<sup>154</sup> Further, the term is not self-defining, and the United States does not understand how this term fits with the customary rules of interpretation of public international law that the DSU specifies should be used. Thus, whatever Hong Kong, China, means by the phrase “necessary implication,” the term has no legal meaning or validity and has no role with respect to any issue in this dispute.

123. Furthermore, the United States observes that the examples that Hong Kong, China, provides with respect to its “necessary implication” standard essentially limit the circumstances in which an exception could be found to apply to those in which an express reference to conformity with the GATT 1994 is provided.<sup>155</sup> This approach suggested by Hong Kong, China, does not reflect interpretation of the text, in its context and in light of an agreement’s object and purpose, as required by the DSU. To the extent that past reports found that GATT Article XX applies in specific circumstances, those reports simply found that express incorporation is sufficient; they do not suggest that express incorporation is *required*. Further, those reports do not call for replacing application of the customary rules of treaty interpretation with an inquiry as to whether similar or identical language exists with respect to a non-GATT agreement in the context of a particular dispute.

## **3. Hong Kong, China, Fails to Appropriately Interpret and Apply the Principle of Effectiveness.**

124. Interpretation consistent with the customary rules of treaty interpretation establishes that Article XXI(b) applies to the claims at issue and, as such, is consistent with the principle of

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<sup>152</sup> U.S. Responses to Questions from the Panel, paras. 112-116.

<sup>153</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 73-76

<sup>154</sup> See U.S. Responses to Questions from the Panel, para. 120.

<sup>155</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 75.

effectiveness, which is embodied in those rules, as the United States has explained. Hong Kong, China, maintains that based on its application of the principle of effectiveness, finding that Article XXI applies to a non-GATT agreement in the absence of language expressly providing as much would render the express incorporations in the Import Licensing Agreement, *Agreement on Trade-Related Investment Measures* (“TRIMs Agreement”), and *Agreement on Trade Facilitation* (“TFA”) ineffective.<sup>156</sup> This purported application of the principle of effectiveness is incorrect. As the United States has explained, the language in those agreements has effect; that is, the Article XXI(b) does apply to those agreements.<sup>157</sup> Upon examination, Article XXI(b) may apply without that language, but that does not make the express reference “ineffective”. A statement providing additional clarity to the reader is not “ineffective”, under either customary rules of interpretation or as a matter of simply logic.

125. Hong Kong, China, does not dispute that the language “Nothing in this Agreement” in Article XXI(b) of the GATT 1994 is not *itself* dispositive of the question of whether it applies to non-GATT agreements.<sup>158</sup> Hence, the question appears to be whether the lack of language in the *Agreement on Rules of Origin* or TBT Agreement expressly incorporating Article XXI(b) is dispositive of this issue. Hong Kong, China, appears to acknowledge that the answer to the question is no – that express incorporation is not the only basis on which Article XXI(b) could apply to a non-GATT agreement.<sup>159</sup> The past reports on which Hong Kong, China, seeks to rely in its arguments state as much.

126. At the same time, Hong Kong, China, argues that finding that Article XXI(b) applies to the *Agreement on Rules of Origin* or the TBT Agreement would render express incorporation in other agreements ineffective – that is, that the principle of effectiveness dictates that Article XXI(b) does not apply.

127. However, as described in the U.S. oral statements and written responses to Panel questions, the principle of effectiveness is built into the customary rules of treaty interpretation themselves, as reflected in the discussions of the negotiators of those rules. That is, having applied those rules and interpreted the terms of a treaty in good faith in its context and in light of the treaty’s object and purpose, there is no separate inquiry or principle regarding effectiveness to be applied. It does not mean that a reading in which a provision provides explicit clarity on a matter is “ineffective” simply because a careful reading of a provision in its context and in light of the treaty’s object and purpose might reach the same result. Thus, the principle does not mean that a treaty should be interpreted in such a way to provide effectiveness in the sense that the

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<sup>156</sup> See Responses of Hong Kong, China, to Questions from the Panel, paras. 102, 103, 106, 107.

<sup>157</sup> U.S. Opening Statement, para. 57.

<sup>158</sup> See Responses of Hong Kong, China, to Questions from the Panel, para. 75.

<sup>159</sup> See Responses of Hong Kong, China, to Questions from the Panel, paras. 89, 98. As noted in Section III.A.2, however, Hong Kong, China, erroneously considers that the only other circumstance in which Article XXI could otherwise apply is by “necessary implication”, a standard that Hong Kong, China, itself has created.

outcomes would necessarily be different in the absence of the language at issue.<sup>160</sup> Instead, the principle simply means that interpretation should not be conducted in a way that makes a provision ineffective.<sup>161</sup>

128. Again, the United States does not consider that the Panel needs to make a finding as to the applicability of Article XXI with respect to any Annex 1A agreement other than the *Agreement on Rules of Origin* or the TBT Agreement (although the United States considers that the structure of the WTO Agreement would support such a finding). However, as the United States has explained, a finding that the Article XXI exception applies to certain claims under the *Agreement on Rules of Origin* or the TBT Agreement does not deprive or make ineffective the incorporation provisions in the TRIMs Agreement, Import Licensing Agreement, or TFA. Those provisions are operable with their full legal meaning intact.<sup>162</sup> Similarly, the United States does not consider that the inclusion of a transparency obligation similar to Article X of the GATT 1994 in other Annex 1A agreements renders the former ineffective.<sup>163</sup> Put simply, redundancy in itself should not be equated with effectiveness, as Hong Kong, China, suggests.<sup>164</sup>

129. Moreover, the suggested application of the principle of effectiveness by Hong Kong, China, also fails to take into account relevant context, in particular the structure of the WTO Agreement, as noted above. Hong Kong, China, does not acknowledge that the provisions of the

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<sup>160</sup> U.S. Opening Statement, para. 57; U.S. Responses to Questions from the Panel, paras. 107, 208-209.

<sup>161</sup> See, e.g., Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer (2010), at 219 (US-142).

<sup>162</sup> With respect to the TRIMs Agreement, Hong Kong, China, cites to a statement by the U.S. delegate during the negotiations for TRIMs that his delegation had not decided “which [exceptions] would be appropriate” and welcomed views. Responses of Hong Kong, China, to Questions from the Panel, at 112 (quoting Negotiating Group on Trade-Related Investment Measures, Meeting of 29-30 January 1990, Note by the Secretariat (MTN.GNG/NG12/15) (19 February 1990), para. 56). According to Hong Kong, China, this statement confirms that the drafters of the TRIMs Agreement understood that Article XXI would not apply if not expressly incorporated. However, the statement by the U.S. delegate cited by Hong Kong, China, makes clear that at the time (that is, January of 1990) “his delegation had no firm views on the best way to put a TRIMs agreement into the GATT legal framework”. See Negotiating Group on Trade-Related Investment Measures, Meeting of 29-30 January 1990, Note by the Secretariat (MTN.GNG/NG12/15) (19 February 1990), para. 57. As noted by Hong Kong, China, the negotiations over the TRIMs involved in part the issue of prohibition of trade-related investment measures. Some delegations advocated for prohibitions of varying scopes; some considered that certain measures were already prohibited by the GATT. However, others took the position that only the trade-distorting effects of TRIMs, not the investment measures themselves, could be brought under GATT discipline, because the GATT addressed trade in goods. The question of whether exceptions should apply to prohibitions on TRIMs arose in this context, at a time when both the scope of any proposed disciplines on TRIMs, and the legal relationship between proposed disciplines on TRIMs and the GATT, was unclear.

<sup>163</sup> See U.S. Opening Statement, paras. 60-61.

<sup>164</sup> U.S. Opening Statement, paras. 55-62; see also Joel Trachtman, *The WTO Seal Products Case: Doctrinal and Normative Confusion*, AJIL Unbound, March 2014- July 2015, vol. 108, at 323 (US-143) (noting that “[g]iven the imprecision of drafting evident in the WTO Agreement,” in WTO dispute settlement the principle of effectiveness “has turned into a dangerous rule”).

covered agreements are a single undertaking, as established by Article II of the WTO Agreement, and that many of these provisions overlap, including those at issue in this present dispute. To find that the Article XXI exception applies only to the GATT 1994 and the agreements that expressly incorporate the exception would deprive the interpretative significance ascribed to Article II of the WTO Agreement, and it would also render Article XXI ineffective as it relates to GATT claims at issue. That is, as demonstrated by the United States in its First Written Submission, if a complainant can challenge a measure under a non-GATT agreement on similar grounds as under the GATT but the respondent cannot assert the essential security exception as to that claim under the non-GATT agreements, it would deprive the effectiveness of that exception as it relates to the claim under the GATT 1994.

130. Therefore, Hong Kong, China, erroneously interprets the principle of effectiveness as requiring a distinct exercise, in which the interpreter must ensure that the interpretation of other treaty language in its context can never produce the same interpretative result, and moreover fails to account for the full context of the WTO Agreement provisions in its application of the principle of effectiveness. By not accounting for the full context of the single undertaking structure, Hong Kong, China, also fails to address the overlapping nature of the disputed provisions.

**B. THE INTERPRETATION BY HONG KONG, CHINA, THAT ARTICLE XXI DOES NOT APPLY FAILS TO ACCORD MEANING TO TEXTUAL LINKS BETWEEN THE AGREEMENTS AT ISSUE.**

131. Perhaps because of its flawed views of the appropriate interpretative approach and the principle of effectiveness, Hong Kong, China, generally does not engage with the specific textual links between the *Agreement on Rules of Origin* and the TBT Agreement, respectively, and the GATT 1994. Instead, Hong Kong, China, asserts that those linkages are not “specific” or “objective” and dismisses them as general in nature.<sup>165</sup>

132. The United States disagrees. In its First Written Submission, the United States identified the various specific linkages among the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement, which as part of a holistic reading support that the essential security exception applies to the provisions at issue in this dispute. Further, as explained in the U.S response to Question 23, those linkages substantively differ from those at issue in past reports in which the linkages between Article XX of the GATT 1994 and a non-GATT agreement were described as “general”.<sup>166</sup>

133. With respect to references to Article XXIII of the GATT 1994 in Article 8 of the *Agreement on Rules of Origin* and Article 14 of the TBT Agreement, Hong Kong, China, attempts to dismiss them as “non-sequitur”.<sup>167</sup> Hong Kong, China, has no basis for this characterization,

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<sup>165</sup> See e.g., Responses of Hong Kong, China, to Questions from the Panel, para. 76.

