UNITED STATES – ORIGIN MARKING REQUIREMENT

(DS597)

OPENING STATEMENT OF
THE UNITED STATES OF AMERICA
AT THE PANEL'S FIRST VIDEOCONFERENCE WITH THE PARTIES

August 31, 2021

I. Introduction

1. Ms. Chairperson, and members of the Panel, on behalf of the U.S. delegation, I thank the Panel, and the Secretariat staff assisting you, for your work in this dispute.

2. 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 fundamental and goes to the heart of the basic responsibilities of a government. WTO Members, including the United States, did not relinquish this inherent right in joining the WTO.

3. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994.[1] As the United States explained in its first written submission, each WTO Member has the right to determine, for itself, what action it considers necessary to protect its own essential security interests. This understanding of Article XXI(b) is based in the text and context of the provision itself, and supported by the negotiating history.

4. Because it is the text of Article XXI(b) itself that is self-judging, it is entirely consistent with the Panel's terms of reference and function under the DSU to make such a finding. The DSB has established this panel to examine the matter and to "make such findings as will assist" the DSB in making a recommendation to bring a measure into conformity with the covered agreements.[2] Because Article XXI(b) is self-judging, an invocation cannot be found to be WTO-inconsistent, and thus there is no recommendation the DSB could make to the United States.

5. The sensitive circumstances of this dispute illustrate why essential security measures may not – and should not – be reviewed by the WTO. The United States has long valued the

[1] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").
[2] DSU Art. 7.1.

fundamental freedoms and human rights of the people of Hong Kong, China, and considered the continued existence of those freedoms and human rights after the resumption of sovereignty by the People's Republic of China to be relevant to U.S. interests.[3] However, 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[4] 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 National Security Law's extraterritorial reach has furthermore allowed China security elements to operate openly and without accountability to authorities of Hong Kong, China, undermining the city's autonomy.[5] The United States has determined the situation with respect to Hong Kong, China, to be a threat to its essential security.[6] And the United States has accordingly taken action it considers necessary to protect its essential security interests.

6. Other WTO Members also find the situation highly concerning.[7] But not all WTO Members have the same perception of what actions are necessary to protect essential security interests in these types of circumstances. That is precisely the issue. The scope of what a Member considers to be within its essential security interest, and the subsequent responsive action, are based on an inherently political and subjective judgment reserved for each WTO

[3] *See, e.g.*, Hong Kong Policy Act of 1992, sec. 2 (US-3).

[4] *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* ("National Security Law").

[5] Hong Kong 2020 Human Rights Report at 2 (US-112).

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

[7] *See* Third Party Submission by the European Union, paras. 11-16.

Member. They are not for the WTO to review – nor could a WTO panel review such a security judgment without substituting its own judgment for the Member's.

7. 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. There is tremendous irony in this action, given statements by the People's Republic of China and by Hong Kong, China, confirming the very basis for the U.S. national security determination.

8. For example, in response to the U.S. actions that followed the imposition of the National Security Law, the People's Republic of China has stated that "legislating on national security is an international norm and falls within national sovereignty" and that the United States has undermined China's sovereignty.[8] Yet, Hong Kong, China, invites the WTO to intervene with respect to a U.S. essential security action that, according to China, "falls within national sovereignty".

[8] The US side is in no position to meddle with Hong Kong affairs under the pretext of values, Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region (April 3, 2021) *available at* https://www.fmprc.gov.cn/ce/cohk/eng/gsxw/t1866745.htm (US-113).

9. The People's Republic of China has also criticized democracies such as the United States for "meddling" with what it characterizes as "internal affairs". Thus, China confirms that it views "Hong Kong affairs, [as] China's internal affairs."[9]

10. Hong Kong, China, officials have also represented that "national security is never part of Hong Kong's autonomy."[10] This only confirms the validity of the U.S. finding of Hong Kong, China's loss of autonomy, especially given the grave implications of the National Security Law on the rights and freedoms of the people of Hong Kong, China.

11. Thus, while Hong Kong, China, challenges the U.S. national security determination with respect to its autonomy, and does so pursuant to the People's Republic of China's criticisms of the U.S. determination, their own official statements both confirm the loss of autonomy and that the U.S. determination is inherently a matter of national sovereignty.

12. These political circumstances highlight why WTO Members agreed that a Member's invocation of Article XXI may not be reviewed. If this Panel were to examine the U.S. invocation of Article XXI, as erroneously suggested by the panel in the *Russia – Transit* dispute as well as certain third parties, this Panel would then also have to review whether the circumstances that prompted the measures at issue are within the scope of Article XXI. Hong

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[9] The US side is in no position to meddle with Hong Kong affairs under the pretext of values, Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region (April 3, 2021) *available at* https://www.fmprc.gov.cn/ce/cohk/eng/gsxw/t1866745.htm (US-113).; The Commissioner's Office firmly opposes external forces' vilification and obstruction of the new electoral system of the HKSAR, Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region (May 28, 2021) *available at* https://www.fmprc.gov.cn/ce/cohk/eng/gsxw/t1879401.htm (US-114).

