UNITED STATES – ORIGIN MARKING REQUIREMENTS
(DS597)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

May 3, 2022

I. EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

1. At issue in this dispute is the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. This right is reflected in Article XXI(b) of the *General Agreement on Tariffs and Trade* ("GATT 1994"), and WTO Members have not agreed to subject the exercise of this right to legal review.

2. The United States-Hong Kong Policy Act of 1992 provides for the continued application of U.S. laws to Hong Kong, China, in the same manner as applied prior to July 1, 1997, unless otherwise provided for by law or by an Executive order. In its 2020 report under the Act, the Secretary of State explained that the People's Republic of China had fundamentally undermined the autonomy of Hong Kong, China, and decertified Hong Kong, China, as warranting treatment under U.S. law in the same manner as U.S. laws were applied before July 1, 1997. On July 14, 2020, the President of the United States issued the Executive Order on Hong Kong Normalization. Citing the report by the Secretary of State as well as the National Security Legislation imposed by the People's Republic of China on Hong Kong, China, the President determined that Hong Kong, China, "is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" for purposes of a number of U.S. laws. The Executive Order further determined "that the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States." The President declared a national emergency with respect to that threat.

3. On August 11, 2020, U.S. Customs and Border Protection issued a clarification in the *Federal Register* indicating that in light of Executive Order 13936, for purposes of 19 U.S.C. § 1304, imported goods produced in Hong Kong, China, may no longer continue to be marked as "Hong Kong," as was the case prior to July 1, 1997. The United States considers that the requirement to mark goods of Hong Kong, China, to indicate "China," pursuant to Executive Order 13936, is an action necessary to protect U.S. essential security interests consistent with Article XXI(b) of the GATT 1994.

A. THE TEXT OF GATT 1994 ARTICLE XXI(B) IN ITS CONTEXT, AND IN LIGHT OF THE AGREEMENT'S OBJECT AND PURPOSE, ESTABLISHES THAT THE EXCEPTION IS SELF-JUDGING.

4. Under DSU Article 3.2, the provisions of the GATT 1994 are to be interpreted "in accordance with customary rules of interpretation of public international law." Section 3 (Articles 31 to 33) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention" or "VCLT") reflects the rules for such interpretation. 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.

5. The plain meaning of the text of Article XXI(b) of the GATT 1994 establishes that the exception is self-judging. As this text provides "[n]othing" in the GATT 1994 shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest,

and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection.

6. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision's reference to actions that the Member "considers necessary" for the protection of its essential security interests. The ordinary meaning of "considers" is "[r]egard in a certain light or aspect; look upon as" or "think or take to be." Under Article XXI(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the action as having the aspect of being necessary for the protection of that Member's essential security interests. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

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

8. And it is "its" essential security interests—the Member's in question—that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves "its interests," that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

9. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

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

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

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

13. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article XXI(b). In this way, the subparagraphs guide a Member's exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

14. The context of Article XXI(b), provided by Articles XXI(a) and XXI(c), Article XX, and other WTO provisions supports that Article XXI(b) is self-judging.

15. First, Article XXI(a) is immediate context for understanding the ordinary meaning of the terms of Article XXI(b). Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to "test" a Member's invocation of Article XXI(b). Moreover, the phrase "which it considers necessary" is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls.

16. Second, the context provided by Article XX also supports the understanding that Article XXI(b) is self-judging. Specifically, Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from Article XXI. The chapeau of Article XX includes an additional non-discrimination requirement, which subjects a Member's action to additional scrutiny based on the particular factual circumstances. By contrast, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau.

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

18. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. 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 was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c). The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member's judgment is set out in Article XXI(b).

19. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement's Preamble. That Preamble provides, among other things, that the GATT 1994 set forth "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." 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. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

B. SUPPLEMENTARY MEANS OF INTERPRETATION, INCLUDING NEGOTIATING HISTORY, CONFIRM THAT ARTICLE XXI(B) IS SELF-JUDGING

20. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirm that Article XXI(b) is self-judging. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). The drafting history shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other interests that, unlike the security-based exceptions referenced above, were retained as part of the "[g]eneral commercial policy" chapter of the ITO draft charter.

21. Regarding the exception's scope, exchanges at a July 1947 meeting of the ITO negotiating committee demonstrate that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment. Documents from early 1948 further confirm the drafters' understanding that non-violation, nullification or impairment claims – and not breach claims – would be the appropriate recourse for countries affected by essential security actions.

22. In its analysis of the negotiating history of Article XXI(b), the *Russia – Traffic in Transit* panel referred at length to internal documents of the U.S. delegation to the GATT negotiations. The panel erred in relying on such material because it is not "negotiating history" within the meaning of the Vienna Convention. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging.

23. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests.

C. RECONCILIATION OF THE ENGLISH, SPANISH AND FRENCH VERSIONS OF ARTICLE XXI(B) DOES NOT ALTER THE SELF-JUDGING NATURE OF THE PROVISION

24. The interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions is not fully supported by the Spanish text of the subparagraphs. Specifically, the Spanish text of the three subparagraphs – in particular, use of the feminine plural "relativas" – indicates that they must be read to modify the term "action" in the chapeau of Article XXI(b), whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term "interests" in the chapeau while the temporal limitation in subparagraph (iii) relates to "action". The meaning that best reconciles the texts, having regarding to the object and purpose of the treaty, must be adopted under Article 33 of the VCLT.

25. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms "any action which it considers" in the chapeau, because this reading is consistent with the Spanish text, and also—while less in line with rules of grammar and conventions—permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. All of the elements in the text, including each subparagraph ending, are part of a single relative clause beginning with "which it considers necessary" and ending at the end of each subparagraph ending, and are left to the determination of the Member. Idiosyncrasies in the Spanish text of

Article XXI(b), compared to the English and French texts of Article XXI, as well as the Spanish texts of security exceptions in the GATS and TRIPS Agreement, do not warrant a different interpretation.

