



WORLD TRADE  
ORGANIZATION

**WT/DS597/R**

21 December 2022

(22-9286)

Page: 1/96

Original: English

## **UNITED STATES – ORIGIN MARKING REQUIREMENT**

REPORT OF THE PANEL

---

**TABLE OF CONTENTS**

<b>1 INTRODUCTION .....</b>	<b>14</b>
1.1 Complaint by Hong Kong, China .....	14
1.2 Panel establishment and composition .....	14
1.3 Panel proceedings.....	14
1.3.1 General .....	14
<b>2 MEASURE AT ISSUE.....</b>	<b>15</b>
<b>3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....</b>	<b>16</b>
<b>4 ARGUMENTS OF THE PARTIES .....</b>	<b>16</b>
<b>5 ARGUMENTS OF THE THIRD PARTIES.....</b>	<b>16</b>
<b>6 INTERIM REVIEW.....</b>	<b>16</b>
6.1 Introduction.....	16
6.2 Requests for review concerning the order of analysis .....	17
6.3 Requests for review concerning whether Article XXI(b) of the GATT 1994 is self-judging such that it excludes any review of the challenged measure by a panel .....	17
6.4 Requests for review concerning whether the origin marking requirement is inconsistent with Article IX:1 of the GATT 1994 .....	18
6.5 Requests for review concerning whether the origin marking requirement is justified under Article XXI(b)(iii) of the GATT 1994 .....	19
<b>7 FINDINGS .....</b>	<b>20</b>
7.1 Introduction.....	20
7.2 Order of analysis .....	21
7.2.1 Which claims to consider first.....	21
7.2.2 Whether to consider first the reviewability of action under Article XXI(b) of the GATT 1994 .....	23
7.3 Whether Article XXI(b) of the GATT 1994 is self-judging such that it excludes any review of the challenged measure by a panel .....	24
7.3.1 Introduction .....	24
7.3.2 The interpretive question at issue .....	24
7.3.3 Ordinary meaning.....	26
7.3.3.1 Introduction .....	26
7.3.3.2 Grammatical structure.....	26
7.3.3.2.1 Arguments of the parties and the third parties.....	26
7.3.3.2.2 Panel's assessment .....	27
7.3.3.2.2.1 Whether the <i>chapeau</i> together with each subparagraph constitute a single relative clause.....	28
7.3.3.2.2.2 What the phrase "which it considers" relates to.....	30
7.3.3.3 Comparison of the three authentic language versions .....	32
7.3.3.3.1 Arguments of the parties and the third parties.....	33
7.3.3.3.2 Panel's assessment .....	34
7.3.3.4 Conclusion on ordinary meaning .....	36
7.3.4 Context .....	37

---

7.3.4.1	Introduction .....	37
7.3.4.2	Immediate context in the remaining paragraphs of Article XXI.....	37
7.3.4.2.1	Arguments of the parties and the third parties .....	38
7.3.4.2.2	Panel's assessment .....	38
7.3.4.3	Article XX of the GATT 1994 .....	39
7.3.4.3.1	Arguments of the parties and the third parties .....	40
7.3.4.3.2	Panel's assessment .....	40
7.3.4.4	Provisions that vest judgment in the Member or in another entity .....	41
7.3.4.4.1	Arguments of the parties and the third parties .....	41
7.3.4.4.2	Panel's assessment .....	41
7.3.4.5	Other provisions under the DSU.....	44
7.3.4.5.1	Arguments of the parties and the third parties .....	44
7.3.4.5.2	Panel's assessment .....	44
7.3.5	Object and purpose.....	44
7.3.5.1	Arguments of the parties and the third parties.....	45
7.3.5.2	Panel's assessment .....	45
7.3.6	Whether there is a subsequent agreement regarding the interpretation or application of Article XXI(b) .....	47
7.3.6.1	Arguments of the parties and the third parties.....	47
7.3.6.2	Panel's assessment .....	47
7.3.7	Conclusion on interpretation under Article 31 of the Vienna Convention .....	49
7.3.8	Negotiating history or other supplementary means of interpretation.....	50
7.3.8.1	GATT (and ITO) negotiations .....	50
7.3.8.2	Uruguay Round negotiations.....	55
7.3.9	Other information submitted by the parties or third parties .....	56
7.3.10	Overall conclusion on the interpretive question at issue .....	57
7.4	Whether the origin marking requirement is inconsistent with Article IX:1 of the GATT 1994 ..	58
7.4.1	Introduction .....	58
7.4.2	Factual background on the measure at issue .....	59
7.4.3	Whether the challenged measure is a marking requirement under Article IX:1 .....	60
7.4.4	Like products .....	60
7.4.5	Less favourable treatment .....	61
7.4.5.1	Introduction .....	61
7.4.5.2	Difference in treatment.....	62
7.4.5.2.1	Whether there is a difference in treatment with respect to origin determination .....	63
7.4.5.2.1.1	Arguments of the parties and the third parties .....	63
7.4.5.2.1.2	Panel's assessment.....	64
7.4.5.2.2	Whether there is a difference in treatment with respect to terminology .....	67
7.4.5.2.2.1	Arguments of the parties and the third parties .....	67
7.4.5.2.2.2	Panel's assessment.....	68
7.4.5.3	Detrimental impact .....	69

---

7.4.5.3.1 Arguments of the parties and the third parties .....	69
7.4.5.3.2 Panel's assessment .....	70
7.4.6 Conclusion on Article IX of the GATT 1994 .....	72
7.5 Whether the origin marking requirement is justified under Article XXI(b)(iii) of the GATT 1994 .....	73
7.5.1 Introduction .....	73
7.5.2 Which subparagraph to review in Article XXI(b) .....	74
7.5.3 Order of analysis under Article XXI(b) .....	74
7.5.4 Review of subparagraph (iii) .....	75
7.5.4.1 Interpretation of the phrase "emergency in international relations" .....	75
7.5.4.1.1 Arguments of the parties and the third parties .....	76
7.5.4.1.2 Panel's assessment .....	77
7.5.4.1.2.1 Ordinary meaning .....	77
7.5.4.1.2.2 Context and object and purpose .....	80
7.5.4.1.2.3 Conclusion on the interpretation of the phrase "emergency in international relations" .....	83
7.5.4.2 Whether the situation at issue is one that constitutes an emergency in international relations .....	85
7.5.4.2.1 Arguments of the parties and the third parties .....	85
7.5.4.2.2 Panel's assessment .....	86
7.5.4.2.2.1 Evidence submitted by the United States .....	86
7.5.4.2.2.2 Overall assessment .....	92
7.5.5 Conclusion on Article XXI(b)(iii) of the GATT 1994 .....	94
7.6 Other claims under the GATT 1994, the ARO, and the TBT Agreement .....	94
<b>8 CONCLUSIONS AND RECOMMENDATION .....</b>	<b>95</b>

**LIST OF ANNEXES****ANNEX A****WORKING PROCEDURES OF THE PANEL**

	<b>Contents</b>	<b>Page</b>
Annex A-1	Working Procedures of the Panel	4
Annex A-2	Additional Working Procedures concerning Business Confidential Information (BCI)	11
Annex A-3	Additional Working Procedures concerning Substantive Meetings with Remote Participation	13

**ANNEX B****ARGUMENTS OF THE PARTIES**

	<b>Contents</b>	<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of Hong Kong, China	18
Annex B-2	Integrated executive summary of the arguments of the United States	39

**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

	<b>Contents</b>	<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Brazil	63
Annex C-2	Integrated executive summary of the arguments of Canada	66
Annex C-3	Integrated executive summary of the arguments of China	71
Annex C-4	Integrated executive summary of the arguments of the European Union	73
Annex C-5	Integrated executive summary of the arguments of Japan	77
Annex C-6	Integrated executive summary of the arguments of Norway	80
Annex C-7	Integrated executive summary of the arguments of the Russian Federation	84
Annex C-8	Integrated executive summary of the arguments of Singapore	89
Annex C-9	Integrated executive summary of the arguments of Switzerland	94
Annex C-10	Integrated executive summary of the arguments of Ukraine	99

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Financial Services</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , <a href="#">WT/DS453/AB/R</a> and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , <a href="#">WT/DS155/R</a> and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina – Import Measures</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , <a href="#">WT/DS438/R</a> and Add.1 / <a href="#">WT/DS444/R</a> and Add.1 / <a href="#">WT/DS445/R</a> and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , <a href="#">WT/DS18/AB/R</a> , adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Australia – Tobacco Plain Packaging</i>	Panel Reports, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , <a href="#">WT/DS435/R</a> , Add.1 and Suppl.1 ( <i>Honduras</i> ) / <a href="#">WT/DS441/R</a> , Add.1 and Suppl.1 ( <i>Dominican Republic</i> ) / <a href="#">WT/DS458/R</a> , Add.1 and Suppl.1 ( <i>Cuba</i> ) / <a href="#">WT/DS467/R</a> , Add.1 and Suppl.1 ( <i>Indonesia</i> ), <a href="#">WT/DS458/R</a> and <a href="#">WT/DS467/R</a> adopted 27 August 2018, DSR 2018:VIII, p. 3925, and <a href="#">WT/DS435/R</a> and <a href="#">WT/DS441/R</a> adopted 29 June 2020, as upheld by Appellate Body Reports WT/DS435/AB/R / WT/DS441/AB/R, DSR 2018:VIII, p. 3925
<i>Brazil – Taxation</i>	Panel Reports, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , <a href="#">WT/DS472/R</a> , Add.1 and Corr.1 / <a href="#">WT/DS497/R</a> , Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <a href="#">WT/DS139/AB/R</a> , <a href="#">WT/DS142/AB/R</a> , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <a href="#">WT/DS139/R</a> , <a href="#">WT/DS142/R</a> , adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , <a href="#">WT/DS412/AB/R</a> / <a href="#">WT/DS426/AB/R</a> , adopted 24 May 2013, DSR 2013:I, p. 7
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , <a href="#">WT/DS276/R</a> , adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , <a href="#">WT/DS276/AB/R</a> , adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , <a href="#">WT/DS339/R</a> , Add.1 and Add.2 / <a href="#">WT/DS340/R</a> , Add.1 and Add.2 / <a href="#">WT/DS342/R</a> , Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , <a href="#">WT/DS363/R</a> and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , <a href="#">WT/DS366/R</a> and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , <a href="#">WT/DS302/AB/R</a> , adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , <a href="#">WT/DS135/AB/R</a> , adopted 5 April 2001, DSR 2001:VII, p. 3243

Short Title	Full Case Title and Citation
EC – Bananas III	Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/R/ECU</a> (Ecuador) / <a href="#">WT/DS27/R/GTM</a> , <a href="#">WT/DS27/R/HND</a> (Guatemala and Honduras) / <a href="#">WT/DS27/R/MEX</a> (Mexico) / <a href="#">WT/DS27/R/USA</a> (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
EC – Bananas III	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/AB/R</a> , adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Ecuador) (Article 22.6 – EC)	Decision by the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , <a href="#">WT/DS27/ARB/ECU</a> , 24 March 2000, DSR 2000:V, p. 2237
EC – Chicken Cuts	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , <a href="#">WT/DS269/AB/R</a> , <a href="#">WT/DS286/AB/R</a> , adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Seal Products	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , <a href="#">WT/DS400/AB/R</a> / <a href="#">WT/DS401/AB/R</a> , adopted 18 June 2014, DSR 2014:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/R</a> , adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
India – Autos	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , <a href="#">WT/DS146/R</a> , <a href="#">WT/DS175/R</a> , and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Patents (US)	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
Indonesia – Autos	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , <a href="#">WT/DS54/R</a> , <a href="#">WT/DS55/R</a> , <a href="#">WT/DS59/R</a> , <a href="#">WT/DS64/R</a> , Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Import Licensing Regimes	Appellate Body Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , <a href="#">WT/DS477/AB/R</a> , <a href="#">WT/DS478/AB/R</a> , and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
Japan – Alcoholic Beverages II	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , <a href="#">WT/DS8/AB/R</a> , <a href="#">WT/DS10/AB/R</a> , <a href="#">WT/DS11/AB/R</a> , adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Film	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , <a href="#">WT/DS44/R</a> , adopted 22 April 1998, DSR 1998:IV, p. 1179
Korea – Radionuclides	Appellate Body Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , <a href="#">WT/DS495/AB/R</a> and Add.1, adopted 26 April 2019
Korea – Radionuclides	Panel Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , <a href="#">WT/DS495/R</a> and Add.1, adopted 26 April 2019, as modified by Appellate Body Report WT/DS495/AB/R
Korea – Various Measures on Beef	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , <a href="#">WT/DS161/AB/R</a> , <a href="#">WT/DS169/AB/R</a> , adopted 10 January 2001, DSR 2001:I, p. 5
Mexico – Taxes on Soft Drinks	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , <a href="#">WT/DS308/R</a> , adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
Russia – Railway Equipment	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , <a href="#">WT/DS499/R</a> and Add.1, adopted 5 March 2020, as modified by Appellate Body Report WT/DS499/AB/R
Russia – Traffic in Transit	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , <a href="#">WT/DS512/R</a> and Add.1, adopted 26 April 2019
Saudi Arabia – IPRs	Panel Report, <i>Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights</i> , <a href="#">WT/DS567/R</a> and Add.1, circulated to WTO Members on 16 June 2020, dispute terminated while appeal pending
Thailand – Cigarettes (Philippines)	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , <a href="#">WT/DS371/R</a> , adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
Thailand – Cigarettes (Philippines)	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , <a href="#">WT/DS371/AB/R</a> , adopted 15 July 2011, DSR 2011:IV, p. 2203

Short Title	Full Case Title and Citation
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , <a href="#">WT/DS334/R</a> , adopted 22 October 2007, DSR 2007:VI, p. 2151
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , <a href="#">WT/DS406/AB/R</a> , adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , <a href="#">WT/DS108/AB/R</a> , adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS108/RW</a> , adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS108/AB/RW</a> , adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Renewable Energy</i>	Panel Report, <i>United States – Certain Measures Relating to the Renewable Energy Sector</i> , <a href="#">WT/DS510/R</a> and Add.1, circulated to WTO Members 27 June 2019, appealed on 15 August 2019
<i>US – Shrimp</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/R</a> and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/AB/R</a> , adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/AB/R</a> , adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS264/AB/RW</a> , adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Tariff Measures (China)</i>	Panel Report, <i>United States – Tariff Measures on Certain Goods from China</i> , <a href="#">WT/DS543/R</a> and Add.1, circulated to WTO Members 15 September 2020, appealed on 26 October 2020
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <a href="#">WT/DS381/AB/R</a> , adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW</a> and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323



**EXHIBITS REFERRED TO IN THIS REPORT**

Panel Exhibit	Title	Short title
HKG-3	19 C.F.R. Part 134	
HKG-4	USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Children's Computer Games (26 January 1990)	
HKG-5	USCBP Ruling Letter HQ 731701 Re: Country of origin marking for products of Hong Kong imported on or after July 1, 1997 (27 June 1997)	
HKG-6	62 Fed. Reg. 30927 (5 June 1997)	
HKG-7	USCBP Ruling Letter N306315 Re: The Country of Origin Marking of Body Spray Mists (2 October 2019)	
HKG-8	USCBP Ruling Letter N308366 Re: The country of origin and marking of an electronic table top score board from Hong Kong (8 January 2020)	
HKG-12	USCBP, Frequently Asked Questions – Guidance on Marking of Goods of Hong Kong – Executive Order 13936 (last modified 6 October 2020)	USCBP Guidance on Marking of Goods of HKG – Executive Order 13936
HKG-16	22 U.S.C. § 5725, Secretary of State report regarding the autonomy of Hong Kong (27 November 2019)	
HKG-17	Information Letter dated 8 October 2020 from USCBP to Ms. Brenda A. Jacobs Re: Country of origin marking of goods produced in Hong Kong, HQ H313080	8 October 2020 USCBP Letter
HKG-20	Marks of Origin, Report by Working Party as adopted by the CONTRACTING PARTIES at their meeting of 21 November 1958, GATT document L/912/Rev.1 (22 November 1958)	1958 GATT Decision
USA-2, HKG-13	Executive Order 13936 on Hong Kong Normalization of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020)	Executive Order 13936
USA-3, HKG-14	United States-Hong Kong Policy Act of 1992, Pub. L. 102-383, codified at 22 U.S.C. § 5701-5732	1992 Hong Kong Policy Act
USA-4	Hong Kong Human Rights and Democracy Act of 2019, Pub. L. 116-76	2019 Hong Kong Human Rights and Democracy Act
USA-5	2020 Hong Kong Policy Act Report (May 28, 2020)	2020 Hong Kong Policy Act Report
USA-6	2021 Hong Kong Policy Act Report (March 31, 2021)	2021 Hong Kong Policy Act Report
USA-7, HKG-10	Department of Homeland Security, U.S. Customs and Border Protection [CBP Dec. 20-15], Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48551 (August 11, 2020)	11 August Federal Register Notice
USA-8	Revisions to the Export Administration Regulations: Suspension of License Exceptions for Hong Kong, 85 Fed. Reg. 45998 (July 31, 2020)	
USA-9	Hong Kong Autonomy Act, Pub. L. 116-149	2020 Hong Kong Autonomy Act
USA-10, HKG-2	Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304	
USA-15	Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949)	
USA-16	Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & GATT/CP.3/SR.22/Corr.1 (June 20, 1949)	Minutes GATT meeting 8 and 20 June 1949
USA-25	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/236 (July 4, 1947)	
USA-30	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947); & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947)	Minutes of the 24 and 30 July 1947 Negotiation Meetings
USA-41	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948)	UK proposal on Article 94
USA-42	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948)	