[10] Correctly Understanding the National Security Legislation from the Perspective of the Constitutional Order, Department of Justice of the Government of the Hong Kong Special Administrative Region (May 26, 2020) *available at* https://www.doj.gov.hk/en/community_engagement/sj_blog/20200526_blog1.html (US-115).

Kong, China, is asking the Panel to find that the U.S. marking requirement that is based on a U.S. national security determination with respect to Hong Kong, China's autonomy is inconsistent with WTO obligations. It is evident that the People's Republic of China and Hong Kong, China, are seeking the WTO's blessing for actions that have blatantly diminished the rights and freedoms of the people of Hong Kong, China.

13. The United States explained in its first written submission that 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 the light of the treaty's object and purpose. We also pointed to supplementary means of interpretation in the negotiating history to support that understanding. The United States further explained how Article XXI is applicable to the *Agreement on Rules of Origin* and the TBT Agreement[11]. Today, the United States will focus on a few key interpretative issues.

14. First, we will highlight that the interpretation that Article XXI(b) applies to the *Agreement on Rules of Origin* and the TBT Agreement is consistent with the customary rules of treaty interpretation. Those rules provide for consideration of the structure of the treaty.

15. Second, the United States will explain that the principle of effectiveness – which is embodied in Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) as written, and not a separate rule – does not dictate a different result.

16. Third, the United States will also elaborate that the interpretation that Article XXI(b) is self-judging and applies to the *Agreement on Rules of Origin* and the TBT Agreement is consistent with the object and purpose of the respective treaty. To be clear, this interpretation

[11] *Agreement on Technical Barriers to Trade* ("TBT Agreement").

does *not* mean that a WTO Member has no recourse with respect to an essential security action taken by another Member, and in turn does not threaten the security and predictability of the multilateral trading system. A non-violation nullification or impairment claim is available in those circumstances.

17. Finally, the United States will explain that for the Panel to make the sole finding that the United States has invoked Article XXI is consistent with the Panel's terms of reference and the DSU.

II. The U.S. National Security Determination with Respect to Hong Kong, China's Autonomy

18. Before turning to interpretative issues, the United States will briefly highlight the national security concerns that gave rise to the measures at issue, in particular the Executive Order on Hong Kong Normalization. The United States will further explain how those security concerns have since materialized.

19. As described in the U.S. first written submission, in light of the commitments made by the PRC government in the Sino-British Joint Declaration,[12] following the handover of Hong Kong, China, on July 1, 1997, Hong Kong, China, benefitted from a special status under the United States-Hong Kong Policy Act of 1992. That is, U.S. laws were to be applied to Hong Kong in the same manner as they were applied prior to the city's handover, and this treatment may be different from that accorded to the PRC.

[12] *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (19 Dec. 1984).

20. In providing for this differential treatment, U.S. law recognized that Hong Kong, China, plays an "important role in [the] regional and world economy," that the "[s]upport for democratization is a fundamental principle of United States foreign policy," and that the "human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to the United States interests in Hong Kong."[13] As such, the special status is contingent on the premise that Hong Kong, China, "***continue[s] to enjoy a high degree of autonomy***" from the PRC government and continues to "***retain its current lifestyle and legal, social, and economic systems until at least the year 2047***."[14]

21. U.S. law further provides that if the President determines that Hong Kong, China, is no longer sufficiently autonomous from the PRC government, that special status will be suspended.[15] The President of the United States made such a determination in the Executive Order challenged in this dispute, following a series of actions by the PRC government that encroached on Hong Kong, China's autonomy, including the imposition of the National Security Law.

22. The Executive Order itself, as well as the State Department Hong Kong Policy Act reports in 2020 and 2021, document those actions and concerns with the National Security Law. Unfortunately, more recent developments have reinforced those concerns. Since then, "PRC and Hong Kong authorities have wielded this legislation to ***silence dissent, arrest individuals for***

[13] Section 2(6) of the United States-Hong Kong Policy Act of 1992 (US-3).

[14] Section 2(1) of the United States-Hong Kong Policy Act of 1992 (US-3) (emphasis added).

[15] Section 2(1) of the United States-Hong Kong Policy Act of 1992 (US-3).

expressing pro-democratic views or participating in democratic processes, crack down on media freedom, and shrink the autonomy of Hong Kong's judiciary and legislature."[16]

23. To recall, China's legislature – not that of Hong Kong, China – passed the National Security Law on June 30, 2020, which went into effect on the same day. The law criminalizes so-called acts of secession, subversion, terrorism, and collusion with a foreign country or external elements.[17]

24. Former lawmakers and prominent pro-democracy activists were subsequently arrested or fled Hong Kong, China, to seek political asylum since the passage of the law.[18] Prominent activists such as Joshua Wong and Agnes Chow, the founding members of political party Demosisto, announced they were leaving the party due to the National Security Law.[19] Both of them have since been charged and sentenced to prison.[20]

25. On July 14, 2020, the Beijing top representative office in Hong Kong, China, warned that elections to select pro-democracy candidates for Legislative Council may violate the National

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[16] Remarks by Jonathan Fritz, Deputy Assistant Secretary for China, Mongolia, and Taiwan Coordination Bureau of East Asian and Pacific Affairs, UN Human Rights Council Side Event (July 1, 2021) *available at* https://www.state.gov/assessing-the-national-security-law-in-hong-kong/ (US-116) (emphasis added).