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

26. The panel in *Russia – Traffic in Transit* erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI. That panel's interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on "the mere meaning of the words and the grammatical construction of the provision," but on what it termed the "logical structure of the provision." Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel's analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

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

27. The structure of the WTO Agreement shows that the essential security exception applies to the Multilateral Agreements on Trade in Goods, including the *Agreement on Rules of Origin*. The starting point for establishing that the essential security exception applies to the *Agreement on Rules of Origin* is to examine the structure of the WTO Agreement as a whole.

28. The Marrakesh Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking. In particular, Annex 1A consists of the Multilateral Agreements on Trade in Goods (including the *Agreement on Rules of Origin* and the *Agreement on Technical Barriers to Trade*), Annex 1B consists of the GATS, and Annex 1C consists of the *Agreement on Trade Related Aspects of International Property Rights* (TRIPS). Two possibilities arise from this structure. The first is that the negotiators understood that the GATT 1947/1994 essential security exception applies to the new agreements on trade in goods contained in Article 1A. The other possibility is that for some reason, the negotiators believed that the essential security exception applied to the fundamental disciplines in the GATT 1994, but not to the elaborations upon those disciplines as set out in the other trade-in-goods agreements. This second interpretation is untenable as a matter of logic or common sense.

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

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

31. Further, it is not the case that negotiators thought that basic disciplines should be subject to the essential security exception, but not more detailed or elaborated exceptions. First, no logical rationale exists for such distinction, nor in most cases can the distinction even be made. Rather, substantial overlap exists between the disciplines in the GATT 1994 and the new Uruguay Round Agreements on trade in goods. Second, in the new areas—Annex 1B services and Annex 1C intellectual property—the essential security exception applies to every obligation —whether fundamental or more detailed. No rationale would point to a different intent for obligations with respect to trade in goods.

32. The *Agreement on Rules of Origin* includes multiple textual links to the GATT 1994. The Preamble includes multiple references to the GATT 1994, and in light of that link the Agreement aims to increase transparency, predictability, and consistency in the preparation and application of rules of origin, and ultimately to harmonize rules of origin. That is, the Preamble confirms that while the Agreement establishes certain principles with respect to rules of origin, at least until completion of the Harmonized Work Program provided for in Part IV of the Agreement, it does not constrain a Member's discretion in a way that would prevent it from acting to protect its essential security interests.

33. In the "Definitions and Coverage" provisions in Part I of the *Agreement on Rules of Origin*, Article 1.1 defines "rules of origin" for purposes of the agreement with reference to the GATT 1994, and Article 1.2 further establishes the linkage to the GATT 1994, providing that "[r]ules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas." Each of these underlying GATT 1994 provisions is subject to the GATT 1994 essential security exception; logic dictates that the associated rules of origin would be subject to the same provision.

34. Article 2(b) of the *Agreement on Rules of Origin* also confirms the connection between the GATT 1994 and the availability of Article XXI of the GATT 1994 as a defense to breaches of the *Agreement on Rules of Origin*. Article 2(b) confirms that rules of origin disciplined by the *Agreement on Rules of Origin* are linked to "commercial policy" instruments disciplined by the GATT, as provided in Article 1.2.

35. In addition, Articles 7 and 8 of the *Agreement on Rules of Origin* provide that the provisions of Articles XXII and XXIII of the GATT 1994, respectively, as elaborated and applied by the DSU, are applicable to the *Agreement on Rules of Origin*. For purposes of Article 8, which provides that the provisions of Article XXIII shall be followed "mutatis mutandis," the reference to "its obligations under this Agreement" in Article XXIII:1 include the substantive

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

36. Moreover, tthe structure of the *Agreement on Rules of Origin*, and the distinct disciplines that apply before and after completion of the work program for the harmonization of rules of origin, provide discretion to Members, including to take action to protect their essential security interests, and further confirm the availability of Article XXI of the GATT 1994 as a defense.

37. Although not necessary for purposes of interpreting the *Agreement on Rules of Origin* in this dispute, supplementary means of interpretation confirm that Members (at the time of the Uruguay Round, Contracting Parties) understood the close link between the GATT and rules of origin. The negotiators of the *Agreement on Rules of Origin*, in discussing the scope of the potential agreement, specifically considered that it should cover rules of origin "subject to GATT disciplines," as well as the extent to which it should cover rules beyond those disciplines, such as government procurement. They understood the *Agreement on Rules of Origin* as linked to the GATT 1994.

38. The claims in this dispute confirm the link between the GATT 1994 and the *Agreement on Rules of Origin*, and the availability of Article XXI(b). With regard to the specific claims at issue, Hong Kong, China, itself acknowledges the link between the *Agreement on Rules of Origin* and the GATT 1994. Hong Kong, China, states that its claims of breach of Article 2(d) of the *Agreement on Rules of Origin* are "essentially the same" as its claims of breach of Articles I:1 and IX:1 of the GATT 1994 (as well as Article 2.1 of the TBT Agreement), and requests further that the Panel exercise judicial economy with respect to its GATT 1994 claims.

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

F. THE EXCEPTION UNDER ARTICLE XXI OF THE GATT 1994 APPLIES TO THE CLAIMS UNDER THE TBT AGREEMENT

40. The explanation that the structure of the WTO Agreement as a whole shows that the GATT 1994 essential security exception applies to the Annex 1A Multilateral Agreement on Trade in Goods, including the *Agreement on Rules of Origin* applies with equal force to the TBT Agreement.

41. Multiple provisions of the TBT Agreement link the Agreement to the GATT 1994 and essential security considerations. The seventh recital of the preamble to the TBT Agreement unambiguously states, "*Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest." The seventh recital does not refer to any qualification or condition with respect to a Member's right to take measures to protect its essential security interests. Like Article XXI(b), the seventh recital reflects that measures taken to protect a Member's essential security interests are not subject to additional requirements or scrutiny. In contrast, the sixth recital, which provides immediate context for the seventh recital, provides a list of certain types of measures that Members are not prevented from taking, "subject to" certain requirements. The contrast between the sixth and seventh recitals reflects an important difference between Articles XX and XXI of the GATT 1994. That is, while the former subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination, and in turn to review in a possible dispute settlement proceeding, the latter provision is self-judging as to what actions are necessary for a Member to protect its essential security measures.