Panel Exhibit	Title	Short title
USA-43	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment – Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947)	
USA-44	Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988)	
USA-45	Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988)	
USA-46	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988)	
USA-52	Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982)	
USA-69	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – 8:00 p.m. meeting – July 2, 1947	
USA-70	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo	
USA-73	U.S. Delegation (Internal), Department of State, Memorandum of Conversation, "Security Exceptions to Proposed ITO Charter" June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder "ITO Charter – Security" (June 17, 1946)	
USA-74	U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946)	
USA-75	U.S. Delegation (Internal), Letter from Coppock to Wilcox, "National Security Provisions in the Draft Charter" July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder "ITO Charter – Security" July, 3 1946	
USA-76	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2	
USA-112	Hong Kong 2020 Human Rights Report	
USA-117	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 <a href="https://www.legco.gov.hk/yr19-20/chinese/panels/ca/papers/ajlsca20200707-qne72-ec.pdf">https://www.legco.gov.hk/yr19-20/chinese/panels/ca/papers/ajlsca20200707-qne72-ec.pdf</a>	
USA-118	Leading democracy campaigner Nathan Law leaves Hong Kong, The Guardian (July 2, 2020) available at <a href="https://www.theguardian.com/world/2020/jul/02/leading-democracy-campaigner-nathan-law-leaves-hong-kong">https://www.theguardian.com/world/2020/jul/02/leading-democracy-campaigner-nathan-law-leaves-hong-kong</a>	
USA-119	Pro-democracy leader Nathan Law leaves Hong Kong, CNN (July 3, 2020) available at <a href="https://www.cnn.com/2020/07/02/asia/hong-kong-nathan-law-intl/index.html">https://www.cnn.com/2020/07/02/asia/hong-kong-nathan-law-intl/index.html</a>	
USA-120	Hong Kong Activists Sentenced For Their Role In Anti-Government Protest, NPR (December 2, 2020) available at <a href="https://www.npr.org/2020/12/02/941032196/hong-kong-activists-sentenced-for-their-role-in-anti-government-protest">https://www.npr.org/2020/12/02/941032196/hong-kong-activists-sentenced-for-their-role-in-anti-government-protest</a>	
USA-121	Beijing's Hong Kong office warns pro-democracy poll could violate new security law, Reuters (July 13, 2020) available at <a href="https://www.reuters.com/article/us-hongkong-security/beijings-hong-kong-office-warns-pro-democracy-poll-could-violate-new-security-law-idUSKCN24F05Y">https://www.reuters.com/article/us-hongkong-security/beijings-hong-kong-office-warns-pro-democracy-poll-could-violate-new-security-law-idUSKCN24F05Y</a>	
USA-122	Hong Kong bars 12 opposition candidates from election, BBC News (July 30, 2020) available at <a href="https://www.bbc.com/news/world-asia-china-53593187">https://www.bbc.com/news/world-asia-china-53593187</a>	
USA-123	Hong Kong opposition lawmakers all quit after four members ousted, The Guardian (November 11, 2020) available at <a href="https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust">https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust</a>	

Panel Exhibit	Title	Short title
USA-124	EU calls for "immediate release" of Hong Kong activists, AP News (January 6, 2021) available at <a href="https://apnews.com/article/europe-democracy-hong-kong-arrests-china-71296e353e67b68f7bba590bf7048122">https://apnews.com/article/europe-democracy-hong-kong-arrests-china-71296e353e67b68f7bba590bf7048122</a>	
USA-125	Assault on Democracy in Hong Kong, Press Statement, Anthony J. Blinken, Secretary of State available at <a href="https://www.state.gov/assault-on-democracy-in-hong-kong/">https://www.state.gov/assault-on-democracy-in-hong-kong/</a>	
USA-126	Hong Kong announces more electoral system changes favouring pro-Beijing camp, Reuters (April 13, 2021) available at <a href="https://www.reuters.com/world/asia-pacific/hong-kong-announces-more-electoral-system-changes-favouring-pro-beijing-camp-2021-04-13/">https://www.reuters.com/world/asia-pacific/hong-kong-announces-more-electoral-system-changes-favouring-pro-beijing-camp-2021-04-13/</a>	
USA-127	Hong Kong Says Common Protest Slogan Calling for "Revolution" is Now Illegal Under National Security Law, Time (July 3, 2020) available at <a href="https://time.com/5862683/hong-kong-revolution-protest-chant-security-law/">https://time.com/5862683/hong-kong-revolution-protest-chant-security-law/</a>	
USA-128	The Government of the Hong Kong Special Administrative Region, Government Statement (July 2, 2020) available at <a href="https://www.info.gov.hk/gia/general/202007/02/P2020070200869.htm">https://www.info.gov.hk/gia/general/202007/02/P2020070200869.htm</a>	
USA-129	Hong Kong bans protests anthem in schools as fears over freedoms intensify, Reuters (July 8, 2020) available at <a href="https://www.reuters.com/article/us-hongkong-protests-education/hong-kong-bans-protest-anthem-in-schools-as-fears-over-freedoms-intensify-idUSKBN2490OE">https://www.reuters.com/article/us-hongkong-protests-education/hong-kong-bans-protest-anthem-in-schools-as-fears-over-freedoms-intensify-idUSKBN2490OE</a>	
USA-130	Hong Kong security law: Four students arrested for "inciting secession", BBC News (July 30, 2020) available at <a href="https://www.bbc.com/news/world-asia-china-53585747">https://www.bbc.com/news/world-asia-china-53585747</a>	
USA-131	Prominent Hong Kong Publisher Arrested Under New National Security Law, NPR (August 10, 2020) available at <a href="https://www.npr.org/2020/08/10/900758905/prominent-hong-kong-publisher-arrested-under-new-national-security-law">https://www.npr.org/2020/08/10/900758905/prominent-hong-kong-publisher-arrested-under-new-national-security-law</a>	
USA-132	Hong Kong: Jimmy Lai sentenced to 14 months for pro-democracy protests, BBC News (April 16, 2020) available at <a href="https://www.bbc.com/news/world-asia-56770567">https://www.bbc.com/news/world-asia-56770567</a>	
USA-133	Two Apple Daily executives charged with collusion with foreign country, Reuters (June 18, 2021) available at <a href="https://www.reuters.com/world/china/hk-pro-democracy-tabloid-apple-daily-increases-production-after-police-raid-2021-06-18/">https://www.reuters.com/world/china/hk-pro-democracy-tabloid-apple-daily-increases-production-after-police-raid-2021-06-18/</a>	
USA-134	Statement by President Joe Biden on Hong Kong's Apple Daily, The White House Press Releases (June 24, 2021) available at <a href="https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/statement-by-president-joe-biden-on-hong-kongs-apple-daily/">https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/statement-by-president-joe-biden-on-hong-kongs-apple-daily/</a>	
USA-135	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 <a href="https://sg.news.yahoo.com/nearly-130-civil-servants-fail-095959794.html">https://sg.news.yahoo.com/nearly-130-civil-servants-fail-095959794.html</a> <sup>1</sup>	
USA-137	Hong Kong teachers' union to disband due to "drastic" political situation, Reuters (August 10, 2021) available at <a href="https://www.reuters.com/world/asia-pacific/hong-kong-teachers-union-disband-due-drastic-political-situation-2021-08-10/">https://www.reuters.com/world/asia-pacific/hong-kong-teachers-union-disband-due-drastic-political-situation-2021-08-10/</a>	
USA-193	The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806	
USA-197	Hong Kong University orders removal of Tiananmen Square massacre statue, The Guardian (October 8, 2021) available at <a href="https://www.theguardian.com/world/2021/oct/09/hong-kong-university-orders-removal-of-tiananmen-square-massacre-statue">https://www.theguardian.com/world/2021/oct/09/hong-kong-university-orders-removal-of-tiananmen-square-massacre-statue</a>	
USA-198	China Loyalty Oath Drives 72% of Hong Kong Councilors From Seats, Bloomberg News (October 21, 2021) available at <a href="https://www.bnnbloomberg.ca/china-loyalty-oath-drives-72-of-hong-kong-councilors-from-seats-1.1670020?fr=operanews">https://www.bnnbloomberg.ca/china-loyalty-oath-drives-72-of-hong-kong-councilors-from-seats-1.1670020?fr=operanews</a>	
USA-199	Amnesty International to close Hong Kong offices due to national security law, The Guardian (October 25, 2021) available at <a href="https://www.theguardian.com/world/2021/oct/25/amnesty-international-to-close-hong-kong-offices-due-to-national-security-law">https://www.theguardian.com/world/2021/oct/25/amnesty-international-to-close-hong-kong-offices-due-to-national-security-law</a>	

<sup>1</sup> This link, submitted by the United States, was not accessible on 29 September 2022.

Panel Exhibit	Title	Short title
USA-200	Hong Kong police tell marathon runners to cover up 'political' clothing and tattoos, The Guardian (October 25, 2021) available at <a href="https://www.theguardian.com/world/2021/oct/25/hong-kong-police-tell-marathon-runners-to-cover-up-political-clothing-and-tattoos">https://www.theguardian.com/world/2021/oct/25/hong-kong-police-tell-marathon-runners-to-cover-up-political-clothing-and-tattoos</a>	
USA-209	Hong Kong pro-democracy news site closes after raid, arrests, AP News (December 29, 2021), available at <a href="https://apnews.com/article/business-media-crime-arrests-hong-kong-2315777ace6e85c58eeb876c6c66feba">https://apnews.com/article/business-media-crime-arrests-hong-kong-2315777ace6e85c58eeb876c6c66feba</a>	
USA-210	Media Freedom Coalition Statement on Closure of Media Outlets in Hong Kong, Office of the Spokesperson, U.S. Department of State (February 8, 2022)	
USA-227	The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993)	
EU-1	Declaration by the High Representative, on behalf of the European Union, on the announcement by China's National People's Congress spokesperson regarding Hong Kong (22 May 2020)	
EU-2	Hong Kong: Council expresses grave concern over national (22 July 2020)	
EU-3	Hong Kong: Declaration by the High Representative on behalf of the EU on the disqualification of Members of the Hong Kong Legislative Council security law (12 November 2020)	
EU-4	Hong Kong: Statement by the High Representative / Vice-President Josep Borrell on the changes to Hong Kong's electoral system (9 June 2021)	
EU-5	Third Party Written Submission by the European Union in <i>United States – Certain Measures on Steel and Aluminium Products (DS544)</i>	European Union's third-party submission in DS544

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
8 October 2020 USCBP Letter	Information Letter dated 8 October 2020 from USCBP to Ms. Brenda A. Jacobs Re: Country of origin marking of goods produced in Hong Kong, HQ H313080
11 August Federal Register Notice	Department of Homeland Security, U.S. Customs and Border Protection [CBP Dec. 20-15], Country of Origin Marking of Products of Hong Kong, United States Federal Register, Vol. 85, No. 155 (11 August 2020)
1949 GATT Decision	GATT Council Decision in the GATT dispute <i>US – Export Restrictions (Czechoslovakia)</i>
1992 Hong Kong Policy Act	United States-Hong Kong Policy Act of 1992, Pub. L. 102-383, codified at 22 U.S.C. § 5701-5732
2020 Hong Kong Autonomy Act	Hong Kong Autonomy Act, Pub. L. 116-149
2019 Hong Kong Human Rights and Democracy Act	Hong Kong Human Rights and Democracy Act of 2019, Pub. L. 116-76
2020 Hong Kong Policy Act Report	2020 Hong Kong Policy Act Report (May 28, 2020)
2021 Hong Kong Policy Act Report	2021 Hong Kong Policy Act Report (March 31, 2021)
GPA 2012	Agreement on Government Procurement as amended in 2012
ARO	Agreement on Rules of Origin
CGLO	Chinese government's Central Government Liaison Office
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Executive Order 13936	Executive Order 13936 on Hong Kong Normalization of 14 July 2020, 85 Fed. Reg. 43413 (17 July 2020)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Havana Charter	Final Charter of the International Trade Organization as adopted in March 1948
HTSUS	Harmonized Tariff Schedule of the United States
ICJ	International Court of Justice
ILC	International Law Commission
ITO	International Trade Organization
ITO Charter	Draft text of the Charter of the International Trade Organization
MFN	Most-favoured nation
Minutes GATT meeting 8 and 20 June 1949	Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & GATT/CP.3/SR.22/Corr.1 (June 20, 1949)
NPCSC	National People's Congress Standing Committee
National Security Law	Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region
TFA	Agreement on Trade Facilitation
TBT Agreement	Agreement on Technical Barriers to Trade
UN General Assembly	United Nations General Assembly
UN Charter	Charter of the United Nations
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
USCBP	United States Customs and Border Protection
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## **1 INTRODUCTION**

### **1.1 Complaint by Hong Kong, China**

1.1. On 30 October 2020, Hong Kong, China requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 7 of the Agreement on Rules of Origin (ARO), and Article 14.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) with respect to the measures and claims set out below.<sup>2</sup>

1.2. Consultations were held on 24 November 2020.

### **1.2 Panel establishment and composition**

1.3. On 14 January 2021, Hong Kong, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 8 of the ARO, and Article 14.1 of the TBT Agreement with standard terms of reference.<sup>3</sup> At its meeting on 22 February 2021, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Hong Kong, China in document WT/DS597/5, in accordance with Article 6 of the DSU.<sup>4</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Hong Kong, China in document WT/DS597/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>5</sup>

1.5. On 19 April 2021, Hong Kong, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 29 April 2021, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms Beatriz LEYCEGUI GARDOQUI

Members: Mr Johann H. HUMAN  
Mr Alexander Hugh McPHAIL

1.6. Brazil, Canada, China, the European Union, India, Japan, the Republic of Korea, Norway, the Russian Federation (Russia), Singapore, Switzerland, Türkiye, and Ukraine notified their interest in participating in the Panel proceedings as third parties.

### **1.3 Panel proceedings**

#### **1.3.1 General**

1.7. After consultation with the parties, the Panel adopted its Working Procedures<sup>6</sup>, Additional Working Procedures concerning Business Confidential Information<sup>7</sup>, and a partial timetable on 21 May 2021. The Panel revised or complemented the timetable on 6 August 2021, 29 September 2021, 21 December 2021, 25 January 2022, 28 April 2022, and 3 October 2022.

---

<sup>2</sup> Request for consultations by Hong Kong, China, WT/DS597/1. See also Communication from the United States, WT/DS597/2.

<sup>3</sup> Request for the establishment of a panel by Hong Kong, China, WT/DS597/5 (Hong Kong, China's panel request).

<sup>4</sup> See WT/DSB/M/449, para. 5.5.

<sup>5</sup> WT/DS597/6.

<sup>6</sup> See the Panel's Working Procedures in Annex A-1.

<sup>7</sup> See Additional Working Procedures concerning Business Confidential Information in Annex A-2. Neither party submitted BCI to the Panel in these proceedings.

1.8. Hong Kong, China and the United States submitted their first written submissions on 28 May 2021<sup>8</sup> and 2 July 2021, respectively. On 16 July 2021, the Panel received third-party submissions from Brazil, Canada, China, the European Union, Switzerland, and Ukraine.

1.9. The Panel held a first substantive meeting with the parties on 31 August 2021 and on 1, 14, and 15 September 2021. A session with the third parties took place on 1 September 2021. Given the continued pandemic situation, the meeting was held by remote participation using the Webex platform, in accordance with the Additional Working Procedures concerning Substantive Meetings with Remote Participation adopted by the Panel on 6 August 2021.<sup>9</sup>

1.10. The Panel sent the parties written questions on 21 September 2021 and received their responses to those questions on 14 October 2021. On 21 September 2021, the Panel also sent written questions to the third parties. On 14 October 2021, the Panel received responses to questions from Brazil, Canada, China, the European Union, Japan, Norway, Russia, Singapore, Switzerland, and Ukraine.<sup>10</sup>

1.11. Hong Kong, China and the United States submitted their second written submissions on 11 November 2021.

1.12. The Panel held a second substantive meeting with the parties on 9, 10, and 11 February 2022. The meeting was held by remote participation using the Webex platform and was conducted in accordance with the Additional Working Procedures concerning Substantive Meetings with Remote Participation.

1.13. The Panel sent the parties a second set of written questions on 14 February 2022 and received their responses to those questions on 28 February 2022. On 14 March 2022, the Panel also received each party's comments on the other party's responses to the second set of questions.

1.14. On 10 May 2022, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 25 October 2022. The Panel issued its Final Report to the parties on 6 December 2022.

## 2 MEASURE AT ISSUE

2.1. Hong Kong, China challenges the requirement applied by the United States as published by the United States Customs and Border Protection (USCBP) in the Federal Register Notice of 11 August 2020 (11 August Federal Register Notice)<sup>11</sup> that imported "goods produced in Hong Kong, ... may no longer be marked to indicate 'Hong Kong' as their origin, but must be marked to indicate 'China'"<sup>12</sup> (origin marking requirement).<sup>13</sup> As Hong Kong, China explains in its panel request, USCBP published the 11 August Federal Register Notice "pursuant to the 'Executive Order on Hong Kong Normalization' signed by the President of the United States Donald J. Trump on 14 July 2020. The Executive Order suspends the application of Section 201(a) of the United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5721(a), to a variety of United States statutes, including Section 304 of the Tariff Act of 1930."<sup>14</sup>

2.2. Hong Kong, China in its panel request identifies as "measures at issue" the following:

<sup>8</sup> Following a request by the United States, on 7 June 2021 Hong Kong, China provided a non-confidential summary of its first written submission pursuant to Article 18.2 of the DSU.

<sup>9</sup> See Additional Working Procedures concerning Substantive Meetings with Remote Participation in Annex A-3.

<sup>10</sup> The Panel had initially set the deadline for the responses to questions for 4 October 2021. Following requests from the United States and some third parties, on 29 September 2021, the Panel decided to extend the deadline in light of the number of questions submitted to the parties and to the third parties.

<sup>11</sup> Department of Homeland Security, U.S. Customs and Border Protection [CBP Dec. 20-15], Country of Origin Marking of Products of Hong Kong, 85 Fed. Reg. 48551 (11 August 2020), (11 August Federal Register Notice), (Exhibits USA-7, HKG-10).

<sup>12</sup> Hong Kong, China's panel request, p. 2.

<sup>13</sup> Hong Kong, China refers to the origin marking requirement as "the revised origin marking requirement". See Hong Kong, China's first written submission, para. 20.

<sup>14</sup> Hong Kong, China's panel request, p. 1.



1. Section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304;
2. The USCBP regulations implementing Section 304, set forth at 19 C.F.R. Part 134;
3. Title II of the United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5721-5724;
4. The "Executive Order on Hong Kong Normalization" signed by the President of the United States Donald J. Trump on 14 July 2020;
5. The USCBP, "Country of Origin Marking of Products of Hong Kong", 85 Fed. Reg. 48551 (11 August 2020).<sup>15</sup>

2.3. Additional information concerning these legal instruments and the factual background that led to the adoption of the origin marking requirement is set forth in Section 7 of this Report.

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Hong Kong, China requests that the Panel find that the origin marking requirement is inconsistent with the United States' obligations under Articles 2(c) and 2(d) of the ARO, Article 2.1 of the TBT Agreement, and Articles I:1 and IX:1 of the GATT 1994.<sup>16</sup> Hong Kong, China further requests that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.<sup>17</sup>

3.2. The United States requests that the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.<sup>18</sup>

### 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annex B).

### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, China, the European Union, Japan, Norway, Russia, Singapore, Switzerland, and Ukraine are reflected in their executive summaries, provided in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annex C). India, the Republic of Korea, and Türkiye did not submit written or oral arguments to the Panel.

### 6 INTERIM REVIEW

#### 6.1 Introduction

6.1. On 25 October 2022, the Panel issued its Interim Report to the parties. On 8 November 2022, Hong Kong, China and the United States submitted their requests for the review of certain aspects of the Interim Report. On 22 November 2022, Hong Kong, China submitted comments on two of the

<sup>15</sup> Hong Kong, China's panel request, p. 2.