[17] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, G.N.(E) 72 of 2020, *available at* https://www.legco.gov.hk/yr19-20/chinese/panels/ca/papers/ajlscase20200707-gne72-ec.pdf (US-117).

[18] *Leading democracy campaigner Nathan Law leaves Hong Kong*, The Guardian (July 2, 2020) *available at* https://www.theguardian.com/world/2020/jul/02/leading-democracy-campaigner-nathan-law-leaves-hong-kong (US-118).

[19] Hong Kong 2020 Human Rights Report at 4 (US-112); *Pro-democracy leader Nathan Law leaves Hong Kong*, CNN (July 3, 2020) *available at* https://www.cnn.com/2020/07/02/asia/hong-kong-nathan-law-intl/index.html (US-119).

[20] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *see also Hong Kong Activists Sentenced For Their Role In Anti-Government Protest*, NPR (December 2, 2020) *available at* https://www.npr.org/2020/12/02/941032196/hong-kong-activists-sentenced-for-their-role-in-anti-government-protest (US-120).

Security Law.[21] Indeed, on July 30, 2020, various pro-democracy candidates were barred from running in the September 2020 Legislative Assembly election based on an alleged risk of collusion with foreign forces and opposition to the National Security Law.[22] The election was ultimately postponed, ostensibly due to the COVID-19 pandemic.

26. On November 11, 2020, 15 pro-democracy politicians resigned from the legislature due to a measure imposed by Beijing to disqualify four sitting legislative members deemed "unpatriotic".[23] On January 6, 2021, more than 50 former lawmakers and pro-democracy activists were arrested over accusations of violating the National Security Law for participating in or organizing elections in 2020.[24]

27. In April 2021, to implement a decision by the Chinese National People's Congress, the electoral system in Hong Kong, China, was overhauled by "limiting political participation, reducing democratic representation, and stifling political debate."[25] As one press report explained, the overhaul is meant to "to significantly curb[ ] democratic representation in its

[21] *Beijing's Hong Kong office warns pro-democracy pol could violate new security law*, Reuters (July 13, 2020) *available at* https://www.reuters.com/article/us-hongkong-security/beijings-hong-kong-office-warns-pro-democracy-poll-could-violate-new-security-law-idUSKCN24F05Y (US-121).

[22] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *Hong Kong bars 12 opposition candidates from election*, BBC News (July 30, 2020) *available at* https://www.bbc.com/news/world-asia-china-53593187 (US-122).

[23] Hong Kong 2020 Human Rights Report at 10 (US-112); *Hong Kong opposition lawmakers all quit after four members ousted*, The Guardian (November 11, 2020) *available at* https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust (US-123).

[24] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *EU calls for "immediate release" of Hong Kong activists*, AP News (January 6, 2021) *available at* https://apnews.com/article/europe-democracy-hong-kong-arrests-china-71296e353e67b68f7bba590bf7048122 (US-124).

[25] *Assault on Democracy in Hong Kong*, Press Statement, Anthony J. Blinken, Secretary of State *available at* https://www.state.gov/assault-on-democracy-in-hong-kong/ (US-125).

institutions to ensure that only 'patriots' can rule."[26] ***In short, the National Security Law has been used as a blunt tool to quash democratic dissent***.

28. The National Security Law also has a ***chilling effect on the freedoms of speech, of the press, and on an independent judiciary***. On July 2, 2020, only two days after the passage of the law, the Hong Kong government issued a statement declaring a protest slogan "Liberate Hong Kong! Revolution of our time!" illegal because it breaches the National Security Law.[27] On July 5, 2020, the Education Bureau called for review of textbooks to ensure they do not violate the National Security Law.[28] On July 8, 2020, the government banned in schools the singing of a song "Glory to Hong Kong", which was popularized during the protests.[29] On July 29, 2020, four members of a now-defunct pro-independence student group, Studentlocalism, were arrested for violating the National Security Law.[30]

29. On August 10, 2020, media executive Jimmy Lai was arrested under the National Security Law for suspected collusion with foreign forces,[31] and he was subsequently sentenced to

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[26] *Hong Kong announces more electoral system changes favouring pro-Beijing camp*, Reuters (April 13, 2021) *available at* https://www.reuters.com/world/asia-pacific/hong-kong-announces-more-electoral-system-changes-favouring-pro-beijing-camp-2021-04-13/ (US-126).

[27] *Hong Kong Says Common Protest Slogan Calling for "Revolution" is Now Illegal Under National Security Law*, Time (July 3, 2020) *available at* https://time.com/5862683/hong-kong-revolution-protest-chant-security-law/ (US-127); The Government of the Hong Kong Special Administrative Region, Government Statement (July 2, 2020) *available at* https://www.info.gov.hk/gia/general/202007/02/P2020070200869.htm (US-128).

[28] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6).

[29] *Hong Kong bans protests anthem in schools as fears over freedoms intensify*, Reuters (July 8, 2020) *available at* https://www.reuters.com/article/us-hongkong-protests-education/hong-kong-bans-protest-anthem-in-schools-as-fears-over-freedoms-intensify-idUSKBN2490OE (US-129).