42. Annex 1.1 of the TBT Agreement provides the definition of a technical regulation, and the second sentence of the definition identifies "marking" as an example of a requirement that might be a technical regulation. At the same time, Article IX of the GATT 1994 specifically disciplines origin marking requirements. That is, while the TBT Agreement imposes disciplines on technical regulations, standards, and conformity assessment procedures, each of which might address a range of subjects, Article IX of the GATT 1994 imposes disciplines specifically on marks of origin. This confirms that, to the extent that a technical regulation provides for origin marking that is disciplined under Article IX of the GATT 1994, Article XXI of the GATT 1994 is available as an exception to both commitments, and a defense for a claimed breach of both the GATT 1994 and the TBT Agreement.

43. Article 2.1 of the TBT Agreement sets forth MFN and national treatment obligations that are similar to that provided by Articles I and III:4 of the GATT 1994. With respect to the issue of discriminatory treatment, Article 2.1 mirrors Articles I:1 and III:4 of the GATT 1994. The overlap between the disciplines of Article 2.1 of the TBT Agreement and Articles I and III:4 of the GATT 1994 confirms that Article XXI applies to Article 2.1 of the TBT Agreement just as it applies to Article I and III of the GATT 1994. This is especially true when read in light of the object and purpose of the TBT Agreement provided in the seventh recital. To conclude otherwise would suggest that a Member would not be able to defend a measure taken to protect its essential security interests, simply because it is a technical regulation.

44. Article 10.8.3 refers specifically to essential security with respect to the disclosure of information. This reference confirms that, as discussed below, the negotiators of the TBT

Agreement did not intend for the agreement to "supplement" or "replace" essential security concerns. This explicit reference to the GATT 1994 further confirms the understanding that essential security measures are not subject to the disciplines of the TBT Agreement, especially when read in light of the object and purpose of the TBT Agreement provided in the seventh recital.

45. Like Articles 7 and 8 of the *Agreement on Rules of Origin*, Article 14 of the TBT Agreement references GATT 1994 and the DSU. As explained above with respect to Articles 7 and 8 of the *Agreement on Rules of Origin*, both Article XXIII of the GATT and Article 14 of the TBT Agreement are "consultations and dispute settlement provisions" under the DSU to be read together, and subject to Article XXI. This is further confirmed by the object and purpose of the TBT Agreement, as provided in the seventh recital.

46. The negotiating history of the TBT Agreement supports the understanding that essential security measures are not reviewable under the TBT Agreement. Prior to the negotiation and completion of the TBT Agreement in the Uruguay Round, an earlier agreement on technical barriers to trade was negotiated as part of the Tokyo Round in 1979. Tokyo Round Standards Code negotiators contemplated that the preamble should "refer" to the exception articles of the GATT, specifically Articles XX and XXI. This supports the interpretation that the seventh recital of the preamble reflects Article XXI of the GATT.

47. Even prior to the Tokyo Round, the GATT Committee on Industrial Products created a working group on non-tariff barriers to examine, among other things, standards as a non-tariff barrier to trade. The working group recognized that the most-favored-nation principle needed to be reconciled with any code covering standards. More specifically, the working group considered the general exceptions of Article XX of the GATT 1947 as "being relevant" to the context of the issue of standards and regulations serving as a barrier to trade. The 1970 report of the working group on technical barriers to trade to the GATT Committee on Trade suggests that, while the working group had been considering the need to reconcile the most-favored-nation principle with the goal of maintaining standards, as well as the idea that a standards code should "supplement" the general exceptions in Article XX of the GATT, it did not similarly consider the Article XXI exception as needing to be "supplemented." This confirms that the Article XXI exceptions are not meant to be reconciled with the TBT Agreement, reflecting that measures under that exception need not be "in accordance with the provisions" of the TBT Agreement.

48. The claims in this dispute confirm the link between the GATT 1994 and the TBT Agreement, and the availability of Article XXI(b). The crux of the claims by Hong Kong, China, that the origin marking requirement breaches Articles 2.1 of the TBT Agreement, as well as Articles I:1 and IX:1 of the GATT 1994 (and Article 2.1 of the TBT Agreement) is that the United States applies a condition of "sufficient autonomy" with respect to goods of Hong Kong, China. Just as the origin marking requirement is subject to an exception to claims under Articles I:1 and IX:1 as an action taken to protect U.S. essential security interests under Article XXI of the GATT 1994, so too is this action subject to an exception to the same substantive claims under the TBT Agreement. There is no logical basis to conclude that an origin marking requirement subject to Article IX of the GATT 1994 could be defended as an action taken to protect essential security interests under Article XXI, but only if that marking requirement is not a technical

regulation. Indeed, by arguing that a "requirement to mark an imported product with its country of origin" is by definition a technical regulation, Hong Kong, China, would deprive a Member from taking action to protect its essential security interests with respect to origin marking requirements – effectively undoing the availability of Article XXI for Article IX claims. The structure of the WTO Agreement, as well as the text of the TBT Agreement, indicate that the negotiators of the TBT Agreement and the GATT 1994 did not intend such a result.

G. IN LIGHT OF THE SELF-JUDGING NATURE OF ARTICLE XXI OF THE GATT 1994, THE SOLE FINDING THE PANEL MAY MAKE CONSISTENT WITH ITS TERMS OF REFERENCE UNDER ARTICLE 7.1 OF THE DSU IS TO NOTE THE INVOCATION OF ARTICLE XXI

49. The DSB has established the Panel's terms of reference under Article 7.1 of the DSU. Under these standard terms of reference, the DSB has tasked the Panel: (1) "[t]o *examine*" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"; and (2) to "make such *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

50. DSU Article 11 confirms this dual function of a panel. Article 11 of the DSU states that the "function of panels" is to "assist the DSB in discharging its responsibilities" under the DSU itself and the covered agreements. Article 11 provides that a panel "should make an objective *assessment* of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," and "such other *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

51. In this dispute, the Panel has been tasked by the DSB to examine the matter and to make such findings as may lead to a recommendation to bring a WTO-inconsistent measure into conformity with the WTO Agreement. Article 11 reflects this function of examination and making such findings. In order to make the "objective assessment" that may lead to findings to assist the DSB to make recommendations, the Panel is to make "an objective assessment of the facts of the case" and "of the applicability of and conformity with the relevant covered agreements." In the context of this dispute, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. And that objective assessment of Article XXI(b) leads to the understanding that the sole finding that the Panel may make is to recognize the Member's invocation of Article XXI(b).