<sup>16</sup> Hong Kong, China's first written submission, paras. 86-87; second written submission, para. 190. Hong Kong, China's panel request included claims under Article 2(e) of the ARO and Article X:3(a) of the GATT 1994. Hong Kong, China did not develop these claims in its first written submission, but rather "reserve[d] the right to develop those claims in subsequent submissions to the Panel, and to seek findings and recommendations in respect of those claims, depending on how the United States responds to the claims and arguments developed herein." (Hong Kong, China's first written submission, fn 64). Hong Kong, China did not develop its claims under Article 2(e) of the ARO and Article X:3(a) in its subsequent submissions.

<sup>17</sup> Hong Kong, China's first written submission, para. 88.

<sup>18</sup> United States' first written submission, para. 329; second written submission, para. 219. We also note that at the DSB meeting on 22 February 2021, the United States stated that the WTO could not, consistent with Article XXI of the GATT 1994, consider Hong Kong, China's claims or make the requested findings, and that there was no basis for a WTO panel to review the claims of breach raised by Hong Kong, China or the invocation of Article XXI (WT/DSB/M/449, para. 5.3).



United States' requests for review, while the United States indicated that it had no comments on Hong Kong, China's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage.

6.3. We have classified the parties' requests in three categories that we treat differently. The first category concerns requests to correct typographical errors, most of which we have corrected together with other such errors that we have also identified since the interim report was issued to the parties, and which we do not list here. The second category concerns requests for changes to the wording of the Interim Report that neither the other party nor we disagree with. We have implemented these changes, which serve to present the parties' arguments more accurately or to improve the consistency of the text, and we do not discuss them in detail below.<sup>19</sup> The third category concerns certain requests made by the United States to modify the text, some of which Hong Kong, China commented on, and that we do not, or not fully, agree with or that prompted further changes on our part. We turn to describe those requests falling under the third category and explain the reasons for the changes we have made.

6.4. The numbering of some of the footnotes in the Report has changed from the numbering of the Interim Report. The discussion below refers to the numbering in this Report and, where it differs, includes the corresponding numbering of the Interim Report.

## 6.2 Requests for review concerning the order of analysis

6.5. Regarding **paragraph 7.10**, the United States requests the Panel to delete references to arguments raised by the United States in the context of the applicability of Article XXI(b) of the GATT 1994 to other Annex 1A Agreements, and instead complement the United States' position on the findings that the Panel should make, given its invocation of Article XXI(b).<sup>20</sup>

6.6. We have changed the wording in paragraph 7.10, albeit in a shorter version than the text proposed by the United States.

## 6.3 Requests for review concerning whether Article XXI(b) of the GATT 1994 is self-judging such that it excludes any review of the challenged measure by a panel

6.7. Regarding **paragraph 7.17**, in the second sentence the United States requests the deletion of the words "at all, whether" as well as the addition of language reflecting an argument that the United States makes regarding the availability of non-violation claims. The United States requests these changes for reasons of transparency and to reflect its interpretation accurately.<sup>21</sup>

6.8. Paragraph 7.17, second sentence refers to the reviewability of the measure in this case. Non-violation claims are not relevant to this issue as none have been made in this case. Therefore, we do not agree with the deletion of the words "at all, whether". As regards the proposed addition, we have included a reference to this broader argument of the United States in new footnote 59.

6.9. Regarding **paragraph 7.50 and footnote 91**<sup>22</sup>, the United States requests certain changes in the text of the paragraph to enhance accuracy and transparency and to provide the relevant context of the Panel's analysis. The United States also requests deletion of footnote 91 which quotes a paraphrase of the subparagraphs of Article XXI(b) that the United States uses in one of its submissions.<sup>23</sup>

<sup>19</sup> These changes have been made in the following paragraphs: 7.6, 7.9, 7.14, 7.18 and fn 62 thereto, 7.29, 7.33, 7.36, 7.37, 7.38, 7.39, 7.41, 7.42, 7.46, 7.47, heading 7.3.3.2.2.1, 7.48, 7.49, 7.50, 7.51, 7.52, 7.53, 7.54, 7.57, 7.58, 7.63, 7.67, 7.68, 7.69, 7.75, 7.77, 7.78, 7.81 and fn 122 thereto, fn 126 to para. 7.82, 7.84, 7.85, 7.86, 7.88, and 7.172. This list refers to the numbering of the footnotes as they appear in this Report.

<sup>20</sup> United States' request for interim review, paras. 5-8.

<sup>21</sup> United States' request for interim review, para. 10

<sup>22</sup> Fn 70 of the Interim Report.

<sup>23</sup> United States' request for interim review, para. 17.

6.10. We have added some language to make clear that this paragraph contains our own analysis and conclusions. As for footnote 91, we decline deleting it. The footnote quotes the United States *verbatim*. It does not suggest that the paraphrase used by the United States in this quote is used throughout the submissions, nor that it is a basis on which treaty terms should be interpreted as argued by the United States.<sup>24</sup>

6.11. Regarding **footnote 92 to paragraph 7.52**<sup>25</sup>, the United States requests in footnote 92 a further citation as well as added language to elaborate on an argument.<sup>26</sup>

6.12. We have accepted the request and have made further changes in the subsequent footnote to refer to the new added language.

6.13. Regarding **paragraph 7.58 and footnote 96**<sup>27</sup>, the United States considers that the footnote misstates its argument and requests additional language to present the argument accurately and avoid confusion.<sup>28</sup>

6.14. We have added language to reflect the United States' position more clearly and have also added cross-references to other parts of the Final Report where this position is presented in more detail.

6.15. Regarding **paragraph 7.101**, the United States requests changes in order to present its arguments and not to seek to (erroneously) characterize their aims. The United States furthermore requests the Panel to clarify that not all third parties to the dispute present views regarding Article XXI(a).<sup>29</sup>

6.16. We note that this paragraph is in a section describing the Panel's assessment of the United States' arguments. To make clear that this is our own understanding of the implications of the United States' argument for the interpretation of Article XXI(b), we have slightly re-phrased the sentence.

#### **6.4 Requests for review concerning whether the origin marking requirement is inconsistent with Article IX:1 of the GATT 1994**

6.17. Regarding **paragraph 7.206**, the United States requests that the Panel modify the first sentence of the paragraph and the corresponding footnote 284.<sup>30</sup> According to the United States, the first sentence incorrectly summarizes the US position regarding the analysis under Article IX:1 of the GATT 1994. The United States submits that it argues that the examination of less favourable treatment includes an assessment of "facts and circumstances" which is not necessarily limited to those relating to the regulatory objective of the measure at issue but is instead a "holistic examination" which can include the assessment of regulatory objective.<sup>31</sup>

6.18. Some of the changes suggested by the United States go beyond the focus of paragraph 7.206 which is to express our disagreement with the United States only to the extent that it suggests that the legal standard of "less favourable treatment" under Article IX:1 includes an inquiry as to whether the detrimental impact is related, or can be explained by, the regulatory objective pursued by the measure at issue. We have, therefore, only partially accepted the United States' request and changed the wording of paragraph 7.206 and the relevant footnotes thereto.

6.19. Regarding **paragraph 7.224**, the United States requests that the Panel replace the word "WTO Member" with the word "territory", because, according to the United States, the evidence on record does not establish that the United States uses "WTO Member" as a basis to determine either origin or terminology to indicate origin.<sup>32</sup>

---

<sup>24</sup> United States' request for interim review, para. 17.

<sup>25</sup> Fn 71 of the Interim Report.

<sup>26</sup> United States' request for interim review, para. 20.

<sup>27</sup> Fn 75 in the Interim Report.

<sup>28</sup> United States' request for interim review, para. 21.

<sup>29</sup> United States' request for interim review, para. 23.

<sup>30</sup> Fn 263 of the Interim Report.

<sup>31</sup> United States' request for interim review, para. 24.

<sup>32</sup> United States' request for interim review, para. 25.

6.20. We have changed the wording of the first sentence of paragraph 7.224 to address the concern raised by the United States. For clarity and to improve the readability of the sentence, we have done so in a manner different from the proposed drafting change suggested by the United States.

6.21. Regarding **paragraph 7.233**, the United States requests that the Panel add the words "what we perceive" when referring to the US practice of "reserving" the name "China" to the People's Republic of China.<sup>33</sup> The United States submits that the terminology "China" is not reserved for the People's Republic of China such that it cannot be used as origin marking for goods originating from Hong Kong, China, and that it is not established that the United States maintains a practice of reserving the same terminology for marking purposes that it might use for other purposes.<sup>34</sup> Hong Kong, China disagrees and submits that the fact that the United States uses the term "China" to refer exclusively to the People's Republic of China for origin marking purposes is not a matter of the Panel's "perception".<sup>35</sup> Hong Kong, China considers that paragraph 7.233 does not require modification but suggests a possible modification to address the United States' concern and better reflect the evidence on record and the parties' arguments.

6.22. Paragraph 7.233 addresses the United States' suggestion that the name "China" may be the United States' way of designating, for origin marking purposes, Hong Kong, China *rather than* the People's Republic of China. It is our understanding that (a) prior to the adoption of the origin marking requirement, the United States accepted marks referring to "China" to indicate the origin of products from the People's Republic of China, and marks referring to "Hong Kong" to indicate the origin of products from Hong Kong, China; and (b) after the adoption of the origin marking requirement, the United States accepts marks referring to the name "China" to indicate the origin of products from the People's Republic of China *and* the origin of products from Hong Kong, China. Therefore, the evidence before the Panel establishes that neither before, nor after the adoption of the origin marking requirement, did the United States use the name "China" to designate Hong Kong, China *and not* the People's Republic of China.

6.23. We disagree with the United States to the extent that it suggests that this element described in paragraph 7.233 reflects the Panel's "perception" rather than facts supported by uncontested evidence. We therefore do not agree with the United States' request to add the words "what we perceive". However, we agree with the United States that the reference to "US practice reserving [the] name ["China"] to the People's Republic of China (while dealing with Hong Kong, China separately)" may be unclear. For the sake of clarity, we have therefore changed the wording of the paragraph and added footnote 343 referring to the evidence on the record reflecting the United States' use of the name "China" to designate the origin of products from the People's Republic of China.

## **6.5 Requests for review concerning whether the origin marking requirement is justified under Article XXI(b)(iii) of the GATT 1994**

6.24. Regarding **paragraph 7.305**, the United States requests that the Panel delete a reference to the parties not having raised arguments regarding the role of the object and purpose of the GATT 1994 in interpreting the phrase "emergency in international relations" in Article XXI(b)(iii).<sup>36</sup>

6.25. We have deleted such reference and note in new footnote 430 that the parties submitted arguments on object and purpose in the context of expressing their views on whether Article XXI(b) is entirely or partly self-judging.

6.26. Regarding **paragraph 7.318**, the United States requests that the Panel replace the word "observes" with the word "submits", when referring to Hong Kong, China's view on the status of its relations, including on trade matters, with the United States.<sup>37</sup> Hong Kong, China requests that instead of making this change, the Panel modify the sentence to include a reference to its relations

<sup>33</sup> United States' request for interim review, para. 28.

<sup>34</sup> United States' request for interim review, para. 27.

<sup>35</sup> Hong Kong, China's comments on the United States' request for interim review, para. 4.

<sup>36</sup> United States' request for interim review, para. 29.

<sup>37</sup> United States' request for interim review, para. 30.

with the United States being affected by the origin marking requirement, as well as other actions taken pursuant to Executive Order 13936 not at issue in this dispute.<sup>38</sup>

6.27. We note that the United States' request concerns the description of Hong Kong, China's arguments. Therefore, we see no reason to reject the request to use the word "submit" instead of "observe". In addition, we find it helpful to add the clarification that Hong Kong, China suggests. We have thus edited the paragraph accordingly.

6.28. Regarding **paragraph 7.356**, the United States requests that the Panel delete a reference to the parallel drawn by the United States between the situation examined by the panel in *Russia – Traffic in Transit* and the situation in the current dispute. According to the United States, it did not suggest that the "same parallel" between those situations is required to establish the existence of an emergency in international relations.<sup>39</sup>

6.29. We disagree with the United States' implication that by comparing the factual situation examined by the panel in *Russia – Traffic in Transit* we are somehow requiring that the United States demonstrate a parallel between the situation in that case and in this one to establish the existence of an emergency in international relations. Rather, as explained in paragraph 7.355, we find it helpful to compare the situation before us with the previous cases where situations were found to constitute an emergency in international relations, to the extent that these may assist in determining whether the United States has demonstrated that the situation at issue is one that falls under Article XXI(b)(iii). The situations in different cases will need to be assessed on the basis of the facts presented in each case and will naturally differ. Nevertheless, a comparison may be instructive on the type(s) of situation that could constitute an emergency in international relations, without such comparison implicating that the situations have to be the same or parallel in all cases. Moreover, the sentence that the United States requests the Panel to delete was aimed at reflecting how we understand the United States to relate the situation in *Russia – Traffic in Transit* to the one before us. For the sake of transparency and accuracy, we have therefore reproduced in the footnote to that sentence the entirety of the United States' view and clarified that we are presenting our understanding of such view.

## 7 FINDINGS

### 7.1 Introduction

7.1. This dispute concerns a requirement in US law that goods produced in Hong Kong, China be marked to indicate that their origin is "China". The United States enacted this origin marking requirement in 2020 (together with other measures) in reaction to certain events in Hong Kong, China that prompted a determination in US law that Hong Kong, China was no longer "sufficiently autonomous to justify differential treatment in relation to the People's Republic of China".<sup>40</sup> Hong Kong, China challenges the consistency of the US origin marking requirement with the GATT 1994, the TBT Agreement, and the ARO. The claims relate primarily to the most-favoured nation (MFN) obligation. In response, the United States invokes the security exception in Article XXI(b) of the GATT 1994.

7.2. In over 70 years of existence, the dispute settlement systems, both under the WTO and before that under GATT, were not called upon to interpret the exception in Article XXI(b).<sup>41</sup> This has

<sup>38</sup> Hong Kong, China's comments on the United States' request for interim review, paras. 6-7.

<sup>39</sup> United States' request for interim review, para. 31.

<sup>40</sup> United States' first written submission, para. 2 (quoting Executive Order 13936 on Hong Kong Normalization of 14 July 2020, 85 Fed. Reg. 43413 (17 July 2020)), (Exhibit USA-2)).

<sup>41</sup> For a comprehensive overview of the history of invocations of Article XXI both inside and outside dispute settlement, see Panel Report, *Russia – Traffic in Transit*, Appendix.

changed in recent years. Several disputes concerning the security exception have been brought<sup>42</sup>, two panel reports have already been issued<sup>43</sup>, and others are forthcoming as we write this Report.<sup>44</sup>

7.3. In this dispute, as in the other disputes, the respondent's invocation of Article XXI(b) has triggered differences of interpretation among the parties and third parties about the reviewability of the invoking Member's action under the security exception. This is a systemic issue of fundamental importance. However, the invocation of Article XXI(b) has also raised another, equally important systemic issue, which is the applicability of the security exception to agreements in Annex 1A *other* than the GATT 1994, namely to the ARO and the TBT Agreement at issue in this dispute.

7.4. With the parties' and third parties' input we have explored and carefully considered these systemic issues, consistent with our task under Article 11 of the DSU. However, in preparing this Report, we have narrowly tailored our analysis, mindful of the aim of the dispute settlement mechanism, as stated in Article 3.7 of the DSU, which is to secure a positive solution to the dispute.

## 7.2 Order of analysis

7.5. In this section, we address two order of analysis questions. The first concerns which of Hong Kong, China's claims to examine first. This choice determines which of the above systemic issues arising from the United States' invocation of Article XXI(b) would become relevant. The claims under the GATT 1994 raise (only) the issue of reviewability of action under Article XXI(b), whereas the claims under the ARO and the TBT Agreement raise the additional threshold issue of whether Article XXI(b) is at all applicable to those claims. The choice of which claim to examine first, thus, determines which of these systemic issues arises first.

7.6. The second order of analysis question then concerns where, in the analysis of the chosen claim, to address the specific systemic issue that may have arisen.

### 7.2.1 Which claims to consider first

7.7. The claims brought by Hong Kong, China relate to the MFN non-discrimination obligation under Article 2(d) of the ARO, Article 2.1 of the TBT Agreement, and Articles I:1 and IX:1 of the GATT 1994. Hong Kong, China also raises a claim regarding the requirements for the determination of origin under Article 2(c) of the ARO.

7.8. Our task, therefore, is to decide which agreement and which claim to start our analysis with.

7.9. Hong Kong, China requests that we first examine its claims under the ARO or the TBT Agreement, before proceeding, if necessary, with those under the GATT 1994.<sup>45</sup> In Hong Kong, China's view "the ARO is the agreement that deals most specifically, and in detail, with the subject matter of the dispute, namely the rules for determining the country of origin as they apply to origin marking requirements".<sup>46</sup> More generally, Hong Kong, China considers that both the ARO and the

<sup>42</sup> Apart from the other cases mentioned in the next two footnotes, in *United Arab Emirates – Goods, Services and IP rights* a panel was established to review measures that the United Arab Emirates considered to have been adopted to protect its essential security interests (see WT/DSB/M/404, para. 3.3), the panel accepted the parties' request to suspend its proceedings, and the panel's authority subsequently lapsed (see Note by the Secretariat, DS526/7).

<sup>43</sup> Panel Reports, *Russia – Traffic in Transit* (concerning Article XXI(b) of the GATT 1994) and *Saudi Arabia – IPRs* (concerning Article 73(b) of the TRIPS Agreement). The panel report in *Saudi Arabia – IPRs* was circulated in June 2020 and Saudi Arabia filed an appeal the same month. On 21 April 2022, Qatar notified the DSB that it had agreed to terminate this dispute, and that it would not seek adoption of the panel report (WT/DS567/11). While the report, thus, remains unadopted, we agree with prior adjudicators that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant." (Panel Report, *Japan – Alcoholic Beverages II*, para. 6.10; Appellate Body Report, *Japan – Alcoholic Beverages II* DSR 1996:I, 97, p. 10).

<sup>44</sup> See the following notifications to the DSB in *US – Steel and Aluminium Products*, WT/DS544/13 (China), WT/DS547/13 (India), WT/DS552/15 (Norway), WT/DS554/22 (Russia), WT/DS556/20 (Switzerland), WT/DS564/20 (Turkey). Note that in DS548 (European Union), the parties referred the matter to an arbitration proceeding pursuant to Article 25 of the DSU, which is currently suspended (WT/DS548/19).

<sup>45</sup> Hong Kong, China's first written submission, paras. 86-87; response to Panel question No. 2, paras. 6-7.