<sup>166</sup> See U.S. Responses to Questions from the Panel, paras. 122-123.

<sup>167</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 118.



which again highlights the failure of Hong Kong, China, to take into account the structural relationship between these multilateral trade in goods agreements and the GATT 1994. The United States has explained how those references support the applicability of Article XXI of the GATT 1994 to the claims at issue in the U.S. response to Question 34.<sup>168</sup> In particular, the multilateral trade in goods agreements become subject to WTO dispute settlement by virtue of the application of Articles XXII and XXIII of GATT 1994 (and the DSU).<sup>169</sup> By making dispute settlement under these agreements subject to the GATT 1994, Members are bounded by Article XXI in the assertion of a breach or nullification or impairment of benefits under those agreements. Thus, the dispute settlement provisions in the GATT 1994, when applied in relation to a substantive provision of a multilateral trade in goods agreement, cannot be used to undermine a Member's essential security rights under Article XXI because "[n]othing in this Agreement [including Articles XXII and XXIII] shall prevent" the exercise of those rights.

134. With respect to the textual references in the TBT Agreement, Hong Kong, China, argues that, in light of its view that the seventh recital somehow only is meaningful with respect to certain provisions such as Article 2.2,<sup>170</sup> "any difference that may exist between a Member's 'essential security interest(s)' and its 'national security requirements' is not relevant for the assessment of the applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement."<sup>171</sup> Such an approach is contrary to rules of treaty interpretation.

135. Under those rules, the terms of a treaty shall be interpreted in accordance with their ordinary meaning, in their context. The terms "essential security interests" and "national security requirements" use different words, and are used in different contexts in the TBT Agreement. As explained in the U.S. response to question 16(c) and the U.S. First Written Submission, the negotiating history of the TBT Agreement strongly suggests that "essential security interest" as it exists in the seventh recital was drafted as an explicit reference to Article XXI. While the term "national security requirement" reflects a security interest, this term does not contain the word "essential". Based on the ordinary meaning, an "essential" interest is one "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."<sup>172</sup> As addressed in the U.S. response to question 36, terms contained within specific provisions of the TBT Agreement should be interpreted in the context of those provisions, and the inclusion of references to "national security" in those provisions does not necessarily mean that a Member would invoke "essential security interests" under Article XXI(b).

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<sup>168</sup> See U.S. Responses to Questions from the Panel, paras. 163-165.

<sup>169</sup> See, e.g., Articles 7 and 8, Agreement on Rules of Origin; Article 14, TBT Agreement.

<sup>170</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 50, 127.

<sup>171</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 119. See also Opening Statement by Hong Kong, China, paras. 31-32.

<sup>172</sup> *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852 (US-11).

136. Furthermore, there is no indication in the negotiating history to suggest that the drafters intended that the reference to “essential security interest” in the preamble was meant to refer to a narrower set of interests than those in Article XXI. Rather, as the United States explained in its First Written Submission, Tokyo Round Standards Code negotiators contemplated expressly that the preamble should “refer” to the exception articles of the GATT, specifically Articles XX and XXI.<sup>173</sup> The negotiating history further confirms that the drafters did not intend to “supplement” the provisions of Article XXI in the context of an agreement disciplining technical barriers to trade. And 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.” Thus, contrary to the suggestions by Hong Kong, China, the seventh recital does not reflect a decision by negotiators to that the object and purpose of taking account of security essential concerns is limited only to those provisions of the TBT Agreement that include a reference to security in some form. Rather, negotiators chose to reflect Article XXI itself in the preamble. The seventh recital therefore supports the interpretation that the preamble refers to a Member’s right to act to protect its essential security interests as provided in Article XXI of the GATT.

**C. HONG KONG, CHINA, INCORRECTLY DISMISSES THE RELEVANCE OF THE SUBSTANTIVE OVERLAP BETWEEN THE CLAIMS AT ISSUE WITH RESPECT TO THE MEASURES AT ISSUE.**

137. As the United States has further explained, the links between the *Agreement on Rules of Origin* and the TBT Agreement, on the one hand, and the GATT 1994, on the other, are particularly relevant with respect to the claims at issue in this dispute.<sup>174</sup> The United States noted in that regard that Hong Kong, China, has brought what it characterized as essentially the same claims against the same measures under the provisions of three Annex 1A Agreements.<sup>175</sup> Although Hong Kong, China, seeks to distance itself from its previous characterization of its claims in its responses to the questions from the Panel,<sup>176</sup> the overlap between the claims is established by the claims themselves. And the relationship between and among the disputed provisions is part of the structural consideration, and in turn part of the context for purposes of treaty interpretation, as discussed above.

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<sup>173</sup> U.S. First Written Submission, paras. 312-313.

<sup>174</sup> U.S. Opening Statement, paras. 41-47; U.S. Responses to Questions from the Panel, paras. 102-105.

<sup>175</sup> See First Written Submission of Hong Kong, China, paras. 8, 66, 72.

<sup>176</sup> In arguing that the claims do not overlap, Hong Kong, China, claims that “[it] does not follow from the fact that violations of Articles I:1 and IX:1 of the GATT 1994 are potentially justifiable under Article XXI of the GATT 1994 that violations of the ARO and the TBT Agreement are also potentially justifiable under that exception.” Responses of Hong Kong, China, to Questions from the Panel, para. 95. However, as the United States has stated at several points, the specific question that the Panel needs to address in this dispute is whether the exception applies to the specific claims at issue. And as the United States has demonstrated in its First Written Submission, the inconsistent application of the essential security exception to the claims at issue in this dispute results in untenable and illogical results.

138. To recall, the measure being challenged is an origin marking requirement. Article IX of the GATT 1994 specifically disciplines marking requirements; marking requirements would be covered under the two other agreements at issue in this dispute only if they were within the set of measures defined as “rules of origin” or “technical regulations”.<sup>177</sup> That is, Hong Kong, China, claims that an origin marking requirement provides discriminatory or “less favourable treatment” under Article I:1 of the GATT, Article IX:1 of the GATT, Article 2.1 of the TBT Agreement, and Article 2(d) of the *Agreement on Rules of Origin*, and that the alleged discrimination is a factor unrelated to manufacturing or processing under Article 2(c) of the *Agreement on Rules of Origin*. With respect to each claim, Hong Kong, China, identifies the determination as to “sufficient autonomy” as the discriminatory treatment or factor unrelated to manufacturing or processing.

139. Contrary to the assertions by Hong Kong, China, that the discrimination claims at issue are somehow not “the same”,<sup>178</sup> the text of the provisions at issue, and the substantive overlap in terms of the claims themselves, establishes that the claims are essentially the same. Article IX:1 of the GATT 1994 provides, “Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country”. Hong Kong, China, recognizes that Article 2(d) of the *Agreement on Rules of Origin* “imposes an MFN-type non-discrimination rule similar to the non-discrimination obligations found in Articles I:1 and IX:1 of the GATT 1994.”<sup>179</sup> Article 2(c) also is closely connected to its other claims of discrimination. That is, the discriminatory element that Hong Kong, China, identifies as the basis of all of its other claims is also the factor that Hong Kong, China, claims is unrelated to manufacturing or processing in contravention of Article 2(c).

140. With respect to the overlap between Article IX and the TBT Agreement in the context of this dispute, the United States explained in its responses to the questions from the Panel that Article 2.1 mirrors Article III of the GATT 1994, which also uses the term “no less favorable” in the context of national treatment,<sup>180</sup> and that, like Article III:4 of the GATT 1994, Article IX:1 is directed to preventing discrimination on the basis of origin.<sup>181</sup> Hong Kong, China, even recognizes that “Article 2.1 of the TBT Agreement contains non-discrimination obligations similar to those contained in Articles I:1 and III:4 of the GATT 1994.”<sup>182</sup> And in the response by Hong Kong, China, to Question 17, it states that “the ‘less favorable’ treatment standard is the same in Article 2.1 of the TBT” as that of Article IX, thus suggesting that Hong Kong, China, also considers that there is an overlap between Article 2.1 and Article IX in terms of discipline.

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<sup>177</sup> The TBT Agreement also applies to conformity assessment procedures and standards, but Hong Kong, China, has asserted only that the measures at issue are technical regulations.

<sup>178</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 91-95.

<sup>179</sup> Responses of Hong Kong, China, to Questions from the Questions from the Panel, para. 93.

<sup>180</sup> U.S. Responses to Questions from the Panel, para. 56 and n.20.

<sup>181</sup> U.S. Responses to Questions from the Panel, paras. 87-88.

<sup>182</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 94.

141. In an attempted effort to differentiate its MFN claims, Hong Kong, China, makes simple assertions that the scopes of the agreements do not overlap because the GATT 1994 does not “specifically address” certain disciplines. This argument makes little sense in the context of this dispute, given that Hong Kong, China, is challenging an origin marking requirement as being discriminatory. Putting aside the question of whether Hong Kong, China, has established that the measures at issue are “rules of origin” or “technical regulations” and in turn subject to the disciplines of the *Agreement on Rules of Origin* or TBT Agreement, the United States notes that the terms “rules of origin” and “technical regulations” cover a broad range of other measures that have nothing to do with “origin marking”. And the measure at issue is not just any rule of origin or technical regulation – rather, Hong Kong, China, is challenging a marking requirement, which the GATT 1994 explicitly addresses in Article IX. Article IX is called “marks of origin”, and the terms of Article IX:1 refer specifically to “treatment with regard to marking requirements”. Therefore, Hong Kong, China, is wrong to assert that the *Agreement on Rules of Origin* or the TBT Agreement contains disciplines regarding the present disputed measures that Article IX does not “specifically address”.