52. The panel objectively assesses the facts of the case by noting that the responding Member has invoked Article XXI(b). The panel objectively assesses the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and—once it has done so and determined Article XXI(b) to be self- judging—finding Article XXI(b) applicable. Nothing in the DSU—including Article 11 of the DSU—requires otherwise.

53. This result is consistent with DSU Article 19. Article 19.1 provides that "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their

findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

54. Invocation of Article XXI(b) means that an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement. It would diminish a Member's "right" to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to find such an action inconsistent with Article XXI(b). Thus, the sole finding that the Panel may make—consistent with its terms of reference and the DSU—is to note in the Panel's report that the United States has invoked its essential security interests. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b).

H. THE PANEL SHOULD BEGIN ITS ANALYSIS BY ADDRESSING THE INVOCATION BY THE UNITED STATES OF ARTICLE XXI

55. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel's determination. Therefore, contrary to the assertion by Hong Kong, China, that the Panel "must begin its analysis" with the claims under the *Agreement on Rules of Origin*, then the TBT Agreement, and then the GATT 1994, the Panel may consider the issues presented in any order that it sees fit. Whatever the Panel's internal ordering of its analysis, as the United States has explained, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole *finding* that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has involved Article XXI. No additional findings concerning the claims raised by Hong Kong, China, in its submissions would be consistent with the DSU, in light of the text of Article XXI(b). Accordingly, the Panel should begin by addressing the invocation by the United States of Article XXI(b).

II. EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE HEARING

56. In this dispute, the Hong Kong Special Administrative Region of the People's Republic of China seeks to use the WTO as a vehicle to second-guess a national security determination of the United States – specifically, a determination that Hong Kong, China, is no longer sufficiently autonomous with respect to the People's Republic of China to warrant differential treatment under U.S. law. A series of recent actions by the People's Republic of China have undermined the autonomy of Hong Kong, China, and the rights and freedoms of its people. These actions include using 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. The United States has determined the situation with respect to Hong Kong, China, to be a threat to its essential security, and has accordingly taken action it considers necessary to protect its essential security interests.

57. Each WTO Member has the right to determine, for itself, what action it considers necessary to protect its own essential security interests. The self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and in the light

of the treaty's object and purpose. Although not necessary in this dispute, this interpretation of Article XXI is confirmed by supplementary means of interpretation, including the Uruguay Round negotiating history. A complaining Member is not without any recourse if a Member invokes the essential security exception. A complaining Member may pursue a non-violation nullification or impairment claim in those circumstances.

58. Article XXI applies to the *Agreement on Rules of Origin* and the TBT Agreement. Notably, the structure of the WTO agreements, as well as numerous textual references within the *Agreement on Rules of Origin* and the TBT Agreement, highlight the applicability of Article XXI. The overall structure of the WTO Agreement is critical context for an interpretation of the covered agreements and Article XXI in particular. Consideration of the structure shows that Article XXI applies to the disputed claims under the *Agreement on Rules of Origin* and the TBT Agreement. The U.S. interpretation of the applicability of Article XXI to the *Agreement on Rules of Origin* and the TBT Agreement reflects the principle of effectiveness. The object and purpose of the agreements at issue confirm that Article XXI applies. In light of the proper understanding of Article XXI, the Panel's terms of reference and the DSU direct the Panel to make the sole finding that the United States has invoked Article XXI.

III. EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL'S FIRST SET OF QUESTIONS

U.S. Responses to Questions 5-11

59. The requirement to indicate a particular country as a country of origin does not necessarily involve a prior determination that that country is the country of origin. The determination of what terminology (marking) is permissible is fundamentally different from, and in turn can be made independently of, a determination that the particular country is the country of origin for goods. The former may involve a political or diplomatic determination as to what is a country, and what is its territory. 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. This matching exercise is fundamentally different than a marking decision. In particular, the marking decision is the name – with which the good must be marked – associated with the geographic region. Each of these marking decisions is independent of the rules of origin that a Member applies, and not governed by the *Agreement on Rules of Origin*. The United States uses its normal rules of origin in determining the applicable region, and then has chosen the name to be associated with the region of Hong Kong, China, based on its essential security interests, in light of China's decision to interfere in the governance, democratic institutions, and human rights and freedoms of Hong Kong, China. This determination of the appropriate marking or label does not implicate any discipline under the *Agreement on Rules of Origin*. The *Agreement on Rules of Origin* does not include any obligation providing for outcomes of the determination of a country of origin; rather, it has explicit disciplines, none of which are implicated by the marking requirement at issue.

U.S. Responses to Questions 12-16

60. In the context of an Article 2.1 analysis of whether a measure accords "less favorable" treatment, there are two approaches before the Panel – the correct one, and the Appellate Body's

flawed one – for assessing this element of Article 2.1. Under both approaches, security interests (if applicable) can and should be taken into account. Both approaches take regulatory purposes and objectives of the disputed measures into consideration. Therefore, if the regulatory purpose or objective of the measure is for the protection of security interests, or if the factual circumstances indicate that the measure is for the protection of security, then a panel cannot ignore these purposes or factual circumstances in its assessment of whether the measure accords less favorable treatment.

61. The proper approach is based on the ordinary meaning of Article 2.1. What Article 2.1 prohibits are measures that accord less favorable treatment to the concerned imported products as compared to other foreign like products *based on origin*. That is, 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. Under the second approach, it must first be established that there is detrimental impact to the conditions of competition, and second, a panel must then further analyze whether such detrimental impact stems exclusively from a legitimate regulatory distinction.

62. It is incumbent on the complainant to establish detrimental impact in establishing a *prima facie* case. This is a fact-intensive exercise – and one that Hong Kong, China, glosses over in its written submission and oral statements. Even if Hong Kong, China, demonstrates detrimental impact, the panel would then have to take into account the regulatory purpose of the disputed measures and whether the impact is rationally related to an origin-neutral regulatory purpose. The United States considers that, if detrimental impact can be explained on the basis of origin-neutral factors or is rationally linked to a regulatory purpose or objective that is origin-neutral, then those circumstances are indicative of non-discrimination.