<sup>46</sup> Hong Kong, China's response to Panel question No. 2, para. 6. (footnote omitted)

TBT Agreement are the more detailed and more specialized agreements pertaining to the subject matter of this dispute relative to the GATT 1994.<sup>47</sup>

7.10. The United States submits that the Panel is free to consider the issues presented to it in any order that it deems fit. However, consistent with its view that Article XXI(b) is self-judging, the United States considers that the Panel should only note the United States' invocation of Article XXI(b).<sup>48</sup>

7.11. We note that panels are generally free to structure the order of their analysis as they see fit<sup>49</sup>, provided that their analysis is consistent with the structure and logic of the provisions at issue in each dispute.<sup>50</sup> However, there may be situations where a particular order is compelled, which, if not followed, might constitute an error of law.<sup>51</sup> Furthermore, in previous disputes, adjudicators have dealt with issues concerning the sequence of analysis by seeking to identify the agreement that "deals specifically, and in detail, with" the measures at issue.<sup>52</sup> On this basis, we turn to examining how best to structure our analysis.

7.12. We see nothing in these provisions to indicate that there is a mandatory sequence of analysis to be followed. Moreover, Hong Kong, China has not argued that disposing first of its claims under the GATT 1994 would somehow pre-empt or affect our analysis under the ARO or the TBT Agreement.

7.13. Turning to the question of which claim may more specifically and in more detail deal with the subject matter of the dispute, the parties agree that the measure at issue is an origin marking requirement.<sup>53</sup> The parties do not agree, however, on whether this origin marking requirement also constitutes a rule of origin.<sup>54</sup> That difference in view can only be resolved in connection with the relevant claim under the ARO.

7.14. Article IX:1 of the GATT 1994 concerns specifically, and only, origin marking requirements<sup>55</sup>, such as the one at issue in this case. In contrast, Article I:1 of the GATT 1994 applies to a broad category of measures.<sup>56</sup> Similarly, the ARO and the TBT Agreement apply to broader categories of measures. The TBT Agreement applies to technical regulations and standards (including those providing for "marking ... requirements" more generally), as defined in its Annex 1, and the ARO applies to rules of origin, as defined in its Article 1. Therefore, Article IX:1 of the GATT 1994 applies more specifically to origin marking requirements and thus deals in more detail with the measure at issue in this case. Moreover, Hong Kong, China raised MFN claims under non-discrimination provisions in the three agreements. We acknowledge that the ARO and the TBT Agreement contain obligations that are more detailed as compared with those in Article IX with respect to those measures subject to their disciplines. Nonetheless, in the context of this dispute, there are claims with respect to non-discrimination (MFN, in particular), which are similarly set out across the three

<sup>47</sup> Hong Kong, China's response to Panel question No. 2, para. 7.

<sup>48</sup> United States' first written submission, para. 328.

<sup>49</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129.

<sup>50</sup> Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109.

<sup>51</sup> Panel Report, *India – Autos*, para. 7.154.

<sup>52</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.6-5.8 (referring to Appellate Body Report, *EC – Bananas III*, para. 204; and Panel Reports, *Indonesia – Autos*, paras. 14.61-14.63; *EC – Bananas III*, paras. 7.185-7.187; *Canada – Autos*, paras. 10.63-10.64; and *India – Autos*, paras. 7.157-7.162).

<sup>53</sup> Hong Kong, China's first written submission, paras. 16, 20, and 71. United States' first written submission, para. 22; response to Panel question No. 4, paras. 15-17.

<sup>54</sup> Hong Kong, China's first written submission, paras. 17-21. United States' second written submission, paras. 159-165; see also responses to Panel question No. 4, paras. 15-17, and No. 5, paras. 18-20.

<sup>55</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2997-7.3021. That panel found that Article IX is circumscribed to laws and regulations that apply to marks of origin. (Ibid. paras. 7.2999, 7.3001, and 7.3021)

<sup>56</sup> Namely, any advantage, favour, privilege or immunity with respect to: "customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports", "the method of levying such duties and charges", "all rules and formalities in connection with importation and exportation", and "all matters referred to in paragraphs 2 and 4 of Article III".



agreements.<sup>57</sup> We therefore disagree with Hong Kong, China that the agreement that deals most specifically and in detail with the origin marking requirement at issue is the ARO.

7.15. Based on the foregoing, we consider it appropriate to start our analysis with Hong Kong, China's claim under Article IX:1 of the GATT 1994. As noted in the introduction of this section, this means that the systemic issue that arises is that of the reviewability of action under Article XXI(b).

7.16. We, therefore, now turn to the second order of analysis question of where in the analysis of Article IX:1 to address that systemic issue of reviewability, and in particular, whether to address it first, as requested by the United States.

## **7.2.2 Whether to consider first the reviewability of action under Article XXI(b) of the GATT 1994**

7.17. As noted above, the United States requests the Panel to find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and to so report to the DSB.<sup>58</sup> Effectively, this would mean that we would not review the challenged measure at all, whether under the claims or under the security exception.<sup>59</sup> Indeed, the United States argues that it would be "legally erroneous" to decide on the merits of the claims before assessing the invocation of Article XXI(b).<sup>60</sup> Furthermore, the United States puts forward arguments under Articles 7.1 and 19 of the DSU as to why we should not make any finding of inconsistency or any recommendations.<sup>61</sup>

7.18. The United States' position is based on its understanding that Article XXI(b), by its terms, is entirely self-judging. In its view, this means that it is the invoking Member alone that determines whether an action is necessary for the protection of the Member's essential security interest in the relevant circumstances.<sup>62</sup> Such action, therefore, cannot be found by a panel to be inconsistent with the covered agreements.<sup>63</sup>

7.19. Hong Kong, China disagrees that an invoking Member's action cannot be reviewed at all under Article XXI(b). In line with the findings made by the panel in *Russia – Traffic in Transit*, it submits that the exception in Article XXI(b) is only partly self-judging, and is, furthermore, subject to the invoking Member demonstrating that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests.<sup>64</sup> There is, accordingly, in Hong Kong, China's view, some scope for review of an invoking Member's action under Article XXI(b). Therefore, a panel, as a matter of legally mandated order of analysis, should engage in such review if and when it has found a breach (as with any other exception).<sup>65</sup> Those third parties that commented on this issue expressed positions similar to that espoused by Hong Kong, China.<sup>66</sup>

---

<sup>57</sup> Article IX:1 of the GATT 1994 requires Members to accord to products from any other Member, with regard to marking requirements, no less favourable treatment than that accorded to like products of any third country. Article I:1 of the GATT 1994 requires Members to accord immediately and unconditionally any advantage, favour, privilege or immunity with respect to the subject matter provided therein granted to the products of any other Member to the like product originating in or destined for all other Members. Article 2.1 of the TBT Agreement requires Members to ensure that in respect of technical regulations, products imported from the territory of any Member accord treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. Article 2(d) of the ARO requires that the rules of origin that Members apply to imports and exports shall not discriminate between other Members.

<sup>58</sup> See para. 3.2 above.

<sup>59</sup> The United States more broadly argues that a Member may request that a panel review a non-violation claim whether benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment under Article 26.1 of the DSU (United States' first written submission, para. 94; responses to Panel question No. 46, para. 216, and No. 65, paras. 272-276). We note that no such non-violation claims have been made in this case.

<sup>60</sup> United States' response to Panel question No. 1, para. 3.

<sup>61</sup> United States' response to Panel question No. 1, paras. 5-6.

<sup>62</sup> United States' first written submission, paras. 11 and 47.

<sup>63</sup> United States' first written submission, para. 326; response to Panel question No. 1, para. 6.

<sup>64</sup> Hong Kong, China's opening statement at the first meeting of the Panel, para. 35.

<sup>65</sup> Hong Kong, China's response to Panel question No. 1, paras. 3-4.

<sup>66</sup> Brazil's third-party statement, para. 7; Canada's third-party submission, paras. 15-19; European Union's third-party statement, paras. 4-8; Norway's third-party statement, paras. 20-22; and Switzerland's third-party submission, paras. 49-51.

7.20. In considering these arguments, we note that each side's position on how to proceed rests on its understanding of the extent of the self-judging nature of Article XXI(b), namely on whether this provision allows for any review by a panel. This is a central question, which fundamentally affects how we proceed. In our view, therefore, it seems appropriate to address it upfront. Furthermore, this is also the most efficient way to proceed. For, if we conclude that the United States is correct and we are not to review the challenged measure under Article XXI(b), it may not be necessary to make any other findings, at least under Article IX:1 of the GATT 1994, as these would not contribute to the positive resolution of the dispute.

7.21. We, therefore, turn to whether Article XXI(b) is self-judging such that it excludes any review by a panel.

### **7.3 Whether Article XXI(b) of the GATT 1994 is self-judging such that it excludes any review of the challenged measure by a panel**

#### **7.3.1 Introduction**

7.22. As indicated above, the parties' debate on whether there is any scope for review of a challenged measure by a panel when Article XXI(b) is invoked is a debate about the scope and extent of the self-judging nature of Article XXI(b). By the term "self-judging" both parties mean the same thing, namely that the elements of Article XXI(b) that they respectively consider to be self-judging, are governed by the invoking Member's own appreciation and judgment, i.e. its own determination as opposed to that of a panel.<sup>67</sup> Furthermore, both parties agree that the source for the self-judging nature of Article XXI(b) is specific language in the provision which we discuss further below.

7.23. What the parties do not agree on is whether the unilateral determination derived from this specific language covers *all* or *only part* of Article XXI(b); in other words, whether all of the elements of Article XXI(b) are self-judging. The parties further disagree whether those elements that are or may be self-judging mean that a panel's review of those elements is excluded altogether or whether the invoking Member's unilateral determination is nevertheless reviewable in some limited way. These are two separate questions.

7.24. We begin with the first of the two questions, i.e. whether Article XXI(b) is entirely self-judging or only partly self-judging.

#### **7.3.2 The interpretive question at issue**

7.25. Article XXI of the GATT 1994 is entitled "*Security Exceptions*". Article XXI(b) reads as follows:

Nothing in this Agreement shall be construed

(a) ...

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

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

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

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

(c) ...

---

<sup>67</sup> United States' first written submission, para. 1; Hong Kong, China's response to Panel question No. 44, paras. 132 and 152. We note that the parties also sometimes refer to a Member's "discretion", implying that is an equivalent term to "unilateral determination", see e.g. United States' first written submission, para. 117; Hong Kong, China's response to Panel question No. 44, paras. 140 and 150. We agree but will mostly use the term "determination" throughout the Report.



7.26. For ease of reference, we refer, as do the parties, to the first two lines of this provision (starting with "to prevent" and ending with "essential security interests") as the *chapeau*, and to the subsequent list (starting with (i), then (ii), and ending with (iii)) as the subparagraphs.

7.27. The parties do not disagree that the specific phrase "which it considers" is the source of the discussed self-judging nature of Article XXI(b).<sup>68</sup> That language clearly refers to the invoking Member's own appreciation and judgment, which cannot be replaced by that of a panel. As Hong Kong, China puts it:

To give meaning to "which it considers", the words that it qualifies must be left to the determination of the invoking Member.<sup>69</sup>

7.28. The question, therefore, is not whether Article XXI(b) provides for a unilateral determination by the invoking Member. It clearly does. The question is rather, what is covered by that determination?<sup>70</sup> That – and, again, the parties agree – depends on what the phrase "which it considers" extends to.<sup>71</sup>

7.29. In the United States' view, the phrase "which it considers" relates to all that follows in the text, that is, the *chapeau* and the subparagraphs. The subparagraphs, therefore, in the United States' view, are circumstances the invoking Member "considers" present, and in this way serve as guidance for that Member's exercise of its rights under the provision.<sup>72</sup>

7.30. In Hong Kong, China's view the phrase "which it considers" does not extend to the subparagraphs. For Hong Kong, China, therefore, the existence of an action of the type described in the subparagraphs is not self-judging but is instead for a panel to decide on the basis of an objective review.<sup>73</sup> The third parties that commented on Article XXI(b) share Hong Kong, China's view, which leads to the same interpretive result as the one reached by the panel in *Russia – Traffic in Transit*.<sup>74</sup>

7.31. The interpretive question that we need to resolve, therefore, is whether the phrase "which it considers" in the *chapeau* of Article XXI(b) extends to the subparagraphs following the *chapeau*. If it does, it is the invoking Member's unilateral determination that governs the application of the subparagraphs, and a panel may not replace this determination with its own. If it does not extend to the subparagraphs, the application of the subparagraphs is subject to a panel's review and Article XXI(b) is not self-judging in its entirety, but only partly self-judging.

7.32. As mandated by Article 3.2 of the DSU, we are to resolve this interpretive question in accordance with the customary rules of interpretation of public international law. These are codified in Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties (Vienna Convention). In particular, according to Article 31(1) of the Vienna Convention:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

7.33. We will therefore examine the interpretive question at issue following the steps set out in Article 31(1) of the Vienna Convention. In undertaking this process, we will also be mindful of the

---

<sup>68</sup> Hong Kong, China's responses to Panel question No. 44, para. 132, and No. 94, para. 96; United States' first written submission, paras. 34 and 37.

<sup>69</sup> Hong Kong, China's second written submission, para. 154.

<sup>70</sup> As noted above, whether the exercise of that discretion is disciplined by certain obligations grounded in good faith and, thus, subject to some review by a panel, as found by previous panels (see Panel Reports, *Russia – Traffic in Transit*, para. 7.132 and *Saudi Arabia – IPRs*, paras. 7.242, 7.250-7.252, and 7.283), is a separate question, which we do not discuss at this juncture of our analysis, see paras. 7.23 and 7.24 above.

<sup>71</sup> United States' response to Panel question No. 94, para. 87; Hong Kong, China's response to Panel question No. 94, para. 96.

<sup>72</sup> United States' first written submission, para. 46; response to Panel question No. 46, para. 205.

<sup>73</sup> Hong Kong, China's response to Panel question No. 44, paras. 135 and 138.

<sup>74</sup> Brazil's third-party submission, paras. 4 and 17. Canada's third-party submission, paras. 23-24. China's third-party submission, paras. 15-16; third-party statement, para. 5. European Union's third-party submission, paras. 23-26. Norway's third-party statement, paras. 6-14. Russia's third-party statement, paras. 2 and 6-17. Singapore's third-party statement, paras. 15-17. Switzerland's third-party submission, paras. 3, 6 and 8-35. Ukraine's third-party submission, paras. 6-8.

interpretive analysis that the panel in *Russia – Traffic in Transit* has carried out.<sup>75</sup> That panel's findings play a central role in the parties' submissions insofar as Hong Kong, China and the third parties base their position on them, and the United States has argued extensively that those findings, and reliance on them, are erroneous. We also note, however, that that panel was faced with different legal and factual issues as well as different arguments.

### 7.3.3 Ordinary meaning

#### 7.3.3.1 Introduction

7.34. We begin with the ordinary meaning of the text of Article XXI(b). As noted above, what is at issue here is whether the phrase "which it considers" extends to the subparagraphs in Article XXI(b). We note that the issue is not the ordinary meaning of these words as such, which the United States, uncontested by Hong Kong, China, describes as "[r]egard in a certain light or aspect; look upon as" or "think or take to be".<sup>76</sup> Instead, what is at issue is the grammatical structure of the sentence where the words are found. Neither the parties nor the third parties question that the grammatical structure of a sentence is part of the ordinary meaning of the relevant treaty terms.<sup>77</sup>

7.35. In the following sections we will (a) examine the grammatical structure of the sentence in the English version of the provision, and (b) compare our findings to the other two authentic language versions of the provision (i.e. French and Spanish), before (c) concluding on our analysis of the ordinary meaning.

#### 7.3.3.2 Grammatical structure

##### 7.3.3.2.1 Arguments of the parties and the third parties

7.36. The United States argues that Article XXI(b) consists of a single relative clause that follows the word "action", beginning with the phrase "which it considers" and extending to each subparagraph. Thus, for the United States, the phrase "which it considers" extends to the entire provision, and all elements of the text are left to the determination of the invoking Member. The three subparagraphs therefore describe the circumstances that the Member "considers" to be present.<sup>78</sup>

7.37. With respect to the term in the *chapeau* that the subparagraphs modify, the United States advocates the most natural reading of the English text to be that subparagraphs (i) and (ii) modify the term "interests".<sup>79</sup> This is because subparagraphs (i) and (ii) both begin with the phrase "relating to", and directly follow the term "interests" in the *chapeau*. The United States, in this regard, refers to a rule in English grammar under which a participial phrase that functions as an adjective normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.<sup>80</sup>

7.38. As regards subparagraph (iii), the United States shares Hong Kong, China's and the third parties' view that in the English text it modifies the term "action" in the *chapeau* rather than

<sup>75</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.59-7.104.

<sup>76</sup> United States' first written submission, para. 37 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (Exhibit USA-11)). The United States also points out that the use of the subjunctive in the Spanish ("*estime*"), and the use of the future in the French ("*estimera*"), reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate (United States' first written submission, para. 38). We do not understand Hong Kong, China to (and do not see a reason ourselves to) contest this statement, as it merely confirms and clarifies the self-judging nature of the phrase "which it considers" but does not indicate whether that language extends to the subparagraphs.

<sup>77</sup> The grammatical construction of a given provision also played a role in prior dispute settlement cases, see Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89; and Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.218; *Australia – Tobacco Plain Packaging*, para. 7.1892; and *China – Auto Parts*, paras. 7.163-7.164.

<sup>78</sup> United States' first written submission, paras. 34-46; responses to Panel question No. 46, paras. 205 and 210, No. 48, para. 225, and No. 63, paras. 258 and 266; and second written submission, para. 18.

<sup>79</sup> United States' first written submission, para. 43.

<sup>80</sup> United States' response to Panel question No. 63, para. 262 (quoting Merriam Webster's Guide to Punctuation and Style 232 (1st edn 1995), (Exhibit USA-194), and The Harper's English Grammar 186-187 (Harper & Row, 1966), (Exhibit USA-195)).