142. In addition, the argument by Hong Kong, China, that the GATT 1994 does not “specifically address” matters covered by the *Agreement on Rules of Origin* is inconsistent with its own position regarding the scope of the provisions at issue. Hong Kong, China, claims that “the GATT 1994 has no disciplines relating to the determination of country of origin”.<sup>183</sup> However, if Hong Kong, China, considers that to be true, it would have no basis to also assert that “[f]or the purpose of Article IX:1 of the GATT 1994, what matter is whether the respondent Member provides *less favourable treatment* with respect to *how* it determines the country of origin for origin marking purposes.”<sup>184</sup>

143. Perhaps based on its new position that its claims are in fact different – notwithstanding the clear overlap discussed above – Hong Kong, China, further argues that the United States lacks the “interpretative basis” to argue the availability of the same exception for these essentially the same claims.<sup>185</sup> However, the overlap between the claims at issue is relevant in the interpretative exercise because, as the United States has explained, the relationship between those claims is relevant context. And the similarity between those claims, in light of the structure of the WTO Agreement, supports the interpretation that Article XXI applies. As the United States has noted in its First Written Submission and opening statement, under the incorrect interpretation that Article XXI does not apply to the *Agreement on Rules of Origin* and TBT Agreement claims, the origin marking requirement at issue could be excepted from MFN claims under the GATT based on essential security, but the very same measure could not be excepted from the non-discrimination claims under the other two agreements based on essential security. Nothing in the single undertaking structure of the WTO Agreement suggests that the MFN principle is different among the agreements, or that Members had a different view of essential security with respect to marking requirements *if* they were also considered to be within

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<sup>183</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 93.

<sup>184</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 64 (emphasis in original).

<sup>185</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 92.

the larger set of measures defined to be rules of origin or technical regulations. As explained in the U.S. First Written Submission and opening statement, this interpretation leads to an absurd and untenable result. Application of the customary rules of treaty interpretation is not supposed to produce absurd interpretations.

**D. HONG KONG, CHINA, FAILS TO PROPERLY READ THE “OBJECT AND PURPOSE” OF THE AGREEMENT ON RULES OF ORIGIN AND THE TBT AGREEMENT.**

144. As stated above, based on customary rules of treaty interpretation, “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 light of its object and purpose.” In its interpretation of the *Agreement on Rules of Origin* and the TBT Agreement, Hong Kong, China, selectively reads the preambles and certain provisions within those agreements to argue that Article XXI does not apply to the claims at issue. As demonstrated below, such selective interpretation is inconsistent with the customary rules of treaty interpretation.

**1. Agreement on Rules of Origin**

145. As the United States explained in its First Written Submission, the preamble of the *Agreement on Rules of Origin* confirms that the Agreement indicates an objective establishing 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. Citing to the third and sixth recitals of the preamble to that Agreement, Hong Kong, China, argues that this purpose indicates that the Agreement precludes “policy considerations” such as essential security interests with respect to rules of origin.<sup>186</sup> Hong Kong, China, has no basis for this argument.

146. Nothing in the preamble indicates that essential security concerns are irrelevant in the context of the *Agreement on Rules of Origin*. Rather, as the United States has explained, the text of the *Agreement on Rules of Origin*, in its context – in particular, the structure of the WTO Agreement – establishes that negotiators understood that the essential security exception applies. And by confirming that the *Agreement on Rules of Origin* establishes general principles, and harmonization as the end product of a work program, the preamble confirms that the Agreement does not constrain a Member’s discretion with respect to essential security interests.

147. The preamble reflects Members’ desires with respect to transparency of laws, regulations, and practices regarding rules of origin, and the “impartial, transparent, predictable, consistent and neutral” preparation and application of rules of origin. The statement of those principles does not suggest that Article XXI(b) does not apply to the *Agreement on Rules of Origin*. The GATT 1994 reflects similar principles in Article X, and the statement of these principles in the GATT 1994 is in no way inconsistent with the right to invoke essential security, as shown by the inclusion of Article XXI in the GATT 1994. And, as noted in the U.S. First Written Submission and in Section II.C above, the preamble of the GATT 1994, by referring to arrangements that are “mutually advantageous” and tariff reductions that are “substantial” (as opposed to complete), confirms that the GATT contains both obligations and exceptions, including Article XXI. The

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<sup>186</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 117.

preamble to the *Agreement on Rules of Origin* similarly recognizes that rules of origin may pose “obstacles to trade” (as opposed to unnecessary obstacles), confirming that the disciplines of the agreement are not absolute in prohibiting consideration of security interests, as Hong Kong, China, asserts.

148. The fourth recital of the preamble to the WTO Agreement, which also applies to the *Agreement on Rules of Origin*,<sup>187</sup> further confirms that the essential security exception applies. The fourth recital states that Members are “[r]esolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.” This recital reflects the structure of the WTO Agreement – which, as the United States has explained, confirms that the GATT 1947/1994 essential security exception applies to the agreements on trade in goods contained in Article 1A. And as the United States has also explained, the viability and durability of the multilateral trading system is preserved by not converting that system into a forum on security issues.

149. Furthermore, by reflecting a desire to “harmonize and clarify rules of origin”, the preamble to the *Agreement on Rules of Origin* confirms the structure of the Agreement, under which transitional disciplines under Article 2 apply until the Harmonized Work Program called for under Article 3 is completed, at which point Members would apply specific rules of origin as provided in Part IV.<sup>188</sup> In the meantime (that is, at present) Members retain a degree of discretion, as provided in Article 2. Again, nothing in the Preamble suggests that discretion excludes the discretion to protect essential security interests. The object and purpose of the *Agreement on Rules of Origin*, as set forth in the agreement’s preamble, confirms the interpretation that Article XXI applies.

## 2. The TBT Agreement

150. Hong Kong, China, likewise misconstrues the preamble of the TBT Agreement. In particular, Hong Kong, China, asserts that the seventh recital<sup>189</sup> indicates that the Article XXI exception does not apply to the Agreement, and security considerations are only relevant for those provisions that specifically mention “security” interests – excluding, in this specific case, Article 2.1.<sup>190</sup>

151. The interpretation by Hong Kong, China – that the recitals are relevant only for certain provisions, and not others – is conclusory, without any basis in the text of the TBT Agreement. A key premise of the interpretation by Hong Kong, China, appears to be that there is no difference between the terms “essential security interests” and “national security requirements”

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<sup>187</sup> See Article II:2, *Marrakesh Agreement Establishing the World Trade Organization*.

<sup>188</sup> U.S. First Written Submission, paras. 289-291.

<sup>189</sup> “Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest . . . .”

<sup>190</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 127 (emphasis in original).

as used respectively in the seventh recital and in Article 2.2.<sup>191</sup> However, as the United States has explained in Section III.B above, the terms “essential security interests” and “national security requirements” not only use different words, but are also used in different contexts in the TBT Agreement, and the negotiating history of the TBT Agreement strongly suggests that “essential security interest” as set forth in the seventh recital was drafted as an explicit reference to Article XXI.

152. And there is no basis to suggest that the “object and purpose” of the TBT Agreement for purposes of analysis of Article 2.2 is different than for Article 2.1. The object and purpose of the Agreement in which both provisions sit, and the role of that object and purpose in interpreting the respective text of those provisions, is not different. The U.S. First Written Submission interpreted the provisions of the TBT Agreement in accordance with the customary rules of treaty interpretation. That is, the United States interpreted Article 2.1 in light of the object and purpose of the Agreement, as informed by the seventh recital, and concluded that Article XXI applies to Article 2.1.<sup>192</sup> In addition, the argument presented above with respect to the preamble of the WTO Agreement and the object and purpose of the *Agreement on Rules of Origin* applies with equal force to the TBT Agreement, and further confirms that Article XXI(b) applies.

#### **IV. HONG KONG, CHINA, HAS NOT ESTABLISHED A BREACH OF THE *AGREEMENT ON RULES OF ORIGIN*, THE TBT AGREEMENT, OR THE GATT 1994**

153. As the Panel is aware, the United States has invoked Article XXI(b) of the GATT 1994 with respect to the measures at issue. Accordingly, as explained in the U.S. First Written Submission and during the videoconference, the Panel should not reach the merits of the claims by Hong Kong, China. In this section, the United States provides views in light of the written responses by Hong Kong, China, to questions from the Panel that address the merits of those claims in the interest of being responsive to the Panel’s inquiries. Those views are without prejudice to the U.S. position regarding Article XXI(b).

154. Section IV.A explains that Hong Kong, China, has failed to establish a breach of the *Agreement on Rules of Origin*. In particular, Section IV.A demonstrates that Hong Kong, China, misconstrues the scope of the *Agreement on Rules of Origin* by conflating marking terminology with the rules of origin used to administer marking requirements, and by asserting that the *Agreement on Rules of Origin* dictates specific outcomes as to the application of rules of origin. In addition to failing to establish that the measures at issue are within the scope of the agreement, Hong Kong, China, has otherwise failed to establish that they breach Article 2(c) or 2(d).

155. Section IV.B explains that Hong Kong, China, has failed to establish a breach of the TBT Agreement. In particular, Section IV.B explains that Hong Kong, China, fails to establish that the measure in dispute is a technical regulation as defined by the TBT Agreement. Furthermore, Hong Kong, China, has not met its burden of proof in establishing a *prima facie* case of Article

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<sup>191</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 119.

<sup>192</sup> See U.S. First Written Submission, paras. 299-302.

2.1 inconsistency by failing to establish less favorable treatment and to take into account the regulatory objectives of the disputed measure.

156. Section IV.C explains that Hong Kong, China, has failed to establish a breach of Article IX:1 or I:1 of the GATT 1994. Hong Kong, China, fails to establish that what it characterizes as the “treatment” of goods from Hong Kong, China, is “less favorable” than that afforded to the goods of other Members. Hong Kong, China, further fails to provide any textual support for its arguments that Article IX:1 of the GATT 1994 prescribes some hypothetical and undefined “actual” country of origin, as well as how it is determined, and requires the “full English name” of that country to be used for an origin mark. Hong Kong, China, fails to establish a claim under Article I:1 for similar reasons.

**A. HONG KONG, CHINA, HAS FAILED TO ESTABLISH A BREACH OF THE *AGREEMENT ON RULES OF ORIGIN*.**

157. The written responses by Hong Kong, China, to the questions from the Panel confirm that Hong Kong, China, misconstrues the scope of the *Agreement on Rules of Origin* in asserting that the measures at issue breach Articles 2(c) and 2(d). In particular, Hong Kong, China, conflates the result of the application of rules of origin, and the name (or mark) used to reflect that result, with the rules of origin themselves. The *Agreement on Rules of Origin* by its terms distinguishes between rules of origin that are applied to administer certain instruments, and the instruments themselves. Moreover, nothing in the *Agreement on Rules of Origin* requires a Member to confer a particular origin – that is, to determine that a particular country is the country of origin, much less to associate a particular name with that country. This does not mean that the *Agreement on Rules of Origin* is “meaningless”, as Hong Kong, China, alleges. It simply means that the disciplines of the Agreement do not require the result that Hong Kong, China, seeks.