U.S. Responses to Questions 20-43

63. The "subject" of this interpretative exercise is the specific claimed breaches, specifically Articles 2(c) and 2(d) of the Agreement on Rules of Origin, Article 2.1 of the TBT Agreement, and Articles I and IX of the GATT 1994. And the issue is whether Article XXI(b) applies to these specific provisions. That is an interpretive inquiry that the Panel must conduct on a case-by-case basis. The Panel should look to the single undertaking structure of the WTO Agreement, which provides context to the application of Article XXI(b) to the specific claims. The principle of effectiveness is not meant to provide the maximum effectiveness to all provisions, but rather it means that interpretation should not deprive the effectiveness of provisions. The United States considers that previous reports, in analyzing the applicability of GATT Article XX to a non-GATT agreement, correctly recognized that lack of explicit incorporation of an exception is not dispositive.

64. The wholesale incorporation of GATT into the WTO Agreement as the lead agreement in Annex 1A further demonstrates the relationship of other multilateral trade in goods agreements with the GATT "as the central pillar of the MTO package" and the Uruguay Round negotiating

history shows a continued interest in maintaining a meaningful essential security exception. That is, the structure of the WTO Agreement establishes that Article XXI(b) applies to the Annex 1A agreements on trade in goods at issue in this dispute. The Annex 1B and 1C agreements were understood not to be as integrally linked to GATT, and therefore each received its own essential security provision.

65. The structural consideration is relevant not only for the relationship between the agreements themselves, but also between the particular claims. Based on the overlaps between the claims at issue under each of the agreements, with respect to the applicability of Article XXI(b), the Panel should find that the exception applies to the specific claims at issue.

U.S. Responses to Questions 44-67

66. The role of the subparagraphs of Article XXI(b) is to guide a Member's discretion by identifying the situation that a Member considers to be present when it takes an action that it considers necessary to protect its essential security interests. Hong Kong, China, suggests that the effectiveness of a treaty provision depends on whether it is reviewable in a dispute settlement mechanism, and whether that review can result in a recommendation to withdraw or modify the underlying measure. This is not correct as a matter of treaty interpretation. "Effective" does not mean that each treaty provision must impose an obligation, or conditions for the exercise of a right, that is reviewable under a dispute settlement mechanism. The VCLT does not suggest that whether a party enters into binding treaty obligations is dependent on that party agreeing to formal dispute settlement. The question of whether a state consents to undertake a particular obligation in international law is simply separate from whether a state consents to dispute settlement in respect of that obligation.

67. In Article XXI(b), the relative clause that follows the word "action" describes the situation which the Member "considers" to be present when it takes such an "action." The clause begins with "which it considers necessary" and ends at the end of each subparagraph. Because the relative clause describing the action begins "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action. Taking essential security actions is a basic function of government. The self-judging nature of Article XXI(b) is established in the text of the provision itself, and reflects the balance between rights and obligations that negotiators struck.

68. Not all preparatory materials may be correctly considered part of a treaty's negotiating history, or *travaux préparatoires*, and therefore appropriate for recourse as a supplementary means of interpretation. Instead, for materials to be so considered, they should be in the public domain, or at least "in the hands of all the parties." The United States considers ITO documents constitute part of the negotiating history or the "preparatory work of the treaty" with respect to the GATT 1994.

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

70. The availability of a non-violation nullification or impairment claim is relevant to the question of whether the essential security exception in Article XXI(b) is self-judging because this is the balance negotiators struck in the text. While it affords recourse to a Member aggrieved by another Member's essential security action, the DSB – as a result of the self-judging nature of Article XXI(b) established by the terms of that provision – may not find that a Member is wrong in considering an action necessary to protect its essential security interests, and recommend that the Member bring that measure into conformity with a covered agreement. To make such a recommendation would diminish a Member's "right" to take action it considers necessary to protect its essential security interests, contrary to Articles 3.2 and 19.2 of the DSU.

IV. EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

A. NONE OF THE ARGUMENTS PRESENTED BY HONG KONG, CHINA, REBUT THE U.S. INTERPRETATION OF ARTICLE XXI(B) AS SELF-JUDGING.

71. 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.

72. 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". 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"). 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. In Article XXI(b), the dependent clause begins with a relative pronoun – "which" – so this dependent clause is also called a relative clause. Relative clauses "postmodify nouns". 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. 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". 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.

73. 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). 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.

74. 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 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. 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. Again, Hong Kong, China, is effectively asking the Panel to read into Article XXI text that is not there.

B. RECONCILING THE AUTHENTIC TEXTS OF ARTICLE XXI(B) UNDER ARTICLE 33 OF THE VCLT ESTABLISHES THAT ARTICLE XXI(B) IS SELF-JUDGING

75. Hong Kong, China, argues that there is no need to reconcile the different language versions of Article XXI(b). Hong Kong, China, fails to account for the clear differences between the Spanish text of Article XXI(b), and the English and 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). 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.

76. 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.

C. INTERPRETATION OF THE SUBPARAGRAPHS OF ARTICLE XXI(B) AS SELF-JUDGING REFLECTS THE PRINCIPLE OF EFFECTIVENESS

77. 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 31 of the VCLT itself embodies the principle of effectiveness. That is, with respect to the interpretation of Article 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.

78. 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'." 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". 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'."

79. 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-judging, 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. The argument by Hong Kong, China, fails to give effect to the different language in the different exceptions. 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. 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.

80. 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 the subparagraphs, like other WTO provisions that do not provide a role for panel review, are not useless in this regard.

D. ARTICLE XXI(B) DOES NOT REQUIRE AN INVOKING MEMBER TO IDENTIFY A SPECIFIC SUBPARAGRAPH

81. 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. 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.

E. THE CONTEXT OF ARTICLE XXI(B) SUPPORTS THAT IT IS SELF-JUDGING.

82. 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. Hong Kong, China, is incorrect with respect to both assertions. 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). Interpreting Article XXI(b) as subjecting a Member's security measures to review by a panel would mean that, at least in some instances, 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).