"essential security interests". This is because "interests" cannot be "taken".<sup>81</sup> The United States describes subparagraph (iii) as a "temporal limitation related to the action taken" and points out that "[i]n this case, the drafters departed from typical English usage in placing the modifier next to 'its essential security interests' as opposed to action".<sup>82</sup> In response to arguments that all subparagraphs must therefore modify the term "action", the United States argues that English grammar permits the subparagraphs in a list to modify different terms of a *chapeau*, as the subparagraphs are not connected by a conjunction to suggest cumulative or alternative situations.<sup>83</sup>

7.39. In Hong Kong, China's view the subparagraphs are not covered by the relative clause starting with "which it considers", but instead directly refer to the word "action".<sup>84</sup> The subparagraphs, therefore, form a "noun phrase" that Hong Kong, China describes as typically beginning with a noun (here "action") followed by additional words that modify the noun.<sup>85</sup>

7.40. Hong Kong, China also notes that the term "action" is placed before the phrase "which it considers". For Hong Kong, China, therefore, the identification of the type or types of GATT-inconsistent action comes before the relative clause that allows the invoking Member to determine whether that action is necessary for the protection of its essential security interests. Hong Kong, China submits that, accordingly, the existence of an action of the type described in the enumerated paragraphs is not self-judging and that, instead, it is for a panel to decide on the basis of an objective review.<sup>86</sup>

7.41. Among the third parties, Norway, Russia, and Switzerland comment specifically on the grammatical structure of the sentence. All three take the view that the subparagraphs relate to the word "action" and are, therefore, not covered by the phrase "which it considers".<sup>87</sup> Switzerland describes the subparagraphs as "coordinated participial clauses" that directly relate to and modify the noun "action" in the *chapeau*.<sup>88</sup> In Switzerland's view, therefore, Article XXI(b) presents a case of "double modification" of the noun "action", namely by the relative clause in the *chapeau*, on the one hand, and by the coordinate construction in the subparagraphs, on the other hand.<sup>89</sup>

### 7.3.3.2.2 Panel's assessment

7.42. As stated above, the interpretive question that we need to resolve is whether the phrase "which it considers" in the *chapeau* of Article XXI(b) extends to the subparagraphs following the *chapeau*. Both the parties and certain third parties agree that this phrase starts a relative clause that qualifies the noun "action". For the United States, that relative clause ends at the end of each subparagraph. For Hong Kong, China and the third parties that expressed a view on this issue, it ends in the *chapeau* and what follows in the subparagraphs is a separate element that independently qualifies the noun "action".

7.43. It may be helpful to illustrate the difference in the parties' positions.

7.44. The United States' view regarding the structure of Article XXI(b) can be illustrated as follows:

<sup>81</sup> United States' first written submission, para. 45.

<sup>82</sup> United States' second written submission, para. 26.

<sup>83</sup> United States' second written submission, paras. 24-26.

<sup>84</sup> Hong Kong, China's response to Panel question No. 44, paras. 135-138.

<sup>85</sup> Hong Kong, China's response to Panel question No. 44, para. 145.

<sup>86</sup> Hong Kong, China's response to Panel question No. 44, para. 138.

<sup>87</sup> Norway's third-party statement, paras. 10-12; Russia's third-party statement, para. 14; and Switzerland's third-party submission, paras. 10-13.

<sup>88</sup> Switzerland's third-party submission, para. 12.

<sup>89</sup> Switzerland's third-party submission, para. 13.

action	<p>which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and material as is carried on directly or indirectly for the purpose or supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations;</p>
--------	---

7.45. Hong Kong, China's and the third parties' position can be illustrated as follows:

action	<p>which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and material as is carried on directly or indirectly for the purpose or supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations;</p>
--------	---

7.46. As is clear from the above illustrations, these are two very different structures. In the structure proposed by the United States, the phrase "which it considers" belongs in the *same* structural element, that is, in the same relative clause, as the subparagraphs. In the structure proposed by Hong Kong, China and the third parties, it does not. Instead, the subparagraphs form their own structural element, separate from the relative clause and directly relating to the word "action".

7.47. We, therefore, turn to examining these different structures from a grammatical point of view to establish whether the relative clause in the *chapeau* ends there or continues into the subparagraphs, such that both the *chapeau* and the subparagraphs together constitute a single relative clause.

#### **7.3.3.2.2.1 Whether the *chapeau* together with each subparagraph constitute a single relative clause**

7.48. Starting with the United States' reading, we begin by observing that it seems more accurate to speak of *three* single relative clauses rather than one. This is because in the United States' reading, as indicated in the first illustration above, the relative clause beginning with "which it considers" extends to each of the three subparagraphs independently, in the following manner:

- a. which it considers necessary for the protection of its essential security interests "relating to fissionable materials or the materials from which they are derived";
- b. which it considers necessary for the protection of its essential security interests "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment"; and
- c. which it considers necessary for its essential security interests "taken in time of war or other emergency in international relations".

7.49. Reading the three clauses individually, the word "relating" in subparagraphs (i) and (ii), which is the present participle of the verb "to relate", could be read as qualifying the noun "interests". When read in this way the relative clause in the *chapeau* starting with "which it considers" could be read as continuing into the two subparagraphs (i) and (ii).

7.50. In contrast, as the United States itself submits regarding the English text, the word "taken", which is the past participle of the verb "to take", must relate to "action" as "interests" cannot be taken.<sup>90</sup> It seems clear to us, therefore, that there is no continuation from the relative clause in the *chapeau* into subparagraph (iii) and that "taken" does not relate to any part of that clause. Indeed, clause (c) above only makes sense under the United States' interpretive approach if the word "taken" is omitted altogether.<sup>91</sup> Thus, while the construct of "single relative clause" works for the first two subparagraphs, it does not for the third one. This casts some doubt on the suggested construct for the provision as a whole.

7.51. Turning to Hong Kong, China's and the third parties' reading of the structure, under that reading the relative clause qualifying the word "action" starts with "which it considers" and ends at the end of the *chapeau* (essential security interests). The clause is complete in that it has a subject (it), a verb (considers) and a complement (necessary for the protection of its essential security interests).

7.52. In respect of this reading, the United States argues that there is no additional language after the words "essential security interests" in the *chapeau* to indicate that the relative clause ends, and that a new structural element begins. For the United States, this is proof that the relative clause continues in the subparagraphs.<sup>92</sup>

7.53. We are not persuaded that there needs to be additional language to indicate that the relative clause ends and something new starts. Visually, there is a break insofar as the *chapeau* is distinct from the subparagraphs, which are set out in an enumerated list below the *chapeau*. The list, thus, is something different and the reader needs to link it back to the *chapeau*, whichever reading is followed. Under this reading the link is to the word "action" whereas under the United States' reading the link is to the relative clause. Additional language could possibly have made it clear which of these two links was intended.<sup>93</sup> However, for the purposes of our interpretation, what matters is whether the meaning advocated by Hong Kong, China and the third parties *depends* on additional language such that it cannot be discerned from the text without that language. In our view, notwithstanding the potential for additional clarity, the existing structure of Article XXI(b) is sufficiently clear in signalling a break between the *chapeau* and the subparagraphs.

7.54. Accordingly, we next turn to the subparagraphs and examine whether, as argued by Hong Kong, China and the third parties, they relate to the word "action" instead of to the relative clause in the *chapeau*. As noted above, this is uncontested as regards the word "taken" in subparagraph (iii). All parties, including the United States, agree that "taken" qualifies the noun "action". As for the word "relating" in subparagraphs (i) and (ii), as noted above, it is a present participle of the verb "to relate" which is used as an adjective. As such, it could be accorded both to the word "action" and to the word "interests" in "essential security interests".

7.55. The United States considers that it is the latter because the word "relating" immediately follows the noun "interests". In support of this view, the United States refers to a rule in English

<sup>90</sup> United States' first written submission, para. 45; response to Panel question No. 63, para. 264.

<sup>91</sup> See also the United States' own paraphrasing of sentence (c) in United States' response to Panel question No. 46, para. 210 ((c) "when a Member takes action it considers necessary for its essential security interests in time of war or other emergency in international relations").

<sup>92</sup> United States' response to Panel question no. 63, para. 260; second written submission, para. 27; comments on Hong Kong, China's response to Panel question No. 99, para. 73. The United States submits that the reading by Hong Kong, China and certain third parties, reads into Article XXI(b) the clauses "and which relates to" before subparagraphs (i) and (ii), and "and which is taken in time of" before subparagraph (iii).

<sup>93</sup> As noted in fn. 92, the United States discusses "and which relates to" for subparagraphs (i) and (ii) and "which is taken in time of" for subparagraph (iii). We note that this would turn the subparagraphs into additional relative clauses that would be connected to the relative clause in the *chapeau* through the connector "and". An alternative to such additional language as proposed by the drafters of the ITO Charter in 1948 is discussed below.

grammar under which a participial phrase that functions as an adjective, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.<sup>94</sup>

7.56. We note that the rule is not absolute ("normally") which means that departing from it does not result in grammatical error. Indeed, as the United States itself observes and accepts, the drafters of Article XXI(b) chose to depart from this rule as regards subparagraph (iii), since the word "taken" there unquestionably relates to the word "action" in the *chapeau*.<sup>95</sup> It is, therefore, conceivable that the drafters could also have chosen to depart from it as regards subparagraphs (i) and (ii).

7.57. Summing up on the question of whether the *chapeau* together with each subparagraph constitute a single relative clause, we are not persuaded by the construct of a "single relative clause" argued by the United States because it does not work for the third subparagraph. In contrast, the reading that the relative clause ends in the *chapeau* is, in our view, grammatically sound and also consistent with the provision separating out, structurally and visually, the *chapeau* from the subparagraphs.

7.58. Under the latter reading (favoured by Hong Kong, China and third parties who have expressed views on this aspect), the structural analysis ends here, as it would be clear that the phrase "which it considers" does not belong in the same structural element as the subparagraphs and, therefore, cannot extend to them. In contrast, under the former reading (favoured by the United States), *if* one were to accept it, the existence of a single relative clause is not enough to link the phrase "which it considers" to the subparagraphs. Whether this is the case, depends on what the phrase "which it considers" relates to in the text of the supposed single relative clause.<sup>96</sup>

7.59. We, therefore, turn to examining what the phrase "which it considers" relates to.

#### 7.3.3.2.2.2 What the phrase "which it considers" relates to

7.60. The verb "consider" is used transitively, that is, it requires a direct object.<sup>97</sup> The word immediately following the verb "considers" is the adjective "necessary". These two words ("considers necessary"), thus, belong together. This is uncontested and both sides agree that what the invoking Member considers "necessary" is subject to unilateral determination.<sup>98</sup>

7.61. However, this does not mean that the subparagraphs are also covered by this specific use of "considers", i.e. in combination with "necessary". Indeed, the subparagraphs are not about what action the Member considers necessary, but about whether that action pertains to specific circumstances. From the United States' point of view, it is reserved to the invoking Member to *consider* that this is the case:

[A]n invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one "which it considers necessary for the protection of its essential security interests". Second, the action is one "which it considers" relates to the subject matters in subparagraph endings (i) or (ii) or "taken

<sup>94</sup> United States' response to Panel question No. 63, para. 262 (quoting Merriam Webster's Guide to Punctuation and Style 232 (1st edn 1995), (Exhibit USA-194) and The Harper's English Grammar 186-187 (Harper & Row, 1966), (Exhibit USA-195)).

<sup>95</sup> United States' second written submission, para. 26.

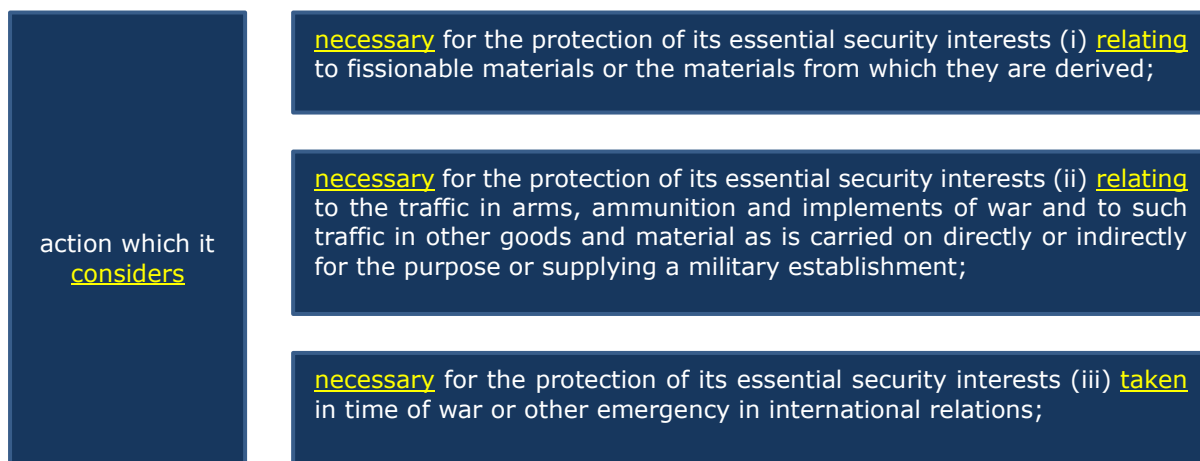
<sup>96</sup> The United States agrees that whether Article XXI(b) is self-judging in full or in part depends on what the words "which it considers" relate to in the text of the provision, see United States' response to Panel question No. 94, para. 87. In the United States' view, the phrase "which it considers" "qualifies" all of the elements in the relative clause, including the subparagraph ending, see also paras. 7.29 and 7.36.

<sup>97</sup> See Merriam Webster Dictionary online, definition of "transitive" <https://www.merriam-webster.com/dictionary/transitive> (accessed 29 September 2022). See also United States' response to Panel question No. 97, para. 106, fn 71 (where the United States observes that the "verb 'consider' in English is a complex-transitive verb that may take either a predicate complement or an infinitive complement" (referring to The Cambridge Grammar of the English Language, R. Huddleston and G. Pullum, eds. (Cambridge University Press 2002), (Exhibit USA-224))).

<sup>98</sup> The word "necessary" in turn is immediately followed by the preposition "for" which creates a link to what follows, namely the word "protection"; "protection", for its part, is linked through the word "of" to the terms "its essential security interest". We leave open, at this juncture of our analysis, what these linkages entail in terms of the self-judging nature of the *chapeau*. This question is a further interpretive issue that becomes relevant if and when we carry out a review under Article XXI(b).

in time of war or other emergency in international relations" as set forth in subparagraph ending (iii).<sup>99</sup>

7.62. In our view, therefore, the question is whether, the phrase "which it considers" does indeed serve twice: in the *chapeau* and in the subparagraphs.<sup>100</sup> This could be illustrated in the following way:



7.63. In considering this structure, we initially observe that there is no word "and" to link the first part of the supposed single relative clause containing the word "considers" (used with "necessary") to the second part, in which the same verb allegedly serves again (used with "relating to" or "taken"). The word "and" could serve as a coordinator.<sup>101</sup> The United States submits that in English a coordinator may be implied between grammatical units of equivalent status.<sup>102</sup> The United States, furthermore, contends that adding a coordinator would arguably change the meaning of the clause. As the United States explains, to revise the sentence with a coordinator would suggest that the language in the subparagraphs is not part of the relative clause in the *chapeau*.<sup>103</sup> The United States, furthermore, points out that placing the word "and" at the end of the *chapeau* would mean that subparagraphs (i) and (ii) would modify the word "action", not "interests" contrary to the US reading.<sup>104</sup>

7.64. In our view, the United States is correct in pointing out that the use of the word "and", in and of itself, would not lead to a reading under which two supposed uses of the verb "consider" are connected. Instead, it would link back to the word "action" and would, thus, be contrary to the reading that two of the subparagraphs do not link back to that word. Therefore, not only is there no coordinator here to connect the two supposed uses of the verb "consider", but also, to read such additional language into the text, would not provide the meaning intended by the United States.

7.65. The second observation is that "considers" would have to accord with the words that start the respective subparagraphs. In both subparagraphs (i) and (ii) this is the word "relating". The phrase "which it considers relating" arguably would require the addition of "to be" ("... considers *to be* relating") to read correctly. More importantly, however, it is not a construction that the United States' reading of the clause allows. This is because, in the United States' reading, those words are not meant to belong together. Instead, as the United States explains, the word "relating"

<sup>99</sup> United States' second written submission, para. 48; response to Panel question No. 96, para. 100.

<sup>100</sup> Hong Kong, China describes this as doing "double duty"; see Hong Kong, China's comments on the United States' response to Panel question No. 94, para. 61.

<sup>101</sup> A coordinator is defined as "a coordinating conjunction", see Oxford English Dictionary online, definition of "co-ordinator": <https://www.oed.com/view/Entry/41068?redirectedFrom=coordinator#eid> (accessed 29 September 2022).

<sup>102</sup> United States' response to Panel question No. 96, para. 101, fn 68 (referring to The Oxford English Grammar, Oxford University Press, S. Greenbaum ed. (1996), (Exhibit USA-223)). We note that in the example provided in the exhibit, the grammatical units are separated by a comma.

<sup>103</sup> United States' response to Panel question No. 96, para. 102.

<sup>104</sup> United States' response to Panel question No. 96, para. 103.



modifies the phrase "essential security interests" and therefore directly links to this phrase.<sup>105</sup> To link "considers" to "relating", therefore, is not possible following the United States' reading.

7.66. Turning to subparagraph (iii), the phrase "which it considers taken" may be less problematic than "considers relating", although, once again, the use of "to be" would seem more natural ("considers *to be* taken").<sup>106</sup> Still, even accepting the United States' argument that the words "to be" may be implied here<sup>107</sup>, a further problem is how to link the word "taken" to the word "considers" ("considers taken") rather than directly to the word "action" ("action taken"). The parties and third parties, including the United States, agree that "taken" relates to "action". There is, however, a difference as to whether it does so *via* the word "considers" or directly. As discussed above, only in the former case ("considers taken") is it for the Member to determine whether the action is taken in time of war or other emergency in international relations. Therefore, for it to be clear that "taken" relates to "considers" ("considers taken") rather than only to "action" ("action taken"), the words "and to be" would seem to be required. Thus, additional language would be required to link "considers" to "taken".

7.67. Based on the above, we consider that any attempt to read the supposed single relative clause in such a way that the verb "consider" serves both the word "necessary" in the *chapeau* and the respective subparagraphs, cannot be accepted as reflecting a proper ordinary meaning of the terms at issue. Such a reading would require additional language that is not included in the text. Furthermore, such a reading cannot be achieved without contradicting the United States' own reading of the construction of subparagraphs (i) and (ii) as directly relating to essential security interests.

7.68. Thus, it would seem that even if Article XXI(b) is read as containing one single relative clause that starts with "which it considers" and ends at the end of each of the three subparagraphs, this reading does not lead to the result argued by the United States: it does not extend the phrase "which it considers" to what is in the subparagraphs.

7.69. Our preliminary conclusion, therefore, is that we see no basis in the text for a reading under which there is a single relative clause *and* the phrase "which it considers" governs the subparagraphs as well as the *chapeau*. In contrast, the reading under which the relative clause ends in the *chapeau* and the subparagraphs directly relate to the word "action" is grammatically sound. Under that latter reading, the word "action" is, thus, doubly qualified, namely by the relative clause containing the phrase "which it considers", on the one hand, and by the subparagraphs, on the other hand.