[30] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *Hong Kong security law: Four students arrested for "inciting secession"*, BBC News (July 30, 2020) *available at* https://www.bbc.com/news/world-asia-china-53585747 (US-130).

[31] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *Prominent Hong Kong Publisher Arrested Under New National Security Law*, NPR (August 10, 2020) *available at*

prison for protests in 2019.[32] The publication which he founded, *Apple Daily*, was later raided by authorities on charges of using reporting to endanger national security.[33] *Apple Daily* was subsequently forced to stop publication.[34] Executives of the paper were charged with collusion with a foreign country, and bail was denied.[35]

30. In January 2021, all civil servants were forced to make a written pledge of allegiance to the government, and 129 officials were terminated as a result of refusing to make the pledge.[36] On February 4, 2021, the Education Bureau released guidelines for schools on national security and banned any political participation or expression on campuses,[37] and recently the Hong Kong Professional Teachers' Union, an organization with around 95,000 members, disbanded due to the National Security Law.[38]

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https://www.npr.org/2020/08/10/900758905/prominent-hong-kong-publisher-arrested-under-new-national-security-law (US-131).

[32] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *Hong Kong: Jimmy Lai sentenced to 14 months for pro-democracy protests*, BBC News (April 16, 2020) *available at* https://www.bbc.com/news/world-asia-56770567 (US-132).

[33] *Two Apply Daily executives charged with collusion with foreign country*, Reuters (June 18, 2021) *available at* https://www.reuters.com/world/china/hk-pro-democracy-tabloid-apple-daily-increases-production-after-police-raid-2021-06-18/ (US-133).

[34] *Statement by President Joe Biden on Hong Kong's Apple Daily*, The White House Press Releases (June 24, 2021) *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/statement-by-president-joe-biden-on-hong-kongs-apple-daily/ (US-134).

[35] *Two Apply Daily executives charged with collusion with foreign country*, Reuters (June 18, 2021) *available at* https://www.reuters.com/world/china/hk-pro-democracy-tabloid-apple-daily-increases-production-after-police-raid-2021-06-18/ (US-133).

[36] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); *Nearly 130 civil servants fail to take required pledge of allegiance to Hong Kong government with most facing dismissal*, South China Morning Post (April 19, 2021) *available at* https://sg.news.yahoo.com/nearly-130-civil-servants-fail-095959794.html (US-135).

[37] 2021 Hong Kong Policy Act Report (March 31, 2021) (US-6); Education Bureau Circular No. 3/2021, National Security: Maintaining a Safe Learning Environment Nurturing Good Citizens (February 4, 2021) *available at* https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21003E.pdf (US-136).

[38] *Hong Kong teachers' union to disband due to "drastic" political situation*, Reuters (August 10, 2021) *available at* https://www.reuters.com/world/asia-pacific/hong-kong-teachers-union-disband-due-drastic-political-situation-2021-08-10/ (US-137).

31. This is not a comprehensive list of developments that have occurred since the National Security Law was enacted, but the picture is clear. ***By imposing the National Security Law, the government of the People's Republic of China has blatantly diminished the rights and freedoms guaranteed under the Sino-British Joint Declaration and the Basic Law***. These developments affirm the determination in the measures being challenged in this dispute – in particular, that Hong Kong is no longer sufficiently autonomous to justify treatment under a particular U.S. law or provision of law different from that accorded to the People's Republic of China.

32. The United States President assessed that these measures by China and Hong Kong, China, pose a threat to the national security, foreign policy, and economy of the United States. Accordingly, the United States has invoked Article XXI of the GATT 1994 with respect to its national security measures. As explained in our first written submission, and as we will now further discuss, Article XXI is self-judging, and the U.S. measures at issue may not be second-guessed by the WTO.

III. Understood Under Customary Rules of Interpretation, Article XXI(b) is Self-Judging and Applies to the *Agreement on Rules of Origin* and the TBT Agreement

33. As demonstrated in our first written submission, Article XXI(b) is by its terms self-judging. We will not restate those arguments in detail today. But to briefly summarize, 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.[39] Although not necessary in this dispute, this interpretation of Article XXI is confirmed by supplementary means of interpretation, including the Uruguay Round negotiating history.[40]

34. Our first written submission also demonstrated that Article XXI applies to the *Agreement on Rules of Origin* and the TBT Agreement.[41] 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.

35. We would note that 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.[42]

36. Today, we will explain further in Part A that 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 United States will then explain in Part B that 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. In Part C, we explain that the object and purpose of the agreements at issue confirm that Article XXI applies. Finally, in Part D, the United States will explain that, in light of the proper understanding of Article XXI,

[39] U.S. First Written Submission, paras. 34-78.

[40] U.S. First Written Submission, paras. 79-123.

[41] U.S. First Written Submission, paras. 266-320.

[42] U.S. First Written Submission, paras. 90-105.

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.