83. Hong Kong, China, also 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. Those differences confirm that Article XXI(b) is self-judging.

84. 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. 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.

85. 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, 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. Such an approach is not consistent with the customary rules of treaty interpretation. Moreover, the security and predictability of the multilateral trading system is not well-served by converting it into a forum for security issues. 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.

F. A SUBSEQUENT AGREEMENT AND RECOURSE TO SUPPLEMENTARY MEANS OF INTERPRETATION CONFIRMS THAT ARTICLE XXI(B) IS SELF-JUDGING.

86. Hong Kong, China, argues that neither 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 meaning of Article 31(3)(a) of the VCLT. Hong Kong, China, further asserts that both decisions support its interpretation of Article XXI(b). While the United States agrees that the 1982 Decision is not a subsequent agreement, the assertions by Hong Kong, China, are otherwise incorrect. 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.

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 Appellate Body reports would be "subsequent agreements". The non-binding nature of such reports is established by the text of the WTO Agreement; 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. The 1982 Decision supports the interpretation that Article XXI(b) is self-judging, contrary to the assertions by Hong Kong, China. The preamble to this decision twice acknowledges the self-judging nature of Article XXI.

87. 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. 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. 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.

G. 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

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

89. 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.

90. 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." 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. 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.

91. 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". 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, this language is not treaty text, nor a standard set forth in the customary rules of treaty interpretation.

92. 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 other WTO agreements ineffective. This purported application of the principle of effectiveness is incorrect. 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 simple logic. 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 outcomes would necessarily be different in the absence of the language at issue. Instead, the principle simply means that interpretation should not be conducted in a way that makes a provision ineffective.

93. 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 as not "specific" or "objective" and dismisses them as general in nature. 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".

94. 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. Although Hong Kong, China, seeks to distance itself from its previous characterization of its claims in its responses to the questions from the Panel, 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. 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. The overlap between

the claims at issue is relevant in the interpretative exercise because the relationship between those claims is relevant context. 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 the larger set of measures defined to be rules of origin or technical regulations.

95. Furthermore, Hong Kong, China, selectively reads the preambles and certain provisions within the *Agreement on Rules of Origin* and the TBT Agreement to argue that Article XXI does not apply to the claims at issue, and such selective interpretation is inconsistent with the customary rules of treaty interpretation.

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

96. Hong Kong, China, has failed to establish a breach of the *Agreement on Rules of Origin*. Hong Kong, China, conflates the result of the application of rules of origin, and the name used to reflect that result, with the rules of origin themselves. 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).

97. 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 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. Hong Kong, China, provides no textual support for this conclusion because there is none.

98. 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. 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. 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 a Member under its marking rules use a particular term for that geographic region. 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.

99. Hong Kong, China, is incorrect in asserting that the *Agreement on Rules of Origin* requires that a specific outcome be reached with respect to the origin of a particular good. 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. Nor does the Agreement provide that any particular term needs to be used to identify that country.

100. Hong Kong, China, also failed to establish a breach 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. 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 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. 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; and that "there is no need for a panel to evaluate whether any detrimental impact on imports stem exclusively from a legitimate regulatory distinction. Relabeling its allegations as *de jure* discrimination, however, does nothing to advance the argument by Hong Kong, China. 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.

101. The United States does not agree that there is "no need for additional analysis" in cases in which a technical regulation makes an origin-based distinction. An origin-based distinction by itself may not necessarily lead to treatment that is "less favorable" per the plain meaning of the text of Article 2.1. A complainant must still demonstrate how such origin-based distinction is "less favorable." The 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.

102. 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. 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. 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 questioning, Hong Kong, China, would have to be in a position 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. Hong Kong, China, has not acknowledged the language of the measures at issue, or anything else on the record in this respect.

103. Hong Kong, China, also failed to establish a breach of the GATT 1994. 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. Hong Kong, China, has failed to do so. 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. 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. 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. Hong Kong, China, has not done so. The claims by Hong Kong, China, under Article I:1 of the GATT 1994 suffer similar flaws as its claims under Article IX:1.

I. THE ONLY FINDING THE PANEL MAY MAKE CONSISTENT WITH THE DSU IS TO NOTE THE UNITED STATES' INVOCATION OF ARTICLE XXI

104. 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. 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.

V. EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE HEARING

105. The measures in dispute on their face make clear the essential security interests at stake. The United States has supplied the Panel with various evidence on how those U.S. essential security concerns have indeed since materialized. Hong Kong, China, has never disputed or contested any of those facts. The Panel is presented with the fundamental question as to the role of the multilateral trading system in such matters.

106. The self-judging nature of Article XXI(b) of the GATT 1994 is established by the text of that provision, in its context, and in light of the treaty's object and purpose. Hong Kong, China, suggests reading a good faith obligation into the text of Article XXI(b). However, under the DSU, panels are limited to examining the consistency of challenged measures with cited provisions of "covered agreements". Nothing in the text of the provisions of the covered agreements at issue, including Article XXI(b), provides for a good faith obligation.

107. Although the U.S. position is that, in light of the self-judging nature of Article XXI(b), it is not compelled to invoke and make an evidentiary showing with respect to a specific subparagraph, Hong Kong, China, is also incorrect to assert that the United States has made no articulation of its essential security interests in this dispute.

108. The United States has shown, using the customary rules of treaty interpretation, that Article XXI(b) applies to the claims at issue under the Agreement on Rules of Origin and the TBT Agreement. Hong Kong, China, incorrectly rejects the relevance of the structure of the WTO Agreement as context under those rules, both in terms of the overlapping nature of the claims at issue and the balance of rights and obligations provided by the single undertaking.

109. Hong Kong, China's claim that the marking requirement at issue breaches the *Agreement on Rules of Origin* is based on a number of fundamentally flawed arguments with respect to the scope of the Agreement, as well as a mischaracterization of the measures at issue and their basis.