### 7.3.3.3 Comparison of the three authentic language versions

7.70. Our analysis, up to this point, has focused on the English version of the provision. The parties have also submitted arguments on the structure of the text in the other two, equally authentic, language versions, i.e. the French and Spanish versions.<sup>108</sup> As noted above, neither the parties nor the third parties question that the grammatical structure of a sentence is part of the ordinary meaning of the relevant treaty terms. We, therefore, now turn to examining the grammatical

<sup>105</sup> See para. 7.37 above. One may argue that there is nevertheless some link to the word "consider" in that "relating" links to "essential security interests", which in turn links to "protection of", which in turn links to "necessary for". However, this (somewhat indirect) link is to the *first* use of the verb "consider" (namely "consider necessary") – or, as the United States would say, the "first element" of consideration. As noted above, this first use makes the *necessity* of the action subject to unilateral determination, but not the question whether that action relates to fissionable materials or traffic in arms, see para. 7.61 above.

<sup>106</sup> We note that this is also how the United States uses it when arguing that "it is the Member that considers the action *to be* 'taken in time of war or other international emergencies'", see United States' response to Panel question No. 96, para. 97. (emphasis added)

<sup>107</sup> United States' response to Panel question No. 97, para. 106, fn 71 (referring to *The Cambridge Grammar of the English Language*, R. Huddleston and G. Pullum, eds. (Cambridge University Press 2002), (Exhibit USA – 224)).

<sup>108</sup> We note that Article 33(1) of the Vienna Convention provides:

When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

Pursuant to Paragraph 2(c)(i) of the GATT 1994, the text of the GATT 1994 shall be authentic in English, French, and Spanish.



structure in those language versions under either of the proposed readings, which we have examined above.

7.71. For ease of reference, we set out the three language versions of Article XXI(b) next to each other in the following table:

<b>Article XXI: Security Exceptions</b>	<b>Article XXI: Exceptions concernant la sécurité</b>	<b>Artículo XXI: Excepciones relativas a la seguridad</b>
<i>Nothing in this Agreement shall be construed</i>	<i>Aucune disposition du présent Accord ne sera interprétée</i>	<i>No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que</i>
[...]	[...]	[...]
<i>(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests</i>	<i>b) ou comme empêchant un Membre de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</i>	<i>b) impida a un Miembro la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas:</i>
<i>(i) relating to fissionable materials or the materials from which they are derived;</i>	<i>i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</i>	<i>i) a las materias fisionables o a aquellas que sirvan para su fabricación;</i>
<i>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</i>	<i>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</i>	<i>ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</i>
<i>(iii) taken in time of war or other emergency in international relations; or</i>	<i>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</i>	<i>iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional; o</i>

### 7.3.3.3.1 Arguments of the parties and the third parties

7.72. The United States points to divergences between the English and French texts, on the one hand, and the Spanish text, on the other, regarding the use of the terms "relating", "*se rapportant*" (French) and "*relativas*" (Spanish). The United States submits that these differences do not permit a coherent reading of Article XXI in the Spanish version and must therefore be understood in the context of the English and French versions to produce the best understanding of these texts.<sup>109</sup> The United States, furthermore, suggests that some of the differences may be translation errors as they do not align with the Spanish text as written in Article XIVbis(1)(b)(iii) of the General Agreement on Trade in Services (GATS) and Article 73(b)(iii) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which it argues are more consistent with the English and French versions. The Panel should, therefore, understand the ordinary meaning of Article XXI(b) as written in those two agreements (serving as immediate context) instead of the GATT 1994 itself.<sup>110</sup>

7.73. As for the use of the feminine plural "*relativas*" in the Spanish version, which on account of its gender cannot accord with the masculine plural noun "*intereses*" as in "*intereses esenciales de*

<sup>109</sup> United States' first written submission, para. 168.

<sup>110</sup> United States' first written submission, paras. 176-177.

*su seguridad*" ("essential security interests"; "*intérêts essentiels de sa sécurité*"), the United States refers to the need to reconcile the different language versions pursuant to Article 33(4) of the Vienna Convention. The United States considers that the most appropriate way to reconcile the textual differences between the texts is to interpret Article XXI(b) such that all three subparagraph endings refer back to "any action which it considers".<sup>111</sup>

7.74. In Hong Kong, China's view the United States has no basis to imply that there is a mistake in the authentic Spanish text of Article XXI(b) of the GATT 1994.<sup>112</sup> Furthermore, Hong Kong, China submits that the alternative interpretation the United States proposes to reconcile the three authentic texts is necessitated only by its own flawed interpretation whereas Hong Kong, China's interpretation gives harmonious effect to all three texts.<sup>113</sup> Hong Kong, China also contends that the proposed alternative interpretation is inconsistent with the United States' own interpretation.<sup>114</sup>

7.75. Among the third parties Canada, the European Union, Russia, and Switzerland commented specifically on the potential differences in the three language versions. Like Hong Kong, China they submit in essence that the Spanish version supports the reading that the word "action" relates to all three subparagraphs and is therefore separate from the relative clause in the *chapeau*.<sup>115</sup>

### 7.3.3.3.2 Panel's assessment

7.76. The parties' arguments primarily concern the United States' reading of Article XXI(b). We, therefore, first address the specific arguments made by the United States in support of its own reading to see whether this changes our preliminary conclusion above that this reading has no basis in the text.

7.77. We recall that the United States' reading of the English text, as discussed above, revealed two problems: (a) that subparagraph (iii) cannot be construed as pertaining to one single relative clause starting at "which it considers", since the word "taken" unquestionably refers to the word "action" in the *chapeau*, which is outside the relative clause; and (b) that, the word "considers" only relates to "necessary"<sup>116</sup> and cannot be construed to also relate to the subparagraphs.

7.78. With this in mind, we turn to the French version first. While it is correct, as the United States suggests, that one could read the introductory words of subparagraphs (i) and (ii) (*se rapportant*) as relating to "*intérêts de sécurité essentiels*", these terms are separated by a colon, which is placed at the end of the *chapeau*. This clear break in the sentence, which does not exist in the English version, constitutes an additional challenge to the construct of a single relative clause. In addition, as with the English version, the word "*appliquées*" unquestionably accords with the word "*mesures*" in the *chapeau* and is, therefore, outside the relative clause.

7.79. Furthermore, as in the English version, the verb "*estimer*" only relates to "*nécessaires*" and cannot be construed as also relating to the subparagraphs. First, this is because there is no coordinator to link the two supposed uses of the verb "*estimer*", and as seen above, there is even a colon at the end of the *chapeau*, which marks a break.

7.80. Second, regarding the subparagraphs, it would seem that it is not possible for the verb "*estimer*" to be directly followed by "*se rapportant*".<sup>117</sup> In any event, this would break the link between "*intérêts*" and "*se rapportant*" contrary to the United States' reading. Finally, as regards

<sup>111</sup> United States' first written submission, para. 186.

<sup>112</sup> Hong Kong, China's response to Panel question No. 62, para. 245.

<sup>113</sup> Hong Kong, China's response to Panel question No. 62, paras. 248-249.

<sup>114</sup> Hong Kong, China's response to Panel question No. 62, para. 248.

<sup>115</sup> Canada's third-party response to Panel question No. 45, paras. 126-128; European Union's third-party response to Panel question No. 45, paras. 132-142; Russia's third-party response to Panel question No. 45, p. 11-13; and Switzerland's third-party response to Panel question No. 45, paras. 36-42.

<sup>116</sup> As noted in fn 98 above we leave open at this juncture of our analysis what the linkages between the words following the word "necessary" entail in terms of the self-judging nature of the *chapeau*. This question is a further interpretive issue that becomes relevant if and when we carry out a review under Article XXI(b).

<sup>117</sup> The verb "*estimer*" must be followed either by an "*adjectif attribut*" or by and "*infinitive ou subordonnée*", see Petit Robert Dictionary online, definition of "*estimer*": <https://dictionnaire.lerobert.com/definition/estimer> (accessed 29 September 2022). Thus, the correct use would seem to be "*estimera ... qu'elles se rapportent*".

the phrase "*estimer appliquées*", even assuming that it is possible as a construct<sup>118</sup>, as with the English version, additional language would be needed to make clear that "*appliquées*" refers back to "*estimer*" rather than directly to the word "*mesures*" in the *chapeau*.<sup>119</sup>

7.81. Turning, next, to the Spanish version, we find that it is not possible based on any of the subparagraphs to construe the provision as consisting of a single relative clause. Even if we were to accept the United States' suggestion to read the text as set out in Article XIVbis(1)(b)(iii) of the GATS and Article 73(b)(iii) of the TRIPS Agreement<sup>120</sup> rather than as in Article XXI(b) itself<sup>121</sup>, the Spanish text is unequivocal that all three subparagraphs relate to the word "*medidas*" in the *chapeau*. That word, as in the other language versions, is placed before the relative clause and, therefore, does not link to the word "*estime*".<sup>122</sup>

7.82. As noted above, the United States suggests that the "idiosyncrasies" in the Spanish text can be reconciled with the English and French versions by reading all three subparagraph endings as referring back to "any action which it considers".<sup>123</sup> We do not see, however, how the United States' suggested reading reconciles the supposed differences between the Spanish version and the English and French versions as these differences seem to remain.<sup>124</sup> In any event, it does not solve the problem of connecting the subparagraphs to the verb "consider" rather than directly to the noun "action" in any of the three languages. Furthermore, with specific regard to the Spanish version, in all three subparagraphs the phrase "*estime relativas*" reads incorrectly, based on Spanish grammar rules<sup>125</sup>, is separated by punctuation even in the GATS and the TRIPS Agreement versions,<sup>126</sup> and would require additional language, either in the version of the GATT 1994 or that of the GATS and the TRIPS Agreement, to make clear that "*relativas*" or "*aplicadas*" relates to "considers" ("*estime*") rather than directly to "*medidas*".<sup>127</sup>

<sup>118</sup> "*estimera ... qu'elles s'appliquent ...*".

<sup>119</sup> "*estimera nécessaires ...et d'être appliquées en temps de guerre ...*".

<sup>120</sup> The *chapeau* in Article XIVbis(1)(b) of the GATS and Article 73(b) of the TRIPS Agreement in their respective authentic text in Spanish reads "*impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad*"; and subparagraph (iii) reads "*aplicadas en tiempos de guerra o en caso de grave tensión internacional*";.

<sup>121</sup> We do not agree with the United States to the extent that it argues that the inclusion of a comma and "*relativas*" in the *chapeau* "may be a translation error" (United States' first written submission, para. 172). The GATT 1994 was clear in indicating the authentic version of its text in Spanish. Paragraph 2(c)(iii) of the GATT 1994 provides that "the authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41". As Hong Kong, China points out, the drafting history of the Spanish text of Article XXI(b)(iii), including the agreed rectifications in document MTN.TNC/41, clarifies that the drafters had several opportunities to correct "errors" in the text. (Hong Kong, China's response to Panel question No. 62, paras. 242-246). Moreover, the United States invites us to consider the Spanish text of Article XIVbis(1)(b) of the GATS and Article 73(b) of the TRIPS Agreement as "immediate context" for understanding the ordinary meaning of the Spanish text of Article XXI(b) of the GATT 1994. What the United States in essence requests us to do is to ignore the authentic Spanish text of Article XXI(b) and to replace it with the authentic Spanish text of other provisions (Article XIVbis(1)(b)(iii) of the GATS and Article 73 of the TRIPS Agreement). This would go against the prescription in Article 33(1), referred to above, that the authentic texts of a treaty are equally authoritative in each language insofar as it suggests that the authentic Spanish text of the GATT 1994 is not authoritative.

<sup>122</sup> In addition, as in the French version, the *chapeau* ends with a colon thus clearly marking a break, whether in the GATT 1994 or in the GATS/TRIPS version. Furthermore, in the GATT 1994 version a comma separates the word "*relativas*" in the *chapeau* from the preceding relative clause.

<sup>123</sup> United States' first written submission, para. 186.

<sup>124</sup> We do not understand the United States to change its view that subparagraphs (i) and (ii) continue to relate to "security interests".

<sup>125</sup> The construction "*estime ... relativas a*" is not correct given that "*estimar*" is a verb of judgment. According to the Real Academia Española de la Lengua, "el verbo *estimar* se construye con mayor frecuencia con adjetivos de naturaleza modal (*conveniente, impropio, necesario, oportuno*)" (Real Academia Española y Asociación de Academias de la Lengua Española, *Nueva gramática de la lengua española* (2009) §38.7k). The adjective "*relativo*" does not express qualities or properties, it is an adjective of relationship that in Article XXI(b) modifies the noun "*medidas*". As the adjective "*relativas*" therefore cannot follow the verb "*estime*", the correct use to convey a link between "*medidas*" and "*relativas*" would seem to be "*estime ... que sean relativas*".

<sup>126</sup> As noted above, we do not agree with the United States that the authentic Spanish version of the GATT 1994 suffers from translation errors. See fn 121 above.

<sup>127</sup> "*estime necesarias ... y que sean aplicadas en tiempos de guerra o en caso de grave tensión internacional*".

7.83. In sum, in our view the United States' reading of Article XXI(b) in the other two authentic versions presents even greater problems than its reading of that provision in the English version.

7.84. We turn to testing Hong Kong, China's and the third parties' reading of the French and Spanish versions of the text. As noted above, following this reading of the structure of Article XXI(b) the word "action" in the *chapeau* would be doubly qualified: (i) by the relative clause starting with "which it considers" in the *chapeau* and ending at the end of the same; and (ii) by the subparagraphs individually acting as "noun phrases". In the English version of the text, our analysis of this structure did not reveal any grammatical issues.

7.85. Beginning with the French text, we note that it is possible to read the relative clause in the *chapeau* as ending at the end of the *chapeau*. Indeed, the colon at the end of the *chapeau* indicating a break, supports that reading. Furthermore, while the words "*se rapportant*" in subparagraphs (i) and (ii) could be read as relating to "*intérêts essentiels de sécurité*", they can also be read as directly relating to the word "*mesures*". With subparagraph (iii) unquestionably doing so, it is possible to read all three subparagraphs as relating to the word "*mesures*" and, therefore, qualifying this word independently from the relative clause in the *chapeau*.

7.86. As for the Spanish version, as noted above, all three subparagraphs unquestionably relate to the word "*medidas*". To read them as qualifying that word independently from the relative clause in the *chapeau*, therefore, makes sense, both in Article XXI(b) itself, and in the (slightly differently worded) Article XIVbis(1)(b)(iii) of the GATS and Article 73(b)(iii) of the TRIPS Agreement. Additionally, the placement of "*relativas*" in the *chapeau* of Article XXI(b), its separation through a comma from the preceding text, and the colon following it, all reinforce this reading.

7.87. Thus, we find that both the French and the Spanish versions, following this reading, align with the reading of the English text and the need to reconcile differing interpretations does not arise.

#### 7.3.3.4 Conclusion on ordinary meaning

7.88. Having examined the structure of the text of Article XXI(b) in all three authentic languages, we have discerned a clear meaning, namely that the phrase "which it considers" does not extend to the subparagraphs.<sup>128</sup> This is the case even if one were to accept the structure advocated by the United States, namely that the subparagraphs are the continuation of a single relative clause that starts in the *chapeau*. Even under this proposed structure (which, as noted above, does not work for the third of the three subparagraphs), nothing connects what is in those subparagraphs to the verb "consider". That verb thus does not do "double duty", but instead only relates to the adjective "necessary" in the *chapeau*. Therefore, in our assessment the United States' reading is not supported by the text.<sup>129</sup>

7.89. The grammatical structure of Article XXI(b) as discerned from the text, thus, suggests that what is in the subparagraphs is not subject to the invoking Member's own determination but is instead subject to objective determination by a panel. The role of the subparagraphs, thus, would be to circumscribe (and limit) the circumstances in which the invoking Member may take action which it considers necessary for the protection of its essential security interests.

7.90. Our finding that the United States' reading is not supported by the text has important implications for the next steps in our interpretive analysis. As the text of Article XXI(b) does not

<sup>128</sup> We note that our analysis of the ordinary meaning of Article XXI(b)(iii) differs in some respects from the approach taken by the panel in *Russia – Traffic in Transit* (Panel Report, *Russia – Traffic in Transit*, paras. 7.63-7.66), due perhaps to our more detailed focus on the text and structure of the provision (see also fn 130 below on the text-based approach to interpretation in the Vienna Convention).

<sup>129</sup> We note that our conclusion that the United States' reading is not supported by the text of Article XXI(b) does not rest on whether such reading, as argued by Hong Kong, China, would render the subparagraphs ineffective. Rather, it is based, as explained above, on our understanding of the grammatical structure of the provision. We do not therefore need to address the question, extensively discussed among the parties and third parties, whether the United States' reading would be contrary to the effectiveness principle (see United States' responses to Panel question No. 46, paras. 205-216, and No. 47, paras. 217-223; second written submission, paras. 49-57; Hong Kong, China's responses to Panel question No. 46, paras. 153-159, and No. 47, paras. 160-162). We also note that the panel in *Russia – Traffic in Transit* questioned the *effet utile* of the subparagraphs if the determination of the circumstances therein were left exclusively to the discretion of the invoking Member, see Panel Report, *Russia – Traffic in Transit*, para. 7.65.

allow for such an interpretation, there is no need to test that reading against the context and the object and purpose of the treaty. Comporting with the rules of treaty interpretation, neither the context nor the object and purpose of a treaty can validate an interpretation that is not supported by the ordinary meaning of the treaty terms and override another interpretation that *does* result from those treaty terms.<sup>130</sup> In terms of next steps, therefore, the focus of our analysis will be on the reading that we have found to have a basis in the text, namely, the one submitted by Hong Kong, China and the third parties. It is this reading that we test against context and object and purpose of the treaty.

### 7.3.4 Context

#### 7.3.4.1 Introduction

7.91. Article 31(1) of the Vienna Convention states that "a treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* ... ." The International Law Commission (ILC) in its Commentary explaining the role of context in interpretation, referred to the following statement from the International Court of Justice (ICJ):

If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.<sup>131</sup>

7.92. We are, thus, called upon to consider whether the meaning that we have discerned "makes sense" in the context of other relevant provisions in the GATT 1994 and elsewhere in the covered agreements.

7.93. The parties have submitted arguments regarding an extensive number of provisions that serve as context for the interpretation of Article XXI(b). Below we discuss these in four separate sections, namely, (i) the immediate context in the remaining paragraphs of Article XXI; (ii) Article XX; (iii) various provisions in different agreements that vest judgment in the Member or in another entity; and (iv) other provisions under the DSU.