158. Apart from the fact that Hong Kong, China, has failed to establish that the measures at issue are within the scope of the *Agreement on Rules of Origin*, Hong Kong, China, has failed to establish that the measures at issue “require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin”, in breach of Article 2(c), or that “the rules of origin that they apply to imports and exports . . . discriminate between other Members,” in breach of Article 2(d). Hong Kong, China, has failed to demonstrate that either provision disciplines considerations of autonomy, or that goods of Hong Kong, China, are subject to different (much less discriminatory) rules of origin than goods from other sources.

**1. Hong Kong, China, Misconstrues the Scope of the *Agreement on Rules of Origin*.  
(U.S. Comments on Responses to Questions 6 through 10)**

**a. Hong Kong, China, Erroneously Argues that Marking Terminology Is a Rule of Origin**

159. In its written responses to the Panel’s questions, Hong Kong, China, continues to conflate the result of the application of rules of origin, and the name used to reflect that result, with the rules of origin themselves. This is incorrect. The *Agreement on Rules of Origin* makes a clear distinction between rules of origin that are applied to determine origin and used in the



administration of certain instruments, and the underlying instruments themselves. The United States explained this distinction in its responses to Questions 5 and 7,<sup>193</sup> as have a number of third parties.<sup>194</sup>

160. The logic behind the argument by Hong Kong, China, appears to be as follows: A rule of origin is applied to determine origin for marking purposes; terminology – in the present dispute, the words used to indicate origin – is used in marking; terminology is therefore itself a rule of origin.<sup>195</sup> Hong Kong, China, provides no textual support for this conclusion because there is none. The *Agreement on Rules of Origin* defines “rules of origin” that are subject to the agreement, and this definition by its terms: 1) distinguishes between “rules of origin” and the measures that those rules are used to administer (such as marking requirements); and 2) does not refer to terminology.<sup>196</sup> As such, the *Agreement on Rules of Origin* does not dictate what terminology is acceptable for marking purposes.

161. Hong Kong, China, also considers that if the *Agreement on Rules of Origin* does not apply to the terminology used in marking requirements, this would mean that the Agreement “does not apply to rules of origin used in the application of origin marking requirements” at all.<sup>197</sup> This is not the case. The specific disciplines set forth in the *Agreement on Rules of Origin* apply to “rules of origin” as defined in the Agreement “used in the application of” marking requirements. By its terms, the Agreement does not apply to terminology used in marking requirements.

162. That does not mean that the *Agreement on Rules of Origin* provides no disciplines whatsoever on the rules of origin (as opposed to the terminology) used to administer a marking requirement. Rules of origin are, as Article 1 of the agreement recognizes, used to administer certain instruments. For example, if a Member’s WTO Schedule reflects different treatment for different Members with respect to a tariff-rate quota (“TRQ”), it may use rules of origin to determine whether a good is eligible for that TRQ. That does not mean that the TRQ itself or associated tariff treatment is a rule of origin. Similarly, the requirement as to what marking is acceptable with respect to a particular country or territory – in particular, for purposes of this dispute, what terminology is used – is simply distinct from the determination that a specific country is the country of origin for marking purposes, and from the rules that are themselves applied to make that determination.<sup>198</sup>

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<sup>193</sup> See U.S. Responses to Questions from the Panel, paras. 18-19; 22-31.

<sup>194</sup> See EU Third Party Submission, para. 45; Responses of Japan to Questions from the Panel, paras. 5-6; Responses of Canada to Questions from the Panel, paras. 4, 15; EU’s Responses to Panel Questions, para. 2.

<sup>195</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 6-9.

<sup>196</sup> See U.S. Responses to Questions from the Panel, paras. 26-31.

<sup>197</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 12; *see also* para. 15.

<sup>198</sup> See Response of the US to Questions 5, 7; *see also* Responses of the EU to Questions from the Panel, para. 19 (noting that a situation where a good is to be marked as goods of Country A while the applicable rule of origin

163. Neither of the documents that Hong Kong, China, seeks to rely on to establish its erroneous conclusion indicate that an origin mark is a rule of origin falling within the scope of the *Agreement on Rules of Origin*. With respect to the table of contents of notifications to the Committee on Rules of Origin, that document refers to 19 U.S.C. 1304 and 19 C.F.R. part 134.<sup>199</sup> As explained in the U.S. response to Question 4, in the context of non-preferential trade, the regulations at 19 CFR part 134 provide that the country of origin for purposes of the marking statute (19 U.S.C. 1304) is the country of manufacture, production, or growth of an article; further work or material added to an article in another country must effect a substantial transformation in order for the second country to be the “country of origin”.<sup>200</sup> This is a different question than what terminology is used to indicate origin. Similarly, with respect to Exhibit HKC-21, this document does not say that the name used to indicate origin is a rule of origin, nor purport to offer an analysis of the scope of the WTO *Agreement on Rules of Origin*. Indeed, the marking terminology that applies to a good from a specific geographic area may change over time – for example, to reflect the establishment of a new nation, or changes in sovereignty over territory, or the emergence or resolution of a territorial dispute. Contrary to the argument by Hong Kong, China, the decision as to terminology is not a rule of origin.

164. Hong Kong, China, is also incorrect in arguing that the August 11 *Federal Register* notice is a determination of origin. Again, this is because Hong Kong, China, erroneously considers that the name used for marking purposes is both a determination of origin, and itself a rule of origin applied to determine origin.

165. As the United States explained in its response to Question 7, the decision as to the name with which a good must be marked is distinct from a determination as to in what geographic area a good was produced, and the rules applied to make that determination.<sup>201</sup> The *Agreement on Rules of Origin* establishes that a “rule of origin” is used to match a good – based on its processing – with a certain territorial region. The Agreement applies to the *process* by which origin of a particular good is matched to a particular geographic area, and does not mandate that

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indicates that they originated in Country B does not result in the marking terminology itself breaching the *Agreement on Rules of Origin*); Responses of Canada to Questions from the Panel, para. 20.

<sup>199</sup> Notifications under Article 5.1 and Paragraph 4 of Annex II of the Agreement on Rules of Origin, Addendum, G/RO/N/1/Add.1 (22 June 1995), at 15.

<sup>200</sup> U.S. Responses to Questions from the Panel, paras. 16-17.

<sup>201</sup> U.S. Responses to Questions from the Panel, paras. 22-31; *see also* paras. 44-47. As stated in the U.S. response to Question 9(c), the U.S. measures at issue do not themselves address the territorial boundaries of Hong Kong, China. However, as the United States also noted in its response, decisions regarding marking could reflect decisions as to territory – for example, the marking permitted with respect to a good produced in a disputed territory. While Hong Kong, China, suggests that “it is not necessary or appropriate” for the Panel to evaluate how Articles 1 and 2 of the Agreement on Rules of Origin would address questions of territorial boundaries, the interpretation by Hong Kong, China, of those provisions appears to be that they do. *See* Responses of Hong Kong, China, para. 26. Hong Kong, China, asserts that the Agreement on Rules of Origin governs the name that a Member permits for marking purposes, and would in fact be meaningless if it did not extend to those decisions.

a Member under its marking rules use a particular term for that geographic region.<sup>202</sup> The *Federal Register* notice does not make a determination of origin as to any product. It simply provides, in light of the determination in Executive Order 13936, what the name would be in the event that – as a result of application of the normal rules of origin – a good was determined to have been produced in the area of Hong Kong, China.

***b. Hong Kong, China, Erroneously Argues that the Agreement on Rules of Origin Requires Specific Outcomes***

166. Hong Kong, China, is incorrect in asserting that the *Agreement on Rules of Origin* applies to marking terminology; this error appears to be based at least in part on the equally incorrect assertion that the Agreement dictates the result of the application of rules of origin. That is, Hong Kong, China, considers that the *Agreement on Rules of Origin* requires that a specific outcome be reached with respect to the origin of a particular good.<sup>203</sup>

167. Hong Kong, China, states that a determination of origin within the meaning of Article 1.1 is “any determination by which a Member decides to confer or not confer a particular origin status to a good or group of goods”.<sup>204</sup> It is not clear what Hong Kong, China, means by “a particular origin status”. However, as the United States explained in its response to Question 7, the *Agreement on Rules of Origin* establishes that “rules of origin” are the rules that a Member puts to use to decide or ascertain the country of origin of goods for certain purposes. That is, they are not used to make a binary determination whether or not to confer a “particular” origin status. Again, the *Agreement on Rules of Origin* does not provide for specific outcomes of the determination of a country of origin.<sup>205</sup>

168. Hong Kong, China, further suggests that the *Agreement on Rules of Origin* requires the United States to find that Hong Kong, China, is the country of origin of goods.<sup>206</sup> Regardless of whether or not a Member is required to treat another Member as a “country” for purposes of the

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<sup>202</sup> See also Responses of Canada to the Questions from the Panel, paras. 18-20; EU’s Responses to the Questions from the Panel, paras. 12, 19.

<sup>203</sup> See First Written Submission of Hong Kong, China, paras. 30, 40, 60-63, 72-73, 75, 83-84; see also Responses of Hong Kong, China, to Panel Questions, paras. 22, 27. With respect to Question 11, the United States considers Canada’s point correct in this regard. The United States understood Canada’s point to respond to the argument made by Hong Kong, China, that the GATT 1994, the TBT Agreement, and the *Agreement on Rules of Origin* require a Member to determine the “actual” country of origin, or the “correct” country of origin. See First Written Submission of Hong Kong, China, paras. 30, 40, 60-63, 72-73, 75, 83-84. Although in its response Hong Kong, China, expresses confusion as to what Canada means, or why Canada considers this statement to be relevant, it is Hong Kong, China, who argues that the *Agreement on Rules of Origin* disciplines both the result of the application of a rule of origin, and the terminology that reflects that result.

<sup>204</sup> Responses of Hong Kong, China, to Panel Questions, para. 16.

<sup>205</sup> See U.S. Responses to Questions from the Panel, paras. 24-31, 42-48; see also Canada’s Responses to Panel Questions, paras. 6, 8.

<sup>206</sup> See, e.g., Responses of Hong Kong, China, to Panel Questions, paras. 22, 27.