A. Considering the Structure of the WTO Agreement as Part of Applying Customary Rules of Interpretation Yields the Interpretation that Article XXI Applies to the Claims at Issue in this Dispute

37. As explained in the U.S. first written submission, when considering the applicability of Article XXI to the breaches claimed under the *Agreement on Rules of Origin* and the TBT Agreement, the Panel should take into consideration the structure of the WTO Agreement ***as a whole***. Such an approach shows that Article XXI may be applied to the covered agreements annexed to the WTO Agreement in Annex 1A, and in particular to the agreements and claims at issue in this dispute.[43]

38. An interpretation that considers the structure of the agreement being interpreted is part of a textual analysis. As one commentary on treaty interpretation points out:

> The systematic structure of a treaty is thus *of equal importance* to the ordinary linguistic meaning of the words used, in order to determine its true meaning, since, as the [Permanent Court of International Justice] had already pointed out, words obtain their meaning from the context in which they are used. . . . Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole

[43] U.S. First Written Submission, paras. 268-279.

set of provisions, of an article within or in relation to the whole structure or scheme of a treaty.[44]

39. The WTO Agreement is structured like an umbrella, with the Marrakesh Agreement establishing that all of the agreements in its annexes are a single undertaking.[45] With respect to the relationship among the WTO Annex 1A agreements on goods, some agreements are clear on how they relate to one another. For example, the General Interpretative Note to Annex 1A provides that, in the event of a conflict between a provision of the GATT 1994 and another agreement in Annex 1A, the provision of the other agreement "shall prevail to the extent of the conflict." Article 21 of the *Agreement on Agriculture* provides that the provisions of the GATT 1994 and other agreements in Annex 1A shall apply "subject to" the provisions of the *Agreement on Agriculture*. Such provisions confirm that the structure of the WTO Agreement is an important consideration.

40. Past panel and Appellate Body reports have considered the structure of the WTO Agreement,[46] and the structure of a "single undertaking", in examining the relationship between Annex 1A agreements. In *US – 1916 Act (Panel)*, for example, the report stated that "In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement . . . ."[47] In *Brazil – Desiccated*

[44] Oliver Dörr, General Rules of Interpretation, in Vienna Convention on the Law of Treaties: A Commentary, O. Dörr and K. Schmalenbach (ed.), Springer, 2d edn. (2012), at 582 (Citing PCIJ, *Competence of the ILO* PCIJ Ser B No 2, 23 (1922); *Constitution of the Maritime Safety Committee* [1960] ICJ Rep. 150, 158 (US-138).

[45] Marrakesh Agreement Establishing the World Trade Organization, Article II:2.

[46] *See, e.g., Canada – Periodicals (Panel)*, para. 5.16; *China – Rare Earths (AB)*, para. 5.51.

[47] *US – 1916 Act (Panel)*, para. 6.97 (internal citations omitted).

Coconut (AB), the report stated that "the relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis."[48] Similarly, the *China – Rare Earths (AB)* report reasoned that the relationship between individual provisions of the multilateral trade agreements "must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, ***with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations***, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A)."[49]

41. In this case, the issue is the relationship among three Annex 1A agreements – the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement – and in particular, whether Article XXI of the GATT 1994 applies to the claimed breaches under those agreements. In other words, the interpretive issue is whether Article XXI applies to what Hong Kong, China, itself characterizes as "essentially the same" MFN claims[50] on a marking requirement under three separate goods agreements, including the specific discipline on marking under Article IX of the GATT.

42. In our first written submission, we have shown that the structure of the WTO Agreement as a whole, as well as multiple textual links between the *Agreement on Rules of Origin* and the TBT Agreement, respectively, and the GATT 1994, demonstrate that Article XXI applies to the particular claims at issue in this dispute.

[48] *Brazil – Coconut (AB)*, pages 14, 16.

[49] *China – Rare Earths (AB)*, para. 5.56 (emphasis added).

[50] Hong Kong, China's First Written Submission, paras. 58, 66.

43. The structure of the WTO Agreement in no way suggests that Members considered essential security a concern for the disciplines of the Annex 1B and 1C agreements with respect to services and intellectual property, respectively, *but not* a concern for the Annex 1A agreements with respect to goods. Nor does logic suggest any reason that essential security should be less of a concern for trade in goods than for trade in services or intellectual property.

44. Similarly, neither the structure of the WTO Agreement, nor logic, suggests that Members considered essential security a concern for an origin marking requirement disciplined specifically under Article IX of the GATT 1994, *but not for* an origin marking requirement if it fits within the definitions of "rules of origin" or "technical regulations" set forth in the *Agreement on Rules of Origin* and the TBT Agreement – each of which cover a range of instruments unrelated to marking.

45. None of the non-GATT Annex 1A agreements repeat the language of Article XXI itself. They include only a few express references to the essential security exception. Furthermore, none of the Annex 1A agreements indicate in any way that the essential security exception ***would not*** apply, notwithstanding the overlapping nature of disciplines.

46. In our written submission, we identified the two theoretically possible interpretations of this structure: either one could conclude that Members understood that Article XXI applies to the Annex 1A agreements, and in turn were not compelled to repeat that exception throughout; or one could assume that Members simply did not consider essential security a concern with respect

to the majority of the Annex 1A agreements, including the *Agreement on Rules of Origin* and the TBT Agreement.[51]

47. The latter interpretation is untenable as a matter of common sense, as shown by the context of the current dispute – which involves "essentially the same claims" against the same measure (a marking requirement) under three different Annex 1A agreements. This interpretation also ignores the relationship between these three Annex 1A agreements on trade in goods, and the overlap between them with respect to the particular claims at issue in this dispute.