#### 7.3.4.2 Immediate context in the remaining paragraphs of Article XXI

7.94. The parties first refer to the immediate context in Article XXI itself. For ease of reference, we set out the relevant paragraphs of Article XXI:

Nothing in this Agreement shall be construed

---

<sup>130</sup> This is a direct consequence of the text-based approach to interpretation adopted in the Vienna Convention, which confines the interpreter to what is contained, expressly or by implication, in the text. The ILC describes it in the following way:

[Article 31 of the Vienna Convention] ... is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute. The textual approach, on the other hand, commends itself by the fact that, as one authority has put it, "*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties*". Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain. (Yearbook of the International Law Commission, 1966, vol. II, p. 220, para. (11) (fns omitted, emphasis original)).

The ILC also refers to the "primacy of the text as the basis for the interpretation". (Ibid. p. 218, para. (2)).

<sup>131</sup> Yearbook of the International Law Commission, 1966, vol. II, p. 221, para. (12) (referring to ICJ, Advisory Opinion, Competence of the General Assembly for the Admission of a State to the United Nations, (1950) ICJ Reports, p. 8).

(a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) ...; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

#### 7.3.4.2.1 Arguments of the parties and the third parties

7.95. According to the United States, 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). The United States considers that at least in some instances a Member exercising its rights under Article XXI(a), and thus withholding information the disclosure of which it considers to be contrary to its essential security interests, may thereby not be able to demonstrate that its measure meets whatever standards the panel is applying. According to the United States, a panel must therefore avoid any interpretation of Article XXI(b) that could undermine or even invalidate the effectiveness of Article XXI(a).<sup>132</sup>

7.96. Furthermore, the United States points to the absence of the phrase "which it considers" in Article XXI(c). The United States submits that the selective use of the phrase highlights that, under Articles XXI(a) and XXI(b) it is the judgment of the Member that controls. In its view, the Panel should recognize and give meaning to such deliberate use of the phrase and not reduce these words to "inutility".<sup>133</sup>

7.97. Hong Kong, China rejects the relevance of Article XXI(a) as context. Hong Kong, China notes that the United States has not invoked Article XXI(a) in this case. Furthermore, Hong Kong, China submits that it finds it difficult to imagine circumstances in which a Member could not disclose sufficient facts to establish the *prima facie* applicability of each subparagraph, in cases where a subparagraph is, in fact, applicable. Accordingly, Hong Kong, China does not see a conflict between Articles XXI(a) and XXI(b).<sup>134</sup>

7.98. As regards the absence of the phrase "which it considers" in Article XXI(c), Hong Kong, China argues that this means that Article XXI(c) is objectively reviewable in its entirety. Hong Kong, China contrasts this with Article XXI(b), which, as it acknowledges, commits to the discretion of the invoking Member the determination of whether an action is necessary for the protection of essential security interests.<sup>135</sup> Hong Kong, China, therefore, considers that this interpretation gives meaning and effect to the phrase "which it considers" without depriving all other elements of Article XXI(b) of meaning.<sup>136</sup>

7.99. Among the third parties Canada, the European Union, Norway, Russia, and Switzerland comment on the immediate context of Article XXI(a) and/or Article XXI(c) taking positions similar to that of Hong Kong, China.<sup>137</sup>

#### 7.3.4.2.2 Panel's assessment

7.100. We address the arguments regarding Article XXI(a) and Article XXI(c) separately.

<sup>132</sup> United States' first written submission, paras. 50-51; second written submission, paras. 63-65.

<sup>133</sup> United States' first written submission, para. 52.

<sup>134</sup> Hong Kong, China's response to Panel question No. 50, paras. 164-167.

<sup>135</sup> As noted above, in Hong Kong, China's view, the invoking Member's exercise of discretion is subject to the invoking Member demonstrating that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, see para. 7.19 above.

<sup>136</sup> Hong Kong, China's response to Panel question No. 51, paras. 168-169.

<sup>137</sup> Canada's third-party responses to Panel question No. 33, paras. 88-89, No. 34, para. 90, and No. 35, para. 32; European Union's third-party responses to Panel question No. 33, paras. 95-97, and No. 34, para. 98; Norway's third-party response to Panel question No. 33, paras. 5-6; Russia's third-party responses to Panel question No. 33, p. 3, and No. 34, pp. 3-4; and Switzerland's third-party response to Panel question No. 33, paras. 11-14.



7.101. Regarding Article XXI(a), we understand the United States' argument to essentially aim at excluding Hong Kong, China's and the third parties' reading of Article XXI(b) (which is the reading we have adopted so far) on the grounds that it deprives Article XXI(a) of its meaning and effect.

7.102. To interpret the subparagraphs as not being covered by the phrase "which it considers", in our view, does not deprive Article XXI(a) of its meaning and effect. First and foremost, there are general and potentially far-reaching transparency/publication obligations in the GATT 1994, such as those in Article X, and Article XXI(a) appears to be essentially directed at such obligations. Second, assuming that Article XXI(a) has any relevance on the disclosure of information in WTO dispute settlement proceedings, including those relating to situations of war or other emergencies in international relations, its existence does not imply that the determination of those situations must be self-judging. It implies at most that, if a case ever came up where the party invoking Article XXI(b) could not disclose any information relating to the existence of such situations because it would be contrary to its essential security interests, then it could potentially invoke Article XXI(a) as an explanation not to provide certain sensitive information to a panel. In other words, there is no need to give meaning and effect to Article XXI(a) by holding that subparagraph (iii) is entirely self-judging.

7.103. Indeed, the very existence of Article XXI(a), to us, suggests that the reading under which the subparagraphs are subject to review by a panel, is the correct reading. This is so because Article XXI(a) is premised on a scenario in which a Member could actually be requested to provide information. That scenario does not exist under the United States' reading of Article XXI(b) since the mere invocation of that provision would exclude any review or inquiry and a Member could not be required to provide any information whatsoever.<sup>138</sup> Thus, under the United States' reading of Article XXI(b), Article XXI(a) would not have any meaning and effect, whereas under the reading adopted here, it would. In other words, it is this reading that gives both Articles XXI(b) and XXI(a) meaning and effect.

7.104. Turning to Article XXI(c), we agree with the United States that the absence of the phrase "which it considers" in this provision is relevant context to the presence of the same language in Article XXI(b). However, the parties do not disagree that the phrase "which it considers" must be given meaning and effect. Both the United States' reading, and the reading adopted by us give it such meaning and effect, albeit to a different extent. In our view, therefore, this argument does not say anything about whether the phrase "which it considers" relates to the subparagraphs of Article XXI(b).

#### **7.3.4.3 Article XX of the GATT 1994**

7.105. The parties also discuss Article XX of the GATT 1994 as relevant context. For ease of reference, we set out below an abbreviated version of this provision:

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

(a) necessary to protect public morals;

(b) necessary to ...

<sup>138</sup> See also Switzerland's third-party response to Panel question No. 33, paras. 12-13 where Switzerland argues that Article XXI(a) does not establish that a Member cannot provide information regarding its essential security measures or interests. Rather, they argue that this provision notes that a Member does not need to provide information "the disclosure of which" it considers contrary to its essential security interests. In this respect the provision therefore acknowledges that there might be situations in which a Member does not have to disclose certain information, but not that a Member may decline to provide any information whatsoever related to its essential security measures or the underlying security interests. On the contrary, a Member acting under Article XXI(a) would be required to explain why the disclosure of certain information is contrary to its essential security interests.

(c) relating to ...

...

(j) ...

### 7.3.4.3.1 Arguments of the parties and the third parties

7.106. The United States contrasts the structure of Article XX with that of Article XXI(b) to contend that it would make no sense for a panel examining an Article XXI(b) defence to proceed in the same manner as it would when examining Article XX, namely to first determine applicability of the subparagraphs. Thus, according to the United States, the Appellate Body's finding that the structure and logic of Article XX suggests a two-step analysis<sup>139</sup>, is not applicable under Article XXI(b).<sup>140</sup>

7.107. Hong Kong, China acknowledges that there are textual differences between Article XX and Article XXI(b) but submits that the similarities between the two provisions render the jurisprudence interpreting the term "relating to" in Article XX as well as the jurisprudence interpreting the structure of Article XX more generally, relevant to the interpretation of Article XXI(b).<sup>141</sup>

7.108. Among the third parties Brazil, Canada, the European Union, Norway, Russia, and Switzerland comment specifically on Article XX.<sup>142</sup> In their comments they mostly highlight the similarities in terms of structure between Articles XX and XXI(b) and, similarly to Hong Kong, China, contend that interpretive approaches to Article XX should be adopted in Article XXI(b) to the extent of those similarities.

### 7.3.4.3.2 Panel's assessment

7.109. Article XX is a relevant contextual provision insofar as it is, like Article XXI, an exception. As it also immediately precedes Article XXI(b), a comparison between the two exceptions seems appropriate.

7.110. The debate between the parties is fundamentally about similarities and differences between the text and structure of Article XX on the one hand, and the text and structure of Article XXI(b), on the other. Any such similarities and differences, however, are relevant only insofar as they impact on the specific interpretive question examined here.

7.111. As we see it, Article XX and Article XXI(b) each have their own structure and logic. Notably, Article XX does not include the phrase "which it considers" in qualifying the type of action that a Member could take to pursue certain policy objectives. In turn, Article XXI(b) does not include a limitation requiring that a measure not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade. In our view, therefore, for the specific purpose of resolving the interpretive question at issue here, a comparison between Article XXI(b) and Article XX is not helpful.<sup>143</sup> What the phrase "which it considers" extends to in Article XXI(b), cannot be resolved by comparison to a provision that does not contain that phrase.

<sup>139</sup> United States' first written submission, para. 56 (referring to Appellate Body Report, *US – Shrimp*, para. 119).

<sup>140</sup> United States' first written submission, para. 57.

<sup>141</sup> Hong Kong, China's response to Panel question No. 52, paras. 170-173.

<sup>142</sup> Brazil's third-party response to Panel question No. 36, paras. 59-63. Canada's third-party response to Panel question No. 36, para. 93. European Union's third-party submission, para. 25, Third Party Written Submission by the European Union in *United States – Certain Measures on Steel and Aluminium Products (DS544)* (European Union's third-party submission in DS544), (Exhibit EU-5), para. 54; and third-party response to Panel question No. 36, paras. 103-104. Norway's third-party response to Panel question No. 59, para. 37. Russia's third-party response to Panel question No. 36, p. 4; third-party statement, para. 15. Switzerland's third-party submission, paras. 28-31; third-party response to Panel question No. 36, paras. 16-17.

<sup>143</sup> We note that Article XX may provide contextual guidance for other interpretive questions referred to by the parties and the third parties, such as whether a panel is to review the subparagraphs in Article XXI(b) first, or whether the word "relating" has the same meaning in the two exceptions. Such questions, however, only become relevant if and when a review under Article XXI(b) is due. We, therefore, do not address them at this stage of the analysis.



7.112. As noted above, the contextual analysis serves to see whether the reading derived from the text makes sense when read with other provisions. In this regard, we consider that our reading according to which the phrase "which it considers" in Article XXI(b) does not extend to the subparagraphs does "make sense" when read in the context of Article XX. To have subparagraphs in Article XXI(b) that qualify action taken under that provision does not contradict Article XX which qualifies measures or action taken under that exception in a very different way.

#### **7.3.4.4 Provisions that vest judgment in the Member or in another entity**

7.113. The parties furthermore discuss as relevant context various provisions across the covered agreements that vest judgment in a Member or in another entity.

##### **7.3.4.4.1 Arguments of the parties and the third parties**

7.114. The United States likens Article XXI(b) to other provisions elsewhere in the covered agreements that also refer to action that a Member "considers" appropriate or necessary thus signalling that a particular judgment resides with that Member. More specifically, it lists the following: Article 18.7 of the Agreement on Agriculture, Article III(5) of the GATS, and Article 3.7 of the DSU. The United States refers to other provisions, which it describes as leaving certain judgments for the determination by a panel, the Appellate Body or a WTO Committee. The United States provides the following examples: Article 12.9 of the DSU and Article 4(1) of the ARO. Lastly, the United States refers to the following provisions as vesting particular consideration with a WTO Member, a panel, the Appellate Body or another entity: Article XXIII:1 of the GATT 1994, the sixth recital, and Articles 10.8.3 and 14.4 of the TBT Agreement, Articles 3.3, 4.11, 13.1, and 17.5 of the DSU, Article 4(2) of the ARO, Article 3(8) of the Agreement on Trade Facilitation (TFA), Articles XIV *bis* and XXIV(1) of the GATS, and Article III(I) of the Agreement on Government Procurement as amended in 2012 (GPA 2012).<sup>144</sup>

7.115. Furthermore, the United States contrasts Article XXI(b) with Articles 22.3, 26.1, and 26.2 of the DSU as examples of provisions where the judgment or discretion of a Member is circumscribed by additional language. The absence of such language in Article XXI(b), according to the United States, demonstrates that Members did not agree to subject a Member's essential security judgments to review by a WTO panel.<sup>145</sup>

7.116. Hong Kong, China comments on the United States' arguments regarding Articles 3.7, 22.3(b), 22.3(c), and 26.1 of the DSU as examples of provisions that have a similar structure to Article XXI(b) and that grant some discretion to the invoking Member subject to certain obligations or specifications for adjudicatory review.<sup>146</sup> More generally, Hong Kong, China makes the point that none of these provisions provides for an entirely self-judging standard that may not be second-guessed by a panel.<sup>147</sup>

7.117. Among the third parties Canada, the European Union, and Russia comment in particular on Articles 22.3, 26.1, and 26.2 of the DSU rejecting the United States' argument in line with Hong Kong, China's arguments above.<sup>148</sup>

##### **7.3.4.4.2 Panel's assessment**

7.118. All the provisions referred to by the United States (and commented on by Hong Kong, China and the third parties) are relevant context insofar as they demonstrate that across the covered agreements there exist provisions that specifically identify where the guiding judgment or appreciation resides in a given situation.

<sup>144</sup> United States' first written submission, paras. 58-60.

<sup>145</sup> United States' first written submission, paras. 62-64.

<sup>146</sup> Hong Kong, China's response to Panel question No. 54, paras. 182-188; second written submission, paras. 167-168.

<sup>147</sup> Hong Kong, China's second written submission, para. 168.

<sup>148</sup> Canada's third-party response to Panel question No. 37, para. 94; European Union's third-party response to Panel question No. 37, paras. 105-114; and Russia's third-party response to Panel question No. 37, pp. 4-5.

7.119. Furthermore, some of these provisions specifically provide that it is the Member's judgment and appreciation that is guiding. These provisions can, therefore, be directly compared to Article XXI(b) where, and to the extent that, this is also the case in that provision. The question here, however, is not how the Member's judgment and appreciation under Article XXI(b) are disciplined, but whether they extend to *all* of Article XXI(b), i.e. also to the subparagraphs of the provision in addition to the *chapeau*.

7.120. For that specific question, the provisions the United States referred to offer little or no contextual guidance. Most of them structurally do not resemble Article XXI(b) in that the question whether the Member's judgment and appreciation may or may not extend to parts of the provision does not arise.<sup>149</sup>

7.121. The only provisions that present a more elaborate structure and, like Article XXI(b), feature a *chapeau* and subparagraphs, are Articles 22.3(b), 22.3(c), 26.1, and 26.2 of the DSU, which the parties have also discussed in some detail. We, therefore, examine these to assess their contextual relevance to the interpretive question at issue.

7.122. Article 22.3(b) and (c) read as follows:

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

...

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

7.123. Subparagraphs (b) and (c) use the phrase "if that party considers that it is not practicable or effective" to suspend concessions in a particular manner. This phrase suggests that it is the Member's judgment controlling the assessment of whether it is "practicable or effective" to suspend concessions or other obligations. The *chapeau* also states, however, that the complaining party "shall apply the following principles and procedures", meaning that the complaining party must show factually that it weighed the considerations in the subparagraphs when deciding whether to suspend concessions or other obligations. The language in the *chapeau*, therefore, places a limit on the discretion exercised by the complaining party.<sup>150</sup>

7.124. The above shows that Article 22.3 of the DSU refers to a Member's judgment, while at the same time disciplining the exercise of that judgment through additional language ("shall apply the following"). The contextual relevance of this provision, according to the United States, is that Article XXI(b) does not feature such additional language. Absent such additional language, the United States submits that the phrase "which it considers" is therefore self-judging.<sup>151</sup> Hong Kong, China argues that the subparagraphs in Article XXI(b), similarly to the *chapeau* in Article 22.3, serve

<sup>149</sup> This is true, for example, for Article 3.7 of the DSU which the parties discuss at some length.

<sup>150</sup> The conclusion above is consistent with that reached by the Arbitrator in *EC – Bananas III (Ecuador)* (Article 22.6 – EC). There, the Arbitrator noted that the phrase "if that party considers" leaves "a certain margin of appreciation to the complaining party in arriving at its conclusions in respect of an evaluation of certain factual elements". The Arbitrator considered that the words "the complaining party shall apply the following principles and procedures" would allow arbitrators "to broadly judge whether the complaining party has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective" to seek suspension in the manner prescribed under the provision, see Decision by the Arbitrator, *EC – Bananas III (Ecuador)* (Article 22.6 – EC), para. 52.

<sup>151</sup> United States' first written submission, para. 62.

to limit the discretion of the invoking Member by specifying the circumstances in which the exception may apply.<sup>152</sup>

7.125. In our view, Article 22.3 of the DSU, while demonstrating that the exercise of a Member's judgment may be disciplined through additional language, is of limited contextual relevance to the interpretive question at issue. This is because the specific limitation in that provision and the language used to provide for it are too dissimilar from that which we are called upon to examine in the *chapeau* and subparagraphs of Article XXI(b). Because it is so dissimilar, the language in Article 22.3 of the DSU neither proves nor disproves the reading that the phrase "which it considers" in the *chapeau* of Article XXI(b) does not extend to the subparagraphs.

7.126. Turning to Article 26.1 of the DSU, this provision in relevant part, reads as follows:

*Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:*

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify and impair benefits ...<sup>153</sup>

7.127. As with Articles 22.3(b) and (c), this provision comprises a *chapeau* and enumerated subparagraphs. It also includes both subjective and objective elements. Its *chapeau* uses the language "where ... such party considers and a panel or the Appellate Body determines", referring partly to the judgment of an invoking Member and subjecting it to review. The enumerated subparagraphs also clearly set out the circumstances that limit the discretion of the invoking Member through the words "subject to the following".

7.128. Furthermore, Article 26.2 of the DSU, in relevant part, states as follows:

[A] panel may only make rulings and recommendations where a party *considers* that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired .... *Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph*, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. ... The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph ...<sup>154</sup>

7.129. Similarly to Article 26.1, this provision subjects the judgment of the invoking Member to review by a panel ("such party considers and a panel determines that").