*Agreement on Rules of Origin* as Hong Kong, China, suggests, nothing in the *Agreement on Rules of Origin* requires a particular “country” (however defined) to in fact be the country of origin for any particular good.<sup>207</sup> And as explained, nor does the Agreement provide that any particular term needs to be used to identify that country. That is, regardless of whether Hong Kong, China, is required to be determined to be a country under the *Agreement on Rules of Origin* as it suggests,<sup>208</sup> it does not follow that Hong Kong, China, must be the country of origin for a particular good, or that “Hong Kong” must be the marking with respect to a good.

169. The United States notes that the parties appear to agree that the Panel is not tasked with clarifying the meaning of “country” for purposes of Article 1.1 of the *Agreement on Rules of Origin*, although for different reasons.<sup>209</sup> Hong Kong, China, claims that the definition of “country” in the Explanatory Notes to the WTO Agreement applies to the *Agreement on Rules of Origin*, and appears to suggest that as such Hong Kong, China, must be the country of origin and the permissible marking for certain goods. However, as the United States explained in its response to Question 9, the *Agreement on Rules of Origin* does not define what “country” means for purposes of the Agreement.<sup>210</sup> The Explanatory Notes recognize that the term “country” or “countries” as used in the covered agreements includes separate customs territory Members of the WTO. However, this does not mean that a separate customs territory needs to be the permissible marking required under the marking rules of a Member, or that any particular term needs to be used to identify that territory. The *Agreement on Rules of Origin* simply does not govern questions of the nomenclature or territorial boundaries of a “country”, however that term is defined.<sup>211</sup>

170. As such, whether the United States permitted the term “Hong Kong” to be used for marking purposes in the past, or whether the United States subjects goods of Hong Kong, China, to additional tariffs imposed with respect to the People’s Republic of China, is not relevant to this dispute. That said, as discussed in the U.S. First Written Submission,<sup>212</sup> the Executive Order makes clear why Hong Kong, China, was determined not to warrant differential treatment vis-à-vis the People’s Republic of China for purposes of the U.S. marking statute.

171. Put simply, as the United States explained in its responses, the *Agreement on Rules of Origin* provides disciplines with respect to the rules that are applied to determine origin. The agreement does not require a Member to reach a specific outcome, that is, to determine that a specific country is the country of origin with respect to a particular good. Moreover, the

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<sup>207</sup> U.S. Responses to Questions from the Panel, paras. 33-36.

<sup>208</sup> Responses of Hong Kong to Questions from the Panel, China, para. 27.

<sup>209</sup> See U.S. Responses to Question 9(a) and 9(b); Responses of Hong Kong, China, to Questions from the Panel, paras. 20, 24.

<sup>210</sup> See also EU’s Responses to Panel Questions, paras. 10-11.

<sup>211</sup> See also Brazil’s Responses to Panel Questions, para. 5; Canada’s Responses to Panel Questions, paras. 4, 8, 20; EU’s Responses to Panel Questions, paras. 10-12, 19.

<sup>212</sup> See U.S. First Written Submission, paras. 8, 18-23; see also U.S. Opening Statement, paras. 18-32.

Agreement simply does not address the terminology to be used for that country under a marking requirement.

**2. Aside from Questions of Scope, Hong Kong, China, Fails to Establish a Breach of Article 2(c) or 2(d) of the *Agreement on Rules of Origin*. (U.S. Comments on Response to Question 11)**

172. Contrary to the statements made by Hong Kong, China, in its response to Question 11, the United States has not conceded that Hong Kong, China, has established a breach of either Article 2(c) or 2(d) of the *Agreement on Rules of Origin* (or any other provision at issue). The U.S. invocation of Article XXI(b) with respect to the measures at issue means that those measures may not be found to be inconsistent, in that the Panel may not second-guess the U.S. consideration that they are necessary to protect its essential security interests; the invocation does not mean that the United States agrees that Hong Kong, China, has satisfied its burden to demonstrate a violation of any provision at issue.

173. In addition, the United States notes that the “condition” that Hong Kong, China, argues that the United States applies in breach of Articles 2(c) and 2(d) of the *Agreement on Rules of Origin* is the condition of “sufficient autonomy”. Thus, as the complainant in this dispute, Hong Kong, China, should have established that “rules of origin” – as defined by the Agreement – require the fulfilment of a condition “of sufficient autonomy”, as a prerequisite for the determination of the country of origin; and that such “rules of origin” that the United States “applies to imports and exports” discriminate between Members with respect to this condition. However, as the United States explained in its response to Question 4, the United States does not make a separate determination as to whether a good is from Hong Kong, China; the rules of origin that would apply to determine the origin of any good from any source apply, on a case-by-case basis.<sup>213</sup> And even under the theory of Hong Kong, China, regarding the “condition” of “sufficient autonomy”, Hong Kong, China, has failed to establish a breach. Hong Kong, China, has not established that either Article 2(c) or Article 2(d) disciplines such considerations, and does nothing more than assert that imports from Hong Kong, China, are subject to what it characterizes as an additional “condition” that is not applied with respect to goods of other Members.

**B. HONG KONG, CHINA, HAS FAILED TO ESTABLISH A BREACH OF THE TBT AGREEMENT.**

174. The written responses by Hong Kong, China, to the questions from the Panel confirm that Hong Kong, China, has failed to make a *prima facie* showing that the measure in dispute is inconsistent with Article 2.1 of the TBT Agreement. As an initial matter, Hong Kong, China, does not make a showing that the measure in dispute falls within the scope of the TBT Agreement as a technical regulation. Furthermore, Hong Kong, China, in its written responses to Panel questions, seeks to clarify that its position is that the measure in dispute is *de jure* discriminatory, but Hong Kong, China, has not met its burden of proof in establishing less

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<sup>213</sup> U.S. Responses to Questions from the Panel, paras. 16-17.

favorable treatment. Moreover, it fails to take into account the regulatory objective of the disputed measure when making its claim.

**1. Hong Kong, China, Fails to Establish that the Measure in Dispute Is a Technical Regulation. (U.S. Comments on Response to Question 12)**

175. As the United States stated in its written responses to the Panel’s questions, Hong Kong, China, bears the burden of establishing that the measures at issue in this dispute constitute a “technical regulation” as set forth in Annex 1.1, that is, showing how the measures at issue meet those elements.<sup>214</sup> In its responses to the questions from the Panel, however, Hong Kong, China, fails to elaborate on its previous assertions that 19 U.S.C. § 1304, part 134 of CBP’s regulations, and “rulings and notices relating thereto” are a “technical regulation” because it is a “marking requirement” that “applies to a product” and that the U.S.-Hong Kong Policy Act, Executive Order 13936, and the August 11 *Federal Register* notice “form part” of the marking requirement.<sup>215</sup>

**2. Hong Kong, China, Does Not Make a *Prima Facie* Showing of Article 2.1 Inconsistency Because It Fails to Make a *De Jure* Discrimination Claim and Moreover Evades Taking into Account the Regulatory Objective of the Disputed Measure.**

***a. The “De Jure” Discrimination Claim by Hong Kong, China, Is Deficient. (U.S. Comments on Response to Question 15)***

176. In its written responses to the Panel’s questions, Hong Kong, China, clarifies it considers that the measures at issue are inconsistent with Article 2.1 of the TBT Agreement because they are *de jure* discriminatory.<sup>216</sup> However, in its first written submission, Hong Kong, China, did not clearly articulate that those measures accord less favorable treatment based on *de jure* discrimination.<sup>217</sup> To recall, it argued that the disputed measures accord less favorable treatment because the “inability of Hong Kong enterprises to mark their goods as goods of Hong Kong or Hong Kong, China origin detrimentally modifies the condition of competition in the U.S. market for these goods vis-à-vis the treatment accorded to like product originating in other Members.”<sup>218</sup> Thus, the initial theory of the case proposed by Hong Kong, China, is that it has the burden of establishing that the U.S. measure “detrimentally modifies the condition of competition in the

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<sup>214</sup> U.S. Responses to Panel Question, paras. 49-51.

<sup>215</sup> See also Responses of Canada to Questions from the Panel, paras. 22 and 26 (questioning whether Hong Kong, China, has actually established that the “integral and essential aspect” of the measure is in fact a “marking requirement” or a country of origin “determination”).

<sup>216</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 52.

<sup>217</sup> Hong Kong, China, does state that the measures at issue provide a *de jure* difference in regulatory treatment, but Hong Kong, China, uses that aspect in establishing the “likeness” element in Article 2.1 analysis, and not to establish the less favorable treatment element. See First Written Submission of Hong Kong, China, paras. 56-58.

<sup>218</sup> First Written Submission of Hong Kong, China, para. 60.

U.S. market.” Hong Kong, China, has not elaborated or expanded on such evidence, and thus has failed to establish a breach of Article 2.1.

177. In its written response to Panel questions, Hong Kong, China, attempts to walk away from its own theory of the case. It claims that the disputed measure is actually *de jure* discriminatory;<sup>219</sup> and that “there is no need for a panel to evaluate whether any detrimental impact on imports stem exclusively from a legitimate regulatory distinction.”<sup>220</sup>

178. Relabeling its allegations as *de jure* discrimination, however, does nothing to advance the argument by Hong Kong, China. To the contrary, the term “*de jure* discrimination” is found nowhere in Article 2.1, and what Hong Kong, China, means by it in the context of this dispute is completely unclear. What is clear is the text of Article 2.1, and Hong Kong, China, needs to establish all of the requirements in Article 2.1 to support an allegation of breach. It has not done so.

179. First, Hong Kong, China, does nothing more than assert that imports from Hong Kong, China, are subject to an additional requirement. It does not attempt to make a factual showing that there is an origin-based discrimination against products from Hong Kong, China, as a result of this “additional requirement”, vis-à-vis other imports, or that it is actually an “additional requirement”.<sup>221</sup>

180. Second, with respect to what Hong Kong, China, characterizes as an “additional requirement”, the “sufficient autonomy” determination reflects a regulatory objective that is not origin-based. The factors that are considered for this “requirement” are origin-neutral and are for the protection of U.S. essential security interests, as stated in the U.S. response to Question 14.<sup>222</sup> Indeed, any mark of origin requirement by definition is a distinction based on origin, and Hong Kong, China, has not demonstrated how the essential security interests that formed the basis for the measure at issue are actually origin-based.