48. As a practical example, building on the hypothetical in our written submission regarding actions under the UN Charter for the maintenance of international peace and security,[52] suppose those actions take the form of an import restriction. Members would respond that they can impose import restrictions that are inconsistent with the GATT 1994 to meet their UN obligations, and they could administer those restrictions using import licensing in a manner inconsistent with the *Agreement on Import Licensing Procedure* to meet their UN obligations. Strangely, however, they could not take any action inconsistent with the *Agreement on Rules of Origin* in order to administer that import licensing. Proper application of the rules of treaty interpretation cannot lead to such an absurd result.

49. Taking into account the "single undertaking" structure of the WTO Agreement, consistent with the customary rules of treaty interpretation, yields the interpretation that Article XXI applies to the asserted claims under the *Agreement on Rules of Origin* and the TBT

[51] U.S. First Written Submission, para. 273.

[52] U.S. First Written Submission, para. 278.

Agreement. We will now explain further that such an interpretation reflects the principle of effectiveness.

B. U.S. Interpretation of the Applicability of Article XXI to the Claimed Breaches Reflects the Principle of Effectiveness

50. Article 31(a)(1) of the VCLT embodies the principle of effectiveness. In our first written submission, the United States has shown that Article XXI(b) of the GATT 1994 is self-judging, and that Article XXI applies to the *Agreement on Rules of Origin* and the TBT Agreement, using the customary rules of interpretation of public international law. As such, the United States has shown that this interpretation reflects the principle of effectiveness. As we will now explain, there is no separate rule of effectiveness that mandates a different conclusion.

51. In preparing the VCLT, the International Law Commission specifically rejected the creation of a separate rule of effectiveness, in part due to concerns that the effectiveness principle, if applied too broadly, could lead to illegitimate interpretations.

52. The Commission considered a draft article, prepared by Special Rapporteur Sir Humphrey Waldock, entitled "Effective interpretation of the terms *(ut res magis valeat quam pereat)*".[53] Draft Article 72 provided, "In the application of articles 70 and 71 a term of a treaty shall be *so interpreted as to give it the fullest weight and effect* consistent — (a) with its natural and ordinary meaning and that of the other terms of the treaty; and (b) with the objects and purposes of the treaty."[54]

[53] Third Report on the Law of Treaties, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1964, vol. II, at 53 (US-139).

[54] Third Report on the Law of Treaties, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1964, vol. II, at 53 (US-139) (italics added).

53. The Special Rapporteur reported that he had "hesitated for two reasons to propose the inclusion of the principle of 'effective' interpretation."[55] The first reason was a "tendency to equate and confuse 'effective' with 'extensive' or 'teleological' interpretation, and to give it too large a scope," while the second reason was that, correctly understood, "'effective' interpretation may be said to be implied in an interpretation made in good faith."[56] In addition, the Special Rapporteur noted "a particular need to indicate the proper limits of the application of the principle if too wide a door is not to be opened to purely teleological interpretations."[57]

54. Ultimately, the ILC specifically *rejected* including a separate rule on effectiveness, due to the concerns identified by the Special Rapporteur:

> The Commission . . . took the view that, in so far as the maxim [it is better for a thing to have effect than to be made void][58] reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. . . . Accordingly, it did not seem to the

[55] Third Report on the Law of Treaties, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1964, vol. II, at 60 (US-140).

[56] Third Report on the Law of Treaties, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1964, vol. II, at 60 (US-140).

[57] Third Report on the Law of Treaties, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1964, vol. II, at 61 (US-141).

[58] In Latin, "*ut res magis valeat quam pereat*."

> Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the principle of 'effective interpretation'.[59]

As one scholar has subsequently put it, "[S]een in its proper context, what the principle of effectiveness is really all about is not that appliers shall attempt to interpret a treaty to make it as effective as possible, but that appliers shall attempt to make sure that the treaty is not *ineffective*."[60]

55. In the WTO dispute settlement context, the principle of effectiveness has often been articulated as meaning that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[61] In turn, certain third parties, and today, Hong Kong, China, have suggested that the interpretation that Article XXI applies to the claims under the *Agreement on Rules of Origin* and the TBT Agreement would render references to security in the Import Licensing and TRIMS Agreements ineffective.[62] These arguments are not correct.

56. First, redundancy cannot be equated with inutility or ineffectiveness. This is particularly so given that effectiveness, as reflected in Article 31, does not require interpretation in a way that affords "maximum" effectiveness. And WTO Members, or any parties to an agreement, may

[59] Draft Articles on the Law of Treaties with Commentaries (1966), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-12).

[60] Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties, Springer (2010), at 219 (US-142).

[61] *United States – Gasoline (AB)*, p. 23.