110. Hong Kong, China, also fails to establish a breach of the TBT Agreement. Hong Kong, China, does not show how the disputed measure actually accords "less favorable" treatment under Article 2.1 of the TBT Agreement on the basis of an origin-based discrimination. Second, Hong Kong, China, fails to engage with the regulatory objective of the disputed measure. Third, the detrimental impact claims by Hong Kong, China, are baseless.

VI. EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL'S SECOND SET OF QUESTIONS

U.S. Responses to Questions 68-82

111. The mere requirement to employ a certain country name in product marking is not sufficient to establish detrimental impact. The fact that goods are marked with "China" simply reflects the fact that all imports must be marked using the terminology determined by the United States. This by itself does not constitute evidence of detrimental impact, much less "less favorable treatment", and the response would be no different depending on whether the Member in question is a separate customs territory. To recall, the purpose and overall concern of the marking requirement at issue is not origin-based. The determination with respect to the autonomy of Hong Kong, China, stems from the global U.S. concern for fundamental freedoms, human rights, and integrity of democratic institutions. Interpreting a measure and its impact, if any, must take into account not only the text of the measure, but also its regulatory objective and purpose. Formally different treatment of like products from different sources does not mean there is "less favorable" treatment.

112. Assessment under Article 2.1 is a holistic examination of all the facts and circumstances, including finding a rational linkage between and among the detrimental impact, the regulatory purpose, or facts and circumstances that may provide an origin-neutral explanation. As for what the United States means by rational linkage or relationship as it pertains to the measure, the meaning is twofold: one, whether the regulatory distinction is apt to advance the origin-neutral purpose (here, the United States determined that Hong Kong, China, lacks sufficient autonomy vis-à-vis the People's Republic of China, and therefore differential treatment was suspended); two, whether detrimental impact naturally flows from the origin-neutral regulatory distinction. Hong Kong, China, has refused to engage with the regulatory objective, even as reflected on the face of the measure, and insists that there is "no need for additional" analysis because the "sufficient autonomy condition" applies only to Hong Kong, China.

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

U.S. Responses to Questions 84-93

114. The basis for considering the legal structure of a treaty is the customary rules of treaty interpretation, which calls for interpretation of the text, in its context and in light of the treaty's object and purpose. The structure of the treaty is context in this exercise. Basic logic and sound reasoning are – quite obviously – necessary for applying the customary rules of treaty interpretation. To not apply logic would run directly contrary to Article 31 of the VCLT, which provides for a treaty to be interpreted "in good faith" in accordance with its text. It is only through logic and reasoning that, for example, a treaty interpreter can analyze what is the "ordinary meaning" of a treaty term or how any particular element of context can affect the interpretation of a particular treaty provision. And conversely, treaty interpretation is not supposed to produce absurd results and interpretations.

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

U.S. Responses to Questions 94-126

116. All of the elements in the text of Article XXI(b), including each subparagraph ending, are part of a single relative clause, and they are left to the determination of the Member. Specifically, because the operative language is "it considers," Article XXI(b) reserves for the Member to decide what action it considers "necessary for" the protection of its essential security interests and which circumstances are present. In that sense, the phrase "which it considers" "qualifies" all of the elements in the relative clause, including the subparagraph ending. The legal effect is that the provision is self-judging in its entirety. In other words, the text of Article

XXI(b) reserves for the Member the determination of what it considers necessary for the protection of its essential security interests in the circumstances set forth.

117. The English, French, and Spanish texts can be reconciled, as called for under Article 33 of the VCLT. The United States has not identified any rule that would prevent the word "considers" in Article XXI(b) from relating to both the phrases beginning with "necessary" and "taken" without there being a connector between those phrases in either English, French, or Spanish. To the contrary, the absence of a connector between the three (logically separate) subparagraph endings strongly suggests parallelism between those endings – that is, that each subparagraph ending completes the relative phrase ("which it considers") that precedes it.

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

119. The report in *Russia – Traffic in Transit* does not reflect an interpretation of Article XXI(b) consistent with the customary rules of treaty interpretation. There is no basis in those rules for rejecting the interpretation such an examination yields in favor of an inquiry into either the "logical structure" of a provision, or whether a provision is "capable of objective determination". The DSU makes clear that it is the text of the relevant agreement(s) that determines how a panel should assess a Member's invocation of Article XXI(b). The *Russia – Traffic in Transit* panel erred in finding that the existence of the circumstances in the subparagraphs is subject to review by a panel. In reaching this finding, the panel discounted its own conclusion that the meaning of the words and the grammatical structure supported the interpretation that Article XXI(b) is self-judging in its entirety, and instead conducted an inquiry into whether the subject matter of the subparagraphs is *capable* of objective determination – an inquiry that is not called for under the customary rules of treaty interpretation. The ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. Contrary to statements by the panel in *Russia – Traffic in Transit*, nothing in the text somehow limits an "other emergency in international relations" under Article XXI(b)(iii) to an emergency similar to "war", or to situations "giv[ing] rise to defence and military interests, or maintenance of law and public order interests." Likewise, nothing in the text of Article XXI(b)(iii) limits an "emergency in international relations" to a specific territorial area, that is, one "engulfing or surrounding a state".

120. Because Article XXI(b) is self-judging, the Panel need not, and should not, assess the existence of an emergency in international relations. To the extent that the Panel nonetheless chooses to assess the merits of the U.S. invocation, the United States has submitted extensive evidence into record that supports the U.S. invocation of Article XXI(b), as well as the existence of an emergency in international relations. Were the Panel to review whether the circumstances at issue constitute an "emergency in international relations", the views of other countries regarding the situation with respect to Hong Kong, China, could support a finding that there is such an emergency. The fact that multiple countries share the U.S. concerns also shows the baselessness of the accusations by Hong Kong, China, during the second videoconference that those concerns are not sincere.

121. The conclusion of the *Russia – Traffic in Transit* report that Article XXI(b) is subject to a good faith obligation is not based in the customary rules of treaty interpretation. The U.S. concerns with the panel's approach do not relate to whether Members are to implement their obligations in "good faith" under international law. The United States understands that they are – indeed, the United States understands further that Members are presumed to act in good faith. However, under the DSU, the WTO dispute settlement system has a limited mandate, which is to determine conformity with the "covered agreements," and not international law more generally. In other words, there is no basis in the DSU for examining the consistency of a Member's action with Article 26 of the VCLT, or with a principle of good faith more generally. These are not provisions of the "covered agreements".