181. Third, contrary to the assertion by Hong Kong, China, the United States does not agree that there is “no need for additional analysis”<sup>223</sup> in cases in which a technical regulation makes an origin-based distinction. As the United States has explained in its written responses to Panel questions, an origin-based distinction by itself may not necessarily lead to treatment that is “less

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<sup>219</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 52.

<sup>220</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 53.

<sup>221</sup> This appears to be the reason why Canada made the statement that formed the premise for Question 12. That is, the United States understood Canada’s view to be that, because of this insufficient showing, Hong Kong, China, should show some other WTO inconsistency to establish detrimental impact.

<sup>222</sup> U.S. Responses to Questions from the Panel, para. 60. While the United States does not agree with the usage of “legitimate regulatory distinction” or that the disputed measures are origin-based discriminatory measures, Canada goes even further to say that “it is conceivable that an origin-based distinction could in itself be [a legitimate regulatory distinction].” Responses of Canada to Questions from the Panel, para. 39.

<sup>223</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 54.

favorable” per the plain meaning of the text of Article 2.1.<sup>224</sup> A complainant must still demonstrate how such origin-based distinction is “less favorable.” Hong Kong, China, originally attempted to meet this element by arguing detrimental impact to conditions of competition.<sup>225</sup> Hong Kong, China, has now abandoned that argument – but has not replaced it. Article 2.1 is clear that a breach only occurs in cases of less favorable treatment. Without presenting an argument and proving its case, Hong Kong, China, simply cannot prevail on an Article 2.1 claim.

182. Finally, simply because Hong Kong, China, has not established *de jure* discrimination, it is not correct for Hong Kong, China, to respond that “there is no need for a panel to evaluate whether any detrimental impact on import” stems exclusively from a legitimate regulatory distinction.<sup>226</sup> In other words, the failure by Hong Kong, China, to make out its case does not excuse it from its burden of showing that the measure does not arise from a legitimate regulatory distinction or consider the regulatory objective of the measure. As the United States explained, in the event that Hong Kong, China, had attempted to address this component of an Article 2.1 claim,<sup>227</sup> the question is whether alleged detrimental impact, *if any*, can be explained by origin-neutral factors and such that the impact is rationally related to an origin-neutral regulatory purpose.

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<sup>224</sup> *Korea – Beef (AB)*, para. 137 (“A formal difference in treatment between imported and like domestic products is . . . neither necessary, nor sufficient, to show a violation of Article III:4”).

<sup>225</sup> See U.S. Responses to Questions from the Panel, para. 57 (“That is, when based on an overall evaluation and assessment of the facts and circumstances, if it is found that there is detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and if that detrimental impact is based on the administration of an origin-based discrimination, then the element of “less favorable treatment” can be established. However, if the detrimental impact can be explained on the basis of origin-neutral factors, then those circumstances are indicative of non-discrimination.”).

<sup>226</sup> Moreover, it is unclear whether the Appellate Body report, which Hong Kong, China, cites, interpreted Article 2.1 as not requiring a legitimate regulatory distinction analysis if there is *de jure* discrimination, or whether legitimate regulatory distinction analysis forms part of a *de jure* discrimination finding. The Appellate Body only stated that “where the technical regulation at issue does not *de jure* discriminate” a panel “must further” undergo the legitimate regulatory distinction. *US – Clove Cigarettes (AB)*, para. 182. But it does not mean that where there is *de jure* discrimination the panel need not undergo or had not undergone legitimate regulatory distinction analysis. Furthermore, in the same report, the Appellate Body states that “the context and object and purpose of the TBT Agreement weigh in favour of reading the ‘treatment no less favourable’ requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, **while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.**” *US – Clove Cigarettes (AB)*, para 175 (emphasis added in bold) (implying that legitimate regulatory distinction is part of *de jure* discrimination analysis).

<sup>227</sup> U.S. Responses to Questions from the Panel, paras. 55-58.



***b. Hong Kong, China, Evades Addressing the Regulatory Objective of the Disputed Measure. (U.S. Comments on Responses to Questions 14 and 16)***

183. In responding to the Panel’s questions on how to take into account “essential security interest” in assessing an Article 2.1 claim, Hong Kong, China, appears to suggest that “essential security interest” need not be taken into account when making an assessment of an Article 2.1 claim.<sup>228</sup> Nonetheless, like its oral response at the first substantive meeting, Hong Kong, China, essentially evades this question in its written response by stating that it is a “difficult question”, and a “question for another day.” This is an extraordinarily odd position. If Hong Kong, China, thought that the role of essential security in evaluating an Article 2.1 claim is a “question for another day,” Hong Kong, China, should not have brought this dispute, and it is free at any time to abandon its claims.

184. As the United States explained in its response to this question,<sup>229</sup> the Panel cannot address essential security interests in this dispute because the United States has exercised its right to invoke Article XXI of the GATT 1994. But as noted at the outset of this section, to be helpful to the Panel, the United States can address the hypothetical situation where security interests are involved, but the Member adopting the measure at issue does not invoke consider that Article XXI applies and does not invoke it. In those circumstances, security interests – like any other, often less important interest – certainly would be taken into account in applying Article 2.1 of the TBT Agreement.

185. The argument by Hong Kong, China, that the seventh recital is irrelevant here at all, and that the intent indicated by that recital is only relevant for certain provisions such as Article 2.2, is completely baseless. And certainly there is no interpretative “dilemma.”<sup>230</sup>

186. 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.” Article 31(1) of the VCLT states, “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 light of its object and purpose.” The preamble sets forth the object and purpose of the treaty, here – the TBT Agreement, as a whole; it simply is not relevant only to provisions in the Agreement that include similar language. Interpretation of any TBT Agreement provision should be made in light of the object and purpose of the Agreement, as articulated in the preamble.

187. As explained in Section III.D.2, the interpretation by Hong Kong, China – that the preamble applies only to certain provisions, and not others – is inconsistent with the customary rules of treaty interpretation. Hong Kong, China, suggests that Article 2.1 should be read without the context served by the recitals because it does not “expressly incorporate national or

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<sup>228</sup> See Responses of Hong Kong, China, to Questions from the Panel, paras. 47, 50-51.

<sup>229</sup> See U.S. First Written Submission, paras. 299-302.

<sup>230</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 51.

essential security considerations”.<sup>231</sup> But there is no basis to suggest that the “object and purpose” of the TBT Agreement for purposes of analysis of Article 2.2 is different than for Article 2.1 or for any other article of the TBT Agreement. The object and purpose of the Agreement in which both provisions sit, and their role in interpreting the respective text of those provisions, is not different.

188. The position of Hong Kong, China, with respect to the seventh recital is not surprising, given its position that the U.S. invocation of Article XXI(b), and the concerning facts relating to the undermining of the autonomy of Hong Kong, China, and the rights and freedoms of its people that the United States has put forth regarding the measures at issue can simply be dismissed.<sup>232</sup> Hong Kong, China, brushes off the basis for the measures at issue as “political considerations” in its first written submission.<sup>233</sup> However, if the Panel were to “take into account essential security interest” (or in the U.S. view “security interest”) in the assessment of the Article 2.1 claim, as suggested by the Panel’s question, Hong Kong, China, would have to be in a position<sup>234</sup> to address the well-documented concerns on the face of the measures at issue and elsewhere in the record about the situation in Hong Kong, China, including the imposition of the National Security Law.<sup>235</sup>

189. Hong Kong, China, has not acknowledged the language of the measures at issue, or anything else on the record in this respect. Indeed, in further response to a question on the burden of proof each party carries when it comes to taking into account security interest in the assessment of Article 2.1, Hong Kong, China, asserts the United States “does not intend to . . . articulate its essential security interest” and it therefore cannot opine on the “nature of what *else* the United States would need to demonstrate.”<sup>236</sup> While the U.S. position is that a Member invoking Article XXI(b) is not *required* to demonstrate its essential security interests, the United States has both explained its concerns in its previous submissions and interventions, as well as put relevant documents on the record.<sup>237</sup> Indeed, the measures at issue reflect those concerns on

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<sup>231</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 51.

<sup>232</sup> See U.S. First Written Submission, paras. 7-9, 18-20; U.S. Opening Statement, paras. 18-32; *see also* Third Party Written Submission of the EU, paras. 11-15; Oral Statement by Canada, paras. 3.

<sup>233</sup> First Written Submission of Hong Kong, China, para. 5.

<sup>234</sup> Assuming Hong Kong, China, has established detrimental impact as a “first step.”

<sup>235</sup> To recall, Hong Kong, China, was asked during the first substantive meeting what its views were on the essential security interests articulated by the United States. However, Hong Kong, China, as in its written responses, simply noted the United States had not invoked a specific subparagraph of Article XXI.

<sup>236</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 56.

<sup>237</sup> See U.S. Opening Statement, para. 22 (“PRC and Hong Kong authorities have wielded this legislation to *silence dissent, arrest individuals for expressing pro-democratic views or participating in democratic processes, crack down on media freedom, and shrink the autonomy of Hong Kong’s judiciary and legislature.*”) (emphasis in original), para. 27 (“*In short, the National Security Law has been used as a blunt tool to quash democratic dissent.*”) (emphasis in original), para. 28 (“The National Security Law also has a *chilling effect on the freedoms of*

their face, and those concerns have indeed materialized and the situation has only gotten worse. To the extent that Hong Kong, China, declines to engage with the measures or the facts in this respect, or considers that the Panel should not do so, that decision reflects the fact that the WTO is not the appropriate forum to address security issues. And this is reflected in the text of Article XXI(b) itself, and in its applicability to the claims at issue.

**C. HONG KONG, CHINA, HAS FAILED TO ESTABLISH A BREACH OF THE GATT 1994. (U.S. COMMENTS ON RESPONSES TO QUESTIONS 17 THROUGH 19)**

190. Article IX:1 provides, “Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country”. Under the customary rules of treaty interpretation as provided for in the DSU, interpretation of Article IX of the GATT 1994 should be based on its plain text, in its context, and in light of the object and purpose of the agreement.