[62] Third Party Submission of Brazil, paras. 25-26; Third Party Submission of Switzerland, para. 62.

well, for reasons of convenience, emphasis, clarity, or simple inadvertence reiterate a legal right or obligation – that is, to set out technically redundant provisions. As one commentator has cautioned, "[g]iven the imprecision of drafting evident in the WTO Agreement," in WTO dispute settlement the principle of effectiveness "has turned into a dangerous rule."[63]

57. Properly understood, the principle of effectiveness – which, again, is not a separate rule of interpretation – does not mean that an interpretation that Article XXI applies to the *Agreement on Rules of Origin* or the TBT Agreement would render the specific incorporation in other Annex 1A agreements redundant or ineffective. To the contrary, under the correct interpretation identified by the United States, Members obviously would have recourse to Article XXI of the GATT or, for example, Article 1.10 of the Import Licensing Agreement, to defend a measure, and the specific reference in the Import Licensing Agreement to Article XXI simply provides further clarity on this point. Thus, an article providing explicitly for incorporation is not "ineffective" as a legal matter simply because it is not *uniquely* effective.

58. In summary, the principle of effectiveness does not mean one should interpret a treaty in such a way to provide the provisions "maximum" 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. The U.S. interpretation of the applicability of Article XXI that the exception applies to the specific claims under the agreements at issue here does not deprive either Article 1.10 of the Import Licensing Agreement or Article 3 of the TRIMS Agreement of effectiveness.

[63] Joel Trachtman, *The WTO* Seal Products *Case: Doctrinal and Normative Confusion*, AJIL Unbound, March 2014-July 2015, vol. 108, at 323 (US-143).

59. Furthermore, prior dispute settlement reports never suggested that the express incorporation in one non-GATT agreement would be rendered ineffective if a GATT exception could apply to a non-GATT agreement in the absence of express incorporation. Indeed, prior reports that considered the applicability of Article XX to agreements other than GATT did not consider the lack of express incorporation dispositive. Rather, the analysis was conducted on a case-by-case basis.[64] Indeed, the *China – Rare Earths (AB)* dispute report even noted Article 3 of the TRIMS Agreement as an example of express incorporation, but went on to explain, "In many instances, no express language identifying the relationship between specific terms and provisions of a Multilateral Trade Agreement with those of another Multilateral Trade Agreement . . . is found in the agreements at issue. Where this is so, recourse to other interpretative elements will be necessary to determine the specific relationship . . . ."[65]

60. Additionally, the WTO Agreement contains many redundancies, and it would be non-sensical to try to adopt interpretations that provide outcome-determinative meanings for each such redundancy. An imagined prohibition against redundancy makes little sense in this context. For example, Article X:1 of the GATT 1994 requires the publication of "[l]aws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to the classification or the valuation of products for customs purposes," as well as other issues. Article 12 of the Customs Valuation Agreement[66] provides that "[l]aws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be

[64] *See Thailand – Cigarettes (First Recourse to Article 21.5) (Panel)*, paras. 7.743-7.744; *China – Rare Earths (AB)*, paras. 5.55-5.56; *China – Raw Materials (AB)*, paras. 278-307; *China – Audiovisual Products (AB)*, paras. 229-233.

[65] *China – Rare Earths (AB)*, para. 5.56.

[66] *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*.

published in conformity with Article X of GATT 1994 . . . ." Would application of some principle of effectiveness mean that measures "giving effect" to the Customs Valuation Agreement do not "pertain[] to the . . . valuation of products for customs purposes" for purposes of Article X of the GATT? The answer, of course, is no.

61. Publication requirements similar to Article X appear in the *Agreement on Rules of Origin*,[67] *Agreement on Preshipment Inspection*,[68] and *Agreement on Safeguards*,[69] for example. Does the principle of effectiveness mean Article X itself must not require the publication of instruments subject to the requirements in those agreements?

62. Indeed, the circumstances of this dispute themselves present redundancy. Hong Kong, China, has pursued MFN claims with respect to the marking requirement at issue under four different legal provisions in three different agreements, including Article IX:1 of the GATT 1994. Article IX of the GATT 1994 deals specifically with marks of origin, and there is no dispute that Article XXI(b) applies with respect to claims under Article IX.

63. Put simply, the principle of effectiveness does not require the Panel to find that Article XXI is available to defend against the provision that is specific to marking under Article IX – but not available to defend against challenges to marking requirements brought under the Agreement on Rules of Origin or the TBT Agreement, such as in the present dispute. As the United States has shown, textual interpretation under the customary rules of interpretation establishes that Article XXI applies to the *Agreement on Rules of Origin* and the TBT Agreement. This

[67] *Agreement on Rules of Origin*, Article 2(g).

[68] *Agreement on Preshipment Inspection*, Article 2.8.

[69] *Agreement on Safeguards*, Article 3.1.

interpretation therefore reflects the principle of effectiveness, by giving effect to the terms of the agreements themselves and the structure of the WTO Agreement as a whole. No separate rule or principle dictates a different conclusion.

C. The Object and Purpose of the Agreements at Issue Confirm That Article XXI Applies

64. Contrary to arguments made by certain third parties,[70] as well as statements made by the panel in the *Russia – Traffic in Transit* dispute,[71] the interpretation that Article XXI(b) is self-judging is fully consistent with the object and purpose of the GATT 1994. The interpretation that Article XXI(b) applies to the Rules of Origin and TBT Agreements is likewise consistent with the object and purpose of those respective agreements.