VII. EXECUTIVE SUMMARY OF THE U.S. COMMENTS ON RESPONSES BY HONG KONG, CHINA, TO THE SECOND SET OF PANEL QUESTIONS

U.S. Comments on Questions 68-82

122. Hong Kong, China, appears to suggest that an "origin-based distinction" in some instances itself establishes "detrimental impact" (such that there is no need for an evidentiary showing of such impact), and that is what it refers to as "*de jure*" discrimination. This position is untenable. The only alleged support that Hong Kong, China, offers for its conclusion is a quote of a single statement from the European Union's third party submission. However, the European Union's submission does not itself explain the basis for this statement, nor does the United States understand the EU statement to support Hong Kong, China's approach.

123. Hong Kong, China's view that there is no need to account for the regulatory purpose of a measure in cases of what it calls "*de jure*" discrimination is not based in the text of Article 2.1, but rather is based on its reading of certain past dispute settlement reports. Notwithstanding that those reports do not stand for the proposition that Hong Kong, China, asserts, the task of the Panel is to interpret the provisions at issue in accordance with the customary rules of treaty interpretation. The United States notes that the prior reports on which Hong Kong, China, seeks to rely (in lieu of the text of Article 2.1) in support of its argument that no regulatory analysis is required in cases of "*de jure*" discrimination did not address a measure that inherently makes distinctions on the basis of origin, such as a mark of origin requirement. Those reports also did not define or clarify what a *"de jure*" discrimination finding would look like in the context of Article 2.1 of the TBT Agreement, and especially in the context of measures relating to actions necessary to protect an "essential security interest." Moreover, those reports never mentioned that there is "no need for additional analysis" or even consideration of the regulatory objective under certain circumstances when it comes to the examination of a disputed measure.

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

under an Article 2.1 claim if the regulation is what Hong Kong, China, characterizes as "*de jure*" discriminatory, regardless of the regulatory objective.

U.S. Comments on Questions 84-93

125. Hong Kong, China, suggests that modifying the GATT 1947 in the GATT 1994 to provide that Article XXI applies to the other Annex 1A agreements "would have been a simple matter". This assertion is just fiction, without any basis. Indeed, incorporating the GATT 1947 into the GATT 1994 was not a "simple matter", and editing the GATT 1947 itself was not necessarily even considered possible.

126. Hong Kong, China, purports to recognize that the "specific relationship" among the agreements and their provisions must take into account this single undertaking structure as context. But then Hong Kong, China, simply ignores this structure and repeats its unsupportable arguments about the applicability of Article XXI. Indeed, within a few sentences of recognizing the overall structure, it rehashes its stale arguments that each of these agreements are "distinct" and essentially must be interpreted in a vacuum reflecting their "own balance of rights and obligations." Rather than conducting a text-based rebuttal of the U.S. application of the customary rules of treaty interpretation with respect to the interpretative question at issue, the response by Hong Kong, China, relies on prior reports addressing the applicability of Article XX. In addition, Hong Kong, China, fails to address the differences between Article XX and Article XXI for purposes of the analysis in this dispute.

127. Hong Kong, China's understanding of a Member's rights under Article XXI(b) is not only flawed, but also alarming. According to Hong Kong, China, the structure of the WTO Agreement reflects that a WTO Member has *no right* to take actions that it considers necessary to protect its essential security interests – in *any* circumstances – under at least "ten other [WTO] agreements". The dangerous consequences of this position are laid bare by the current circumstances facing Ukraine and the Ukrainian people in the wake of the unjustified invasion by the Russian Federation. The United States considers, consistent with its views expressed in this dispute, that Ukraine is well within its rights to suspend application of the WTO agreements in Annex 1A other than the GATT 1994 to the Russian Federation. The current situation makes clear the absurdity, and the dangerousness, of the argument that drafters of the Uruguay Round simply chose to relinquish their respective rights to take essential security actions under those agreements (for example, because they did not expressly incorporate Article XXI(b) into certain agreements).

128. Furthermore, Hong Kong, China, fails to acknowledge that the United States has also shown the various text-based linkages that establish that Article XXI applies to the ***specific claims at issue*** under the agreements at issue. Hong Kong, China's claim that the U.S. interpretation in that regard would apply with respect to Article XX is not only incorrect in light of the differences between Article XX and Article XXI(b) that the United States has identified throughout this dispute, but it also ignores the specific interpretive issue at hand. The overlap between the claims is established by the nature of the claims themselves – that is, for all of its claims, Hong Kong, China, is claiming that it is subject to a requirement (consideration of autonomy, and in turn marking as "China") that other Members are not, in a way that it is

impermissibly discriminatory. And the relationship between and among the disputed provisions is part of the structural consideration, and in turn part of the context for purposes of treaty interpretation.

U.S. Comments on Questions 94-126

129. Contrary to Hong Kong, China's suggestion, the United States is not asking the Panel to use "interrogative powers" with respect to its invocation of Article XXI(b). The United States does not ask the Panel – or anyone else – to make its case for it. To be clear, because Article XXI(b) is self-judging by its terms, a Member invoking that provision has no further case to make. Even though Article XXI(b) is self-judging and a panel should not review a Member's essential security decisions, the United States in fact has provided ample evidence on this issue. Thus, Hong Kong, China, is incorrect to assert that the United States has provided no evidence or argument to support its invocation of Article XXI(b).

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

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

132. Hong Kong, China, seeks to establish to the contrary by citing first the title of Article XXI, Security Exceptions. The title of a provision is context, and the operative language of Article XXI(b) itself refers to "its essential security interests", and reflects a Member's right to take "any action which it considers necessary for the protection of" those interests. The ordinary meaning of the terms of Article XXI(b) establishes that "essential security interests" are not limited to "defense and military interests, as well as maintenance of law and public order interests".

133. Hong Kong, China, also now appears to suggest that Article 31 of the VCLT imposes a good faith obligation on WTO Members that is reviewable by a panel. This suggestion is also not based in the text of either the DSU or Article 31 itself.