191. As the United States has noted, as the complainant in this dispute, Hong Kong, China, has the burden of establishing each of the elements of a claim under Article IX:1 with respect to the measures at issue.<sup>238</sup> Hong Kong, China, has failed to do so, as discussed below. In particular, Hong Kong, China, fails to establish different treatment, much less “less favorable” treatment. In addition – as with its claims under the *Agreement on Rules of Origin* – Hong Kong, China, considers that Article IX:1 of the GATT 1994 prescribes the “actual” country of origin, as well as how it is determined, and requires the “full English name” of that country to be used for a mark. Hong Kong, China, does not provide any textual support for its conclusion that Article IX:1 imposes such a requirement.

192. In its responses to the Panel’s questions, Hong Kong, China, reiterates its claim that for purposes of Article IX:1 of the GATT 1994 “it is less favourable treatment to subject goods of Hong Kong, China origin to these difficulties and inconveniences [to mark the same products differently and segregate those products according to their destination] while allowing goods imported from all other Members to be marked with a single mark of origin using the English name of the actual country of origin.”<sup>239</sup> As such, Hong Kong, China, bears the burden of establishing that what it characterizes as the “treatment” of goods from Hong Kong, China, is “less favorable” than that afforded to the goods of other Members. Hong Kong, China, has failed to do so.

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*speech, of the press, and on an independent judiciary*”) (emphasis in original). See also US-3, US-6, US-115 to US-137.

<sup>238</sup> U.S. Responses to Questions from the Panel, para. 84.

<sup>239</sup> First Written Submission of Hong Kong, China, para. 75; Responses of Hong Kong, China, to Questions from the Panel, para. 30. Hong Kong, China, claims that this purported “less favorable treatment” is also inconsistent with Article I:1 of the GATT 1994.

193. Hong Kong, China, asserts that in the present dispute the question of what constitutes “less favorable treatment” in Article IX:1 of the GATT 1994 is the same as what constitutes “less favorable treatment” for purposes of Article 2.1 of the TBT Agreement, and reiterates its erroneous conclusion that the measures at issue are *de jure* discriminatory.<sup>240</sup> However, as the United States has explained in Section IV.B above, the attempt by Hong Kong, China, to relabel its claim as one involving “de jure discrimination” does nothing to advance its argument. Whatever label Hong Kong, China, uses – e.g., *de jure* or *de facto* – it has the burden of proving its claim. For both Article IX:1 of the GATT 1994 and Article 2.1 of the TBT Agreement, Hong Kong, China, must prove that the measure provides for *different* treatment, and that the different treatment is *less favorable* treatment.<sup>241</sup> Hong Kong, China, has not done so.

194. Hong Kong, China, argues that “what matter[s] [for purposes of Article IX:1 of the GATT 1994] is whether the respondent Member provides *less favourable* treatment with respect to *how* it determines the country of origin for marking purposes (which is “treatment with regard to marking requirements”).<sup>242</sup> Hong Kong, China, does not explain, as a matter of treaty interpretation, how “treatment with regard to marking requirements” captures “how” a Member determines the country of origin; if it considers this to be grounds for breach, then it was required to do so.<sup>243</sup> Hong Kong, China, also has not made a showing that the measures at issue provide “less favorable” treatment with respect to how country of origin is determined; as noted in the U.S. response to Question 18, nothing in the record indicates that the United States determines country of origin for Hong Kong, China, in a manner different than for any other WTO Member. This is not surprising – as the United States has explained, the United States applies the same analysis that would apply to determine the origin of any good from other sources. In addition, although Hong Kong, China, claims that the United States applies a “condition” of “sufficient autonomy” to goods, Hong Kong, China, has not demonstrated that the United States applies such a condition to goods, nor explained how such a condition even could apply to goods.

195. Hong Kong, China, also claims the existence of less favorable treatment in that goods from other Members may be marked with their “actual” country of origin. In addition to the fact that, as just noted, Hong Kong, China, has not shown that the United States determines the “actual” country of origin for marking purposes differently, the United States observes that

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<sup>240</sup> Response of Hong Kong, China, to Question 17.

<sup>241</sup> U.S. Responses to Questions from the Panel, para. 87; *see also Thailand – Cigarettes (AB)*, para. 128 (citing *Korea – Beef (AB)*, para. 137). As noted in the *Korea – Beef (AB)* report, “A formal difference in treatment between imported and like domestic products is . . . neither necessary, nor sufficient, to show a violation of Article III:4”. *Korea – Beef (AB)*, para. 137.

<sup>242</sup> Responses of Hong Kong, China, to Panel Questions, para. 64.

<sup>243</sup> As explained previously, there is a distinction between rules of origin that are applied to determine origin, and an origin mark. Hong Kong, China, blurs this distinction both in its claims under the *Agreement on Rules of Origin*, and under Article IX:1 of the GATT 1994.

Article IX:1 does not use the term “actual” country of origin, nor establish a definition of such a concept or any related criteria.<sup>244</sup>

196. Hong Kong, China, seeks to rely on the 1958 GATT Decision to establish that the measures at issue provide less favorable treatment because it considers that the 1958 GATT Decision supports its case.<sup>245</sup> As the United States explained, the 1958 GATT Decision is not relevant to this dispute because the treaty provisions at issue – including Article IX:1 of the GATT 1994 – by their terms do not require a Member to use a particular mark to identify a country, or purport to define what the “actual” country of origin is or how that would be determined.

197. That said, to the extent that Hong Kong, China, considers that Article IX:1 requires that Members allow the “full English name that a Member uses to participate in the WTO” for origin marking purposes, it cites no language in Article IX that would prescribe such a requirement. Article IX:1 does not refer to the “full name”, the “English name”, or to “the name that a Member uses to participate in the WTO”. While a Member might decide to allow the English name that another Member uses in the WTO as an origin mark, Article IX does not require it to do so. In addition, the United States does not consider that Hong Kong, China, can establish a breach of Article IX:1 based on the marking requirements of other Members. If Hong Kong, China, has to mark its goods differently depending on the export destination, that is presumably due to varying requirements of multiple Members. Article IX:1 does not require Members to harmonize their marking requirements.

198. What Hong Kong, China, takes issue with is the fact that goods are marked with the name “China”. But that does not mean that such marking is a breach of the WTO Agreement, or that “China” may not be the English name for marking purposes. Indeed, it is not in dispute that Hong Kong, China, is part of China.<sup>246</sup> And as set forth in Executive Order 13936, 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,”<sup>247</sup> the United States has determined

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<sup>244</sup> U.S. Responses to Questions from the Panel, para. 93. The United States notes, with respect to the assertion by Hong Kong, China, in paragraph 63 of its responses to the Panel’s questions, regarding issues that are not in dispute, that the United States has not conceded either of those points. That is, the United States does not agree that “[i]t is not in dispute that the revised origin marking requirement applies to goods that have an origin of Hong Kong, China under the USCBP’s definition of ‘country of origin’, or ‘that ‘Hong Kong, China’ is the ‘full English name’ of the country of origin of these goods . . . .” However, the United States does not consider those assertions to be relevant, given that the United States does not determine origin differently for Hong Kong, China, than for any other Member, and the plain meaning of the terms of Article IX:1.

<sup>245</sup> Responses of Hong Kong, China, to Panel Questions, para. 65.

<sup>246</sup> Opening Statement of Hong Kong, China, para. 2; *see also* Opening Statement of the People’s Republic of China, para. 2; Canada’s Responses to Panel Questions, para. 44.

<sup>247</sup> Executive Order 13936 (US-2).

that Hong Kong, China, does not warrant differential treatment with respect to the People’s Republic of China for purposes of the marking statute (as well as other laws).

199. The claims by Hong Kong, China, under Article I:1 of the GATT 1994 suffer similar flaws as its claims under Article IX:1. Hong Kong, China, asserts that what it characterizes as “less favorable treatment” under Article IX:1 – that is, to “subject goods of Hong Kong, China origin to these difficulties and inconveniences [to mark the same products differently and segregate those products according to their destination] while allowing goods imported from all other Members to be marked with a single mark of origin using the English name of the actual country of origin.” – is also inconsistent with Article I:1 of the GATT 1994.<sup>248</sup>

200. As the United States has explained, the treaty provisions at issue do not purport to define what the “actual” country of origin is or how that would be determined.<sup>249</sup> It is not sufficient for purposes of establishing a breach of Article I:1 (or for any of the provisions at issue) for Hong Kong, China, simply to assert that the United States does not extend what it characterizes as an “advantage” (that is, the ability of enterprises to mark their goods with the name of the “actual” country of origin) to Hong Kong, China. As noted in the U.S. response to Question 19, for example, Hong Kong, China, has not shown that any particular mark provides more favorable competitive opportunities or affects the competitive relationship when compared to imports of other like foreign products.

#### **V. THE ONLY FINDING THE PANEL MAY MAKE CONSISTENT WITH THE DSU IS TO NOTE THE UNITED STATES’ INVOCATION OF ARTICLE XXI**

201. As the United States has explained,<sup>250</sup> in light of the self-judging nature of Article XXI(b) and the U.S. invocation with respect to the claims at issue, the sole finding that the Panel may make consistent with the terms of reference and the DSU is to note the U.S. invocation. Hong Kong, China, argues that Articles 3.2, 3.3, 7.2, 11, 23.1, and 23.2(a) of the DSU indicate that Article XXI(b) is not self-judging, and compel a panel to make a recommendation as to whether an essential security measure is consistent with WTO obligations or should be modified or withdrawn.<sup>251</sup> Hong Kong, China, does not interpret the terms of these, or any other, DSU provisions as written in making these arguments. Hong Kong, China, also fails to recognize the availability of non-violation nullification and impairment claims as a recourse.

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<sup>248</sup> First Written Submission of Hong Kong, China, para. 75; Responses of Hong Kong, China, to Questions from the Panel, para. 30.

<sup>249</sup> U.S. Responses to Questions from the Panel, paras. 48, 93-94.

<sup>250</sup> See U.S. First Written Submission, Section III.E; U.S. Opening Statement, paras. 69-79.

<sup>251</sup> See Response of Hong Kong, China, to Question 53.

**A. HONG KONG, CHINA, MISINTERPRETS THE TERMS OF THE DSU IN ARGUING THAT THEY COMPEL A PANEL TO REVIEW THE MERITS OF AN ESSENTIAL SECURITY MEASURE.**

202. Hong Kong, China, asserts that Articles 7.2 and 11 of the DSU require a panel to evaluate the merits of an invocation of Article XXI. However, the text of those provisions does not require such an evaluation.<sup>252</sup> Nothing in either DSU provision calls for ignoring the plain language of Article XXI(b), or indicates that every term of every WTO provision must be subject to panel review.