65. As explained in the U.S. first written submission, the object and purpose of the GATT 1994, as set out in the agreement's preamble, confirm that Article XXI(b) is self-judging.[72] The language of the preamble reflects that the obligations and exceptions of the GATT 1994 are part of a single undertaking, in which it is specifically contemplated that Members will make use of exceptions, consistent with their text.

66. The object and purpose of the Agreement on Rules of Origin, as set out in the preamble, confirms the close relationship between that agreement on trade in goods, the GATT 1994 and the GATT-disciplined measures that rules of origin administer. The object and purpose of the TBT Agreement, also set out in the preamble, among other goals, makes clear that Members

[70] Third Party Submission of the PRC, para. 16; Third Party Submission of Switzerland, para. 3.

[71] *Russia – Traffic in Transit (Panel)*, para. 7.79.

[72] U.S. First Written Submission, paras. 65-67.

"should not be prevented from taking measures necessary for the protection of its essential security interest."

67. This interpretation does not undermine the "predictability and security" of the multilateral trading system. As explained in the U.S. first written submission – and as discussed at length during the negotiation of Article XXI – Members still have recourse with respect to another Member's essential security actions. They can pursue a non-violation nullification or impairment claim. Such a claim may, in turn, result in the Member being authorized by the DSB to take countermeasures.

68. What a panel or the Dispute Settlement Body may not do, as a result of the self-judging nature of Article XXI, is find that a Member *that considers an action necessary to protect its essential security interests is* ***wrong*** and recommend that the Member *bring that measure into conformity* with a covered agreement. To do so would be to "prevent [the Member] from taking any action which it considers necessary for the protection of its essential security interests," contrary to Article XXI. This impermissibility of reviewing an Article XXI invocation does not threaten the security and predictability of the multilateral trading system. Rather, it reflects the balance between rights and obligations reflected in the preamble. Members understood the sensitive nature of essential security issues. Accordingly, they provided recourse to non-violation nullification or impairment claims as a means to address those, without assigning dispute settlement panels the role of evaluating the merits of a sovereign Member's security actions and recommending they be modified or withdrawn.[73]

[73] U.S. First Written Submission, paras. 98-105, 204-210.

D. In Light Of The Self-Judging Nature Of GATT 1994 Article XXI, The Sole Finding The Panel May Make Consistent With Its Terms Of Reference Under DSU Article 7.1 Is To Note The Invocation Of Article XXI

69. As the United States has described in its first written submission, in light of the self-judging nature of Article XXI, the sole finding that the panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI.[74]

70. Under DSU Article 7.1, the Panel's terms of reference call on the Panel to examine the matter referred to the DSB by the Member and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements]."[75] As this text establishes, the Panel has two functions: (1) to "examine" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests;"[76] 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.

71. This dual function of panels is confirmed in DSU Article 11, which states that the "function of panels" is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." A panel "should make an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

72. As DSU Article 19.1 provides, these "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are

[74] U.S. First Written Submission, paras. 321-327.

[75] United States – Origin Marking Requirement, Constitution of the Panel Established at the Request of Hong Kong, China, Note By the Secretariat, WT/DS597/6 (April 30, 2021).

[76] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870 (US-11).

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."

73. The text of GATT 1994 Article XXI(b), however, establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination.

74. As such, categorizing Article XXI as an "exception" or "affirmative defense" does not have any implications for the Panel's order of analysis. Nor does the concept of "burden of proof" require the Panel to order its analysis in a particular manner, or to interpret Article XXI in a manner contrary to the text. What is required of the party exercising its right under Article XXI is set forth in the terms of Article XXI itself: that the Member consider one or more of the circumstances set forth in Article XXI(b) to be present. The invoking Member's burden is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination.

75. Accordingly, when a respondent has invoked its essential security interests under Article XXI(b) as to a challenged measure, a panel may make no legal findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1, 11, and 19. Under these circumstances, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security

interests under GATT 1994 Article XXI(b). This means that the Panel cannot, consistent with its terms of reference, make findings of inconsistency or provide a recommendation on that issue.

76. This result is also consistent with DSU Article 19.2 because finding an essential security measure to breach a covered agreement would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests.

77. This result is likewise consistent with Article 7.2 of the DSU. Article 7.2 of the DSU provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The ordinary meaning of "address" is to "[t]hink about and begin to deal with (an issue or problem)".[77] That is, to address an issue is not necessarily to resolve that issue. Panels and the Appellate Body have often "addressed" an issue by judicial economy. In the context of this dispute, the panel "addresses" the issue by finding that the United States has invoked Article XXI.

78. Such an understanding also respects the decision of the WTO Members. WTO Members agreed to remove invocation of the essential security exception from multilateral judgment when they agreed to self-judging text included in Article XXI. This decision by Members recognized that issues of essential security are inherently political in nature, and there are no legal criteria by which a Member's consideration of its essential security interests can be objectively determined. Importantly, the decision recognized that the Members did not relinquish the sovereign right of a state to take action to protect its essential right.

[77] *The New Shorter Oxford English* Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, 1993) at 25 (US-144).

79. Therefore, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of this provision, the sole finding that the Panel may make is to note the U.S. invocation. Such a finding is consistent with the Panel's terms of reference and the DSU.

IV. Conclusion

80. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB. The United States thanks the Panel for its attention and looks forward to answering its questions in the coming weeks.