203. Article 7.2 provides that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” As the United States has explained, the ordinary meaning of “address” is to “[t]hink about and begin to deal with (an issue or problem).”<sup>253</sup> That is, to “address” an issue is not necessarily to resolve that issue, as Hong Kong, China, presumes, without providing any analysis of the ordinary meaning of the terms of the provision. Indeed, panels and the Appellate Body have often “addressed” an issue by judicial economy, and thereby declined to provide a substantive analysis as to the meaning of a provision at issue or the consistency of a measure with a provision. When Article XXI has been invoked, the panel “addresses” the issue by finding that the responding Member has invoked Article XXI.

204. Under Article 11, 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.” The fact that Article 11 indicates that a panel should make an “objective assessment” does not mean that the merits of an invocation of Article XXI (or any other provision of the WTO Agreement) must be “objectively reviewable”, as Hong Kong, China, claims.<sup>254</sup>

205. In the context of a dispute in which Article XXI has been invoked, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. That is, the United States has not suggested that a panel should not conduct an “objective assessment” of Article XXI(b), as Hong Kong, China, suggests. Rather, as the United States has explained, 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). Thus, the panel objectively assesses (1) the facts of the case by noting that the responding Member has invoked Article XXI(b); and (2) 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 finding Article XXI(b) applicable. Nothing in Article 11 or elsewhere in the DSU requires otherwise.

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<sup>252</sup> See U.S. Response to Panel Question 53.

<sup>253</sup> The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, 1993) at 25 (US-144).

<sup>254</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 180.

**B. THE DSU PROVIDES RECOURSE TO NON-VIOLATION NULLIFICATION AND IMPAIRMENT CLAIMS FOR ESSENTIAL SECURITY ACTIONS.**

206. Hong Kong, China, also asserts that if Article XXI(b) were self-judging, an invoking Member would be making a determination that a violation of one of the covered agreements has occurred or that benefits have been nullified or impaired, in contravention of Article 23 of the DSU.<sup>255</sup> This is not correct. As the United States has explained, the invocation of Article XXI(b) reflects the invoking Member’s determination that the measure at issue is necessary to protect its essential security interests. This is not the equivalent of a determination as to the WTO-consistency of, or any nullification or impairment of benefits due to, the measure.

207. Moreover, the United States has also explained that a Member concerned by another Member’s essential security measure does have recourse to the dispute settlement process.<sup>256</sup> In particular, the United States has explained that Article 26.1 sets out that the DSU “shall apply” to non-violation claims, subject to four adjusted procedures. And because the DSU applies, Article 22 applies to such claims. Article 22.2 of the DSU confirms that a panel’s recommendation to make a mutually satisfactory adjustment (as required by Article 26.1(b)), could, in turn, potentially lead to authorization to take countermeasures. As such, the premise of the argument by Hong Kong, China, regarding Article 23 of the DSU is incorrect.

208. The crux of the arguments by Hong Kong, China, that the DSU mandates that a panel review the merits of a Member’s essential security measures in order to determine if those measures, “were, in fact, justified under Article XXI(b) and which needed to be revoked or modified” is that such a review is necessary to bring “security and predictability to the multilateral trading system” under Article 3.2 of the DSU and for the “prompt settlement” of disputes under Article 3.3.<sup>257</sup>

209. As stated repeatedly, the United States does not agree that tasking dispute settlement panels with evaluating security issues and recommending Members to withdraw or modify their essential security measures serves the security and predictability – or the credibility – of the multilateral trading system. The self-judging nature of Article XXI(b) is established in the text of Article XXI itself.

210. As explained in Section II.E.3, the drafting history makes clear that nullification or impairment claims, rather than breach claims, are the means of recourse for parties affected by essential security measures – and in turn confirms the ordinary meaning of Article XXI(b), that it is self-judging. Members understood the sensitive nature of essential security issues. Thus, they provided recourse to non-violation nullification or impairment claims as a means to address

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<sup>255</sup> Responses of Hong Kong, China, to Questions from the Panel, para. 181.

<sup>256</sup> U.S. First Written Submission, paras. 31, 94, 207, 210; U.S. Opening Statement, paras. 16, 35, 37; U.S. Closing Statement, paras. 6-7; U.S. Responses to Questions from the Panel, paras. 269-271, 272-276.

<sup>257</sup> Responses of Hong Kong, China, to Questions from the Panel, paras. 176-178.



those, without assigning dispute settlement panels the role of evaluating the merits of a sovereign Member’s security actions and recommending they be modified or withdrawn.<sup>258</sup>

211. Articles 3.2 and 3.3 of the DSU confirm this balance, and reflect these concerns regarding the nature of essential security issues. What Members agreed to in Article 3.2 was that recommendations of the dispute settlement body may not “diminish the rights and obligations provided in the covered agreements” – including the right of Members to take action they consider necessary to protect their essential security interests. And with respect to “[t]he prompt settlement of situations in which a Member considers that any benefit accruing to it . . . under the covered agreements are being nullified or impaired”, Members agreed that they could have recourse to non-violation nullification or impairment claims with respect to another Member’s essential security actions.

**C. THE ONLY FINDING CONSISTENT WITH THE DSU IS TO NOTE THE U.S. INVOCATION OF ARTICLE XXI(B).**

212. The United States has explained that the interpretation that Article XXI(b) is self-judging is consistent with the DSU.<sup>259</sup> Under Article 7.1 of the DSU, the Panel’s terms of reference call on the Panel to examine the matter referred to the DSB by the Member and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].” Article 11 states that the “function of panels” is “to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements”, and provides that a panel “should make an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” In the context of this dispute, as the United States has explained, the Panel conducts an objective assessment by noting the U.S. invocation of Article XXI(b), and interpreting Article XXI(b) as self-judging, consistent with the customary rules of treaty interpretation.

213. As Article 19.1 of the DSU provides, the “recommendations” referred to in Articles 7.1 and 11 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.” 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 agreements.” Hong Kong, China, does not acknowledge Article 19.2 in arguing that the DSU empowers panels to evaluate the merits of a Member’s essential security measure and recommend that such a measure be withdrawn. However, to make the sole finding that the U.S. has invoked Article XXI(b) is the only result consistent with DSU Article 19.2 because finding an essential security measure to breach a covered agreement would diminish the “right” of a Member to take action it considers necessary for the protection of its essential security interests.

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<sup>258</sup> See U.S. First Written Submission, paras. 94-105.

<sup>259</sup> U.S. First Written Submission, Section III.E; U.S. Opening Statement, paras. 67-79.

## VI. THE PANEL SHOULD BEGIN ITS ANALYSIS BY ADDRESSING THE UNITED STATES' INVOCATION OF ARTICLE XXI

214. In its oral statement and response to Panel questions, the United States explained why, although the DSU does not specify the order of analysis that a panel must adopt, the Panel should begin by addressing the U.S. invocation of Article XXI(b).<sup>260</sup> That is, the Panel may consider the issues presented in any order that it sees fit. However, whatever the Panel's *internal* ordering of its analysis, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole *finding* that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has invoked Article XXI. 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).

215. In contrast, Hong Kong, China, argues that there are certain circumstances that “compel[s] a particular order” and that whenever a respondent Member invokes an exception there is a “legally mandated order of analysis”<sup>261</sup> to first analyze whether there is a breach. There is no basis in the DSU for this position. Moreover, the logic that might have suggested a particular analysis in past disputes that did not address Article XXI(b) does not apply in the circumstances of this dispute.<sup>262</sup>

216. Hong Kong, China, is incorrect to argue that the Panel must first determine whether the measures at issue breach the GATT 1994, the *Agreement on Rules of Origin*, or the TBT Agreement, before assessing the U.S. invocation of Article XXI. This is because Article XXI is a defense to claims under the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement, and the United States has invoked Article XXI as to *all* aspects of *all* the measures challenged. Thus, if the Panel determines that Article XXI(b) is self-judging, consistent with the text, or that Article XXI in any event applies under another interpretation, there would be no need to review any of the complainant's claims, as the United States has explained.

217. Nor does characterizing Article XXI as an “affirmative defense” or an “exception”, as Hong Kong, China, does in its response to Question 22, require the Panel to begin its analysis with the complainant's claims. The DSU does not use these terms, and instead calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation. As interpreted according to these customary rules, Article XXI is a self-judging exception to a Member's obligations, under the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement.

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<sup>260</sup> See U.S. Responses to the Panel Questions, paras. 5-10.

<sup>261</sup> Response of Hong Kong, China, to the Panel Questions, paras. 2, 4.

<sup>262</sup> Hong Kong, China, cites to *Thailand – Cigarettes (Article 21.5) Panel* and *Colombia – Textiles (Panel)* as past instances in which there is a “legally mandated order of analysis.” However, in those disputes, the exceptions provision at issue was Article XX, not Article XXI. Hong Kong, China, also cites to the report in *Canada – Wheat Exports and Grain Imports (AB)* to show that “relationship between different provisions at issue compels a particular order.” However, that report was assessing the order of analysis of the two subparagraphs in GATT Article XVII:1(a) and (b), which expressly relate to each other in their plain text. With respect to Article XXI(b), the plain text provides that invocation of measures under the Article is self-judging and not subject to review.

Once the United States invokes Article XXI(b), the sole finding that the Panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI. Any characterization of Article XXI as an affirmative defense or other kind of exception cannot change the ordinary meaning of Article XXI, such that the invoking party must make a legal or evidentiary showing not required by the text.

218. In sum, as the United States has explained, under the terms of reference set by the DSB for the Panel, the Panel is to examine the matter and to make such findings as will assist the DSB in making recommendations to bring a WTO-inconsistent measure into conformity with the covered agreements. If the Panel objectively examines Article XXI and correctly finds this provision is self-judging, there is no finding in relation to any claim by the complainant that would assist the DSB in making a recommendation. That is, whatever the arguments brought forward in relation to a claim, the Panel would find that Article XXI serves as an exception to that claim. There is no basis under the Panel's terms of reference to make a finding on a claim that could not lead to a recommendation. For purposes of its report, therefore, the Panel should start its analysis with Article XXI.

## **VII. CONCLUSION**

219. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) with respect to all claims and so report to the DSB.