7.130. The United States, as with Article 22.3, notes the qualifying language and submits that it is the absence of similar qualifying language in Article XXI(b) that demonstrates that Members did not agree to subject a Member's essential security judgments to review by a WTO panel.<sup>155</sup> For Hong Kong, China these provisions are similar to Article XXI(b) in that they are not entirely self-judging.<sup>156</sup>

7.131. In our view, as with Article 22.3 of the DSU, Articles 26.1 and 26.2 are of limited contextual relevance to the interpretive question at issue. While it is correct that Article XXI(b) does not feature the same additional language as Article 26, it has its own additional language, namely the subparagraphs, which serve a similar function of restricting a Member's judgment. Again, the specific

<sup>152</sup> Hong Kong, China's response to Panel question No. 54, para. 187.

<sup>153</sup> Emphasis added.

<sup>154</sup> Emphasis added.

<sup>155</sup> United States' first written submission, para. 64.

<sup>156</sup> Hong Kong, China's response to Panel question No. 54, para. 188.

restriction in Article 26 and the language used to provide for it, are too dissimilar from Article XXI(b) to provide any guidance for the interpretive issue here. Because it is so different, that language neither proves nor disproves the reading that the phrase "which it considers" in the *chapeau* does not extend to the subparagraphs.

7.132. We conclude, therefore, that the provisions referred to by the parties are of limited relevance to the interpretive issue at hand.

#### **7.3.4.5 Other provisions under the DSU**

7.133. The last category of provisions that the parties discuss as context to Article XXI(b) are certain provisions of the DSU, other than those examined above.

##### **7.3.4.5.1 Arguments of the parties and the third parties**

7.134. Certain third parties, namely Brazil, China, the European Union, Switzerland, and Ukraine, refer to several provisions under the DSU to contend that it would run counter to the objectives of dispute settlement or would prevent panels from fulfilling their mandate to read Article XXI(b) as entirely self-judging.<sup>157</sup> The provisions in question are the following: Articles 3.2, 3.3, 7.1, 7.2, 11, 23.1, and 23.2(a) of the DSU.

7.135. In response the United States submits that the self-judging nature of Article XXI(b) is established by the text of the provision and that nothing in the DSU calls for ignoring the plain language of Article XXI(b) or indicates that every term of every WTO provision must be subject to panel review.<sup>158</sup>

##### **7.3.4.5.2 Panel's assessment**

7.136. The question that this contextual argument raises is whether the United States' reading of Article XXI(b) runs counter to the above-referenced DSU provisions. As we explained above, we found that the United States' reading is not supported by the text of Article XXI(b). In our view, therefore, the question of whether such a reading also runs counter to the DSU provisions in question can be left open. What matters is whether the correct reading of the provision that we have discerned above based on the ordinary meaning of the text interpreted in accordance with Article 31(1) of the Vienna Convention runs counter to those DSU provisions. In the absence of any argumentation to the contrary, we do not see any reason to consider that it does.

#### **7.3.5 Object and purpose**

7.137. We now turn to testing the reading that we have discerned against the object and purpose of the GATT 1994 and the WTO Agreement more generally. We recall that pursuant to Article 31(1) of the Vienna Convention, "a treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*".<sup>159</sup> The role of an "object and purpose" analysis, thus, is somewhat similar to that of the "context" analysis, insofar as the ordinary meaning discerned is tested against the treaty as a whole.<sup>160</sup> We agree that "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."<sup>161</sup>

<sup>157</sup> Brazil's third-party submission, para. 7 (concerning Article 7.2 of the DSU); China's third-party submission, para. 16 (concerning Article 3.2 of the DSU); European Union's third-party submission in DS544, (Exhibit EU-5), paras. 39-45 (concerning Articles 3.2, 7.1, 7.2, 11, and 23 of the DSU); Switzerland's third-party submission, paras. 40-48 (concerning Articles 3.3, 11, 23.1, and 23.2(a) of the DSU); Ukraine's third-party submission, paras. 7-8 (concerning Articles 3.2, 3.3, 7.2, and 11 of the DSU).

<sup>158</sup> United States' response to Panel question No. 53, paras. 231-239.

<sup>159</sup> Emphasis added.

<sup>160</sup> See Yearbook of the International Law Commission, 1966, vol. II, p. 221, para (12): "[T]he ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose." Also, *ibid.* reference to Permanent Court of International Justice's Advisory Opinion on the Competence of the ILO to Regulate Agricultural Labour: "it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".

<sup>161</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p.106, fn 20.

### 7.3.5.1 Arguments of the parties and the third parties

7.138. The United States considers that the object and purpose of the GATT 1994 establishes that Article XXI(b) is self-judging. It points to the preamble of the GATT 1994 which provides for "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade". The United States infers from this language that Members acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions in Article XXI, and specifically contemplated that Members will make use of the exceptions, consistent with their text.<sup>162</sup>

7.139. The United States also submits that the security and predictability of the multilateral trading system would not be well-served under Hong Kong, China's reading because it would lead to panels evaluating security issues and recommending that Members withdraw or modify their essential security measures.<sup>163</sup>

7.140. Hong Kong, China contends that several aspects of the object and purpose of the GATT 1994 support a reading that Article XXI(b) is not entirely self-judging. In this regard, Hong Kong, China refers to statements by the panel report in *Russia – Traffic in Transit* and submits that security and predictability would be undermined if Article XXI(b) were read to be entirely self-judging.<sup>164</sup>

7.141. Among the third parties, Brazil, Canada, the European Union, Russia, Switzerland, and Ukraine similarly to Hong Kong, China, reject the US reading as contrary to the object and purpose and consider that security and predictability would be undermined if Article XXI(b) were considered to be entirely self-judging.<sup>165</sup>

### 7.3.5.2 Panel's assessment

7.142. The parties discuss two aspects as forming part of the object and purpose of the GATT 1994, and more generally, the covered agreements. These are, on the one hand, the "mutually advantageous arrangements", referred to in the preamble of the GATT 1994<sup>166</sup>, which describe the balance struck between the various rights and obligations; and, on the other hand, the security and predictability of the multilateral trading system specifically referred to in Article 3.2 of the DSU.<sup>167</sup> We understand the parties to agree that both these aspects have a rightful place in the description of the object and purpose of the GATT 1994 and of the covered agreements in general.

7.143. The reading that we test against this object and purpose, which is the only reading that is supported by the text, is that the phrase "which it considers" in the *chapeau* of Article XXI(b) does not extend to the subparagraphs of the provision.

<sup>162</sup> United States' first written submission, paras. 65-67.

<sup>163</sup> United States' opening statement at the first meeting of the Panel, para. 68; closing statement at the first meeting of the Panel, para. 11; and second written submission, paras. 80 and 209.

<sup>164</sup> Hong Kong, China's response to Panel question No. 55, paras. 189-192.

<sup>165</sup> Brazil's third-party response to Panel question No. 38, paras. 64-67. Canada's third-party response to Panel question No. 38, paras. 95-98. European Union's third-party response to Panel question No. 38, paras. 115-117. Russia's third-party response to Panel question No. 38, pp. 5-6. Switzerland's third-party submission, paras. 32-34. Ukraine's third-party response to Panel question No. 38, paras. 14-16.

<sup>166</sup> The preamble (which is the original preamble of GATT 1947) reads in relevant parts as follows:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce ...

<sup>167</sup> Article 3.2 of the DSU reads in relevant part: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." In prior cases these two aspects have also been formulated together as one object and purpose of the WTO Agreement, see Appellate Body Report, *EC – Chicken Cuts*, para. 243 (where the Appellate Body agreed with the panel that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994.").

7.144. With this in mind, we do not believe that the argument regarding the balance struck between obligations and exceptions can help prove or disprove whether Article XXI(b) is self-judging. This argument seems to be somewhat circular because the understanding of where the balance has been struck seems to rest entirely on the result of the very interpretation that is being tested.<sup>168</sup> Thus, to say that the provision is entirely self-judging because its self-judging nature is part of the balance struck is as correct as saying that the provision is only partly self-judging because that is part of the balance that was struck. We, therefore, do not draw any conclusions for our interpretation from this aspect of the object and purpose.

7.145. Regarding security and predictability, we understand the United States' argument to be directly aimed at rejecting the reading discussed here. We have three observations in this regard.

7.146. First, we recall the narrow scope of the interpretive question here, namely, whether the circumstances described in the subparagraphs of Article XXI(b) are subject to review by a panel. At issue, therefore, is not whether, and if so how, a panel would discuss in any form the security issues that may arise from such circumstances.

7.147. Second, we are cognizant that the international institutional framework in which the WTO operates, has the United Nations at the centre of multilateral action dealing with the maintenance of international peace and security.<sup>169</sup> The United Nations is therefore the main international organization for the discussion of security issues generally. The WTO was established to provide the "common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement".<sup>170</sup> To that extent, the WTO was entrusted with providing the multilateral framework on international trade.<sup>171</sup> Within the covered agreements, there are provisions, other than Article XXI(b) that directly refer to security-related matters that affect international trade; chief among them is Article 2.2 of the TBT Agreement, which refers to "national security requirements". While recognizing that this concept is distinct from "essential security interests" as used in Article XXI(b) it nonetheless shows that WTO Members raise within the WTO institutional framework (e.g. within the TBT Committee) trade-related concerns with respect to security measures taken by Members.<sup>172</sup> In this context, we consider that the political nature of essential security interests does not *in itself* warrant the exclusion of any evaluation thereof by a panel, particularly, bearing in mind our reading of the terms of Article XXI(b) described above.

7.148. Third, we consider that the security and predictability of the multilateral trading system are intricately related to Members pursuing unilateral trade-related action within the scope of the requisite multilateral review carefully framed and provided for in the WTO's dispute settlement mechanism.<sup>173</sup> In that sense, the reading discussed here serves the security and predictability of

<sup>168</sup> See also Switzerland's third-party submission, para. 33 (referring to "circular reasoning"); Canada's third-party response to Panel question No. 38, para. 98 (referring to "analytical leap").

<sup>169</sup> Article 1 of the Charter of the United Nations (UN Charter).

<sup>170</sup> Article 2.1 of the Marrakesh Agreement.

<sup>171</sup> We note that in response to a question from the Panel, the United States referred to certain provisions of the ITO Charter on how the ITO was meant to address political matters or issues with reference to the United Nations and the ICJ (Articles 86(3) and 96 of the ITO Charter). According to the United States, such provisions reflect that the ITO Charter negotiators recognized that the ITO would not be the appropriate forum for certain matters. (United States' response to Panel question No. 100, paras. 113-116). In this regard, we note that it is difficult to support the United States' conclusion without the benefit of any practical guidance from the operation of the ITO, which never existed beyond the text of the ITO Charter adopted by its negotiators. Additionally, as noted in this section the WTO Agreement does include a range of provisions that touch on issues relating to "security" matters.

We note that the institutional framework of the ITO Charter referred to by the United States was not incorporated into the GATT or the WTO. Moreover, we do not see how the differences of competence between the ITO and the United Nations may inform how the WTO generally, or its dispute settlement specifically, would transgress the security and predictability of the multilateral trading system by addressing issues of a political nature. We therefore do not see the context referred to by the United States contradicting the view set out in this paragraph.

<sup>172</sup> See United States' responses to Panel question No. 79, paras. 52-54, and No. 81, paras. 61-62 (referring G/TBT/N/CHN/1172, (Exhibit USA-216); G/TBT/N/CHN/1172 Regular Notification, Technical Barriers to Trade Information Management System, (Exhibit USA-217); and Committee on Technical Barriers to Trade, Minutes of the Meeting of 12-15 November 2019 (G/TBT/M/79), (Exhibit USA-218)).

<sup>173</sup> This is confirmed for instance by Article 23 of the DSU which, as the panel in *US – Shrimp* observed, "stresses the primacy of the *multilateral* system and rejects unilateralism as a substitute for the procedures foreseen in that agreement." (Panel Report, *US – Shrimp*, para. 7.43). (emphasis original)

the multilateral trading system by allowing for sufficient flexibility for Members to adopt the measures they consider necessary for the protection of their security interests, while at the same time ensuring that this flexibility is exercised within the limits intended by the drafters.

7.149. We underscore that we agree with the United States that the WTO should not become a forum to discuss security issues generally. Rather, the WTO Agreement and its annexes set forth the limited circumstances under which the WTO and its dispute settlement mechanism have been tasked with addressing security matters linked to international trade. Only in those circumstances, would it be appropriate for those issues to be addressed.

7.150. Summing up our object and purpose analysis, we do not see the reading that we have adopted as contradicting the object and purpose of the GATT 1994, and, more generally, that of the WTO Agreement. In particular, review by a panel of the subparagraphs of Article XXI(b), in our view, supports the security and predictability of the multilateral trading system.

### **7.3.6 Whether there is a subsequent agreement regarding the interpretation or application of Article XXI(b)**

7.151. Having examined the ordinary meaning, context, and object and purpose, we now turn to the final point under Article 31 of the Vienna Convention. This is whether there is a subsequent agreement within the meaning of Article 31(3)(a) on the self-judging nature of Article XXI, as submitted by the United States. Article 31(3)(a) requires that:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

#### **7.3.6.1 Arguments of the parties and the third parties**

7.152. The United States submits that such a subsequent agreement confirming the self-judging nature of Article XXI(b) was concluded in 1949 in the form of a GATT Council Decision in the GATT dispute *US – Export Restrictions (Czechoslovakia)* (1949 GATT Decision). Referring to the minutes of the GATT Council meeting, the United States considers relevant statements made by the United Kingdom, Cuba, Pakistan, and the GATT Council chairman to support the idea that Article XXI(b) of the GATT 1947 was considered self-judging. The United States also highlights that the rules of procedure existing at the time provided that "decisions shall be taken by a majority of the representatives present and voting".<sup>174</sup> These rules, according to the United States, neither restricted the contracting parties' ability to interpret the provisions of the GATT 1947, nor provided special procedures for adopting an interpretation of the provisions.<sup>175</sup>

7.153. Hong Kong, China argues that the 1949 GATT Decision does not qualify as a subsequent agreement pointing out that the 1949 GATT Decision pertains to a specific dispute. Hong Kong, China also highlights the fact that the decision was adopted by a majority vote and takes the view that a subsequent agreement must reflect consensus. Furthermore, on the substance of the decision, Hong Kong, China considers that the "actual course of events" in that dispute undermines the US position in this dispute that Article XXI(b) is entirely self-judging.<sup>176</sup>

7.154. Among the third parties, Canada, the European Union, and Russia comment on this issue taking positions similar to that of Hong Kong, China.<sup>177</sup>

#### **7.3.6.2 Panel's assessment**

7.155. We recall that this 1949 GATT Decision concerned a dispute between Czechoslovakia and the United States. Czechoslovakia, pursuant to Article XXIII paragraph 2 of the GATT 1947, had

<sup>174</sup> United States' first written submission, para. 76.

<sup>175</sup> United States' first written submission, paras. 68-78.

<sup>176</sup> Hong Kong, China's response to Panel question No. 56, paras. 193-202.

<sup>177</sup> Canada's third-party response to Panel question No. 39, paras. 99-101. European Union's third-party response to Panel question No. 39, paras. 118-120; European Union's third-party submission in DS544, (Exhibit EU-5), paras. 58-78. Russia's third-party response to Panel question No. 39, pp. 6-7.



requested a decision that the United States had failed to carry out its obligations under Article I through its administration of a certain export licence. The United States defended its measure primarily under Article XXI.<sup>178</sup> At the GATT Council meeting in question, the United States reiterated its proposal that the request be dismissed on the ground that the claim was not supported by facts.<sup>179</sup> Cuba, Pakistan and the United Kingdom intervened taking the view that the US measure was justified under Article XXI. The chairman, in light of the invocation of exceptions, reformulated the relevant question to be decided under Article XXIII paragraph 2 as being about "whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences."<sup>180</sup> There was a vote by roll-call, 17 voted against, three abstained and two were absent. Only Czechoslovakia voted in favour.<sup>181</sup>

7.156. In order for a decision to qualify as a subsequent agreement, the terms and content of the decision must express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.<sup>182</sup> The Appellate Body has specified that the extent to which any such agreement "will inform the interpretation and application of a term or provision ... in a specific case ... will depend on the degree to which it 'bears specifically' on the interpretation and application of the respective term or provision".<sup>183</sup> Such an agreement must also "clearly express[] a common understanding, and an acceptance of that understanding among Members" on the interpretive question at issue.<sup>184</sup>

7.157. We also note the ILC's Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties<sup>185</sup>, of which the United Nations General Assembly (UN General Assembly) took note in December 2018.<sup>186</sup> The definition of "subsequent agreement" contained in Draft Conclusion 4 specifically refers to an agreement between the parties "regarding the interpretation of the treaty or the application of its provisions". The Commentary to this Conclusion 4<sup>187</sup> explains that "[t]he parties must ... intend, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied", and refers, *inter alia*, to the Appellate Body position as described above.<sup>188</sup> Draft Conclusion 6 and its accompanying Commentary further specify that the identification of subsequent agreements requires "a determination whether the parties, by an agreement ..., have taken a position regarding the interpretation of the treaty" or "whether they

<sup>178</sup> Specifically, under Article XXI(b)(i), see Reply by the Vice-Chairman of the United States Delegation, Mr John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949), (Exhibit USA-15), p. 3.

<sup>179</sup> Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (Minutes GATT meeting 8 and 20 June 1949), (Exhibit USA-16), p. 5.

<sup>180</sup> Minutes GATT meeting 20 June 1949, (Exhibit USA-16), p. 9: "The Czechoslovakian representative had posed the question of whether or not such regulations conform to the provisions of Article I. The chairman, however, was of the opinion that the question was not appropriately put because the United States Government had defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I. The question should be put as expressed in the Agenda item, i.e. whether the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences."

<sup>181</sup> Minutes GATT meeting 8 and 20 June 1949, (Exhibit USA-16), p. 9.

<sup>182</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 262.

<sup>183</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 372. See also Appellate Body Report, *US – Clove Cigarettes*, para. 267.

<sup>184</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 267. In *US – Clove Cigarettes* and *US – Tuna II (Mexico)*, the Appellate Body found that a Doha Ministerial Decision and a TBT Committee Decision satisfied each of the necessary elements for demonstrating the existence of a "subsequent agreement". In both cases, the relevant decision was adopted by consensus after the establishment of the WTO and expressed a common understanding as to the interpretation or application of a provision of the TBT Agreement. (See Appellate Body Reports, *US – Clove Cigarettes*, paras. 263, 266, and 267; and *US – Tuna II (Mexico)*, paras. 370-373).

<sup>185</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10) (available at: [https://legal.un.org/ilc/reports/2018/english/a\\_73\\_10\\_advance.pdf](https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf) (accessed 29 September 2022)).

<sup>186</sup> UN General Assembly, Seventy-third session, Resolution of 20 December 2018, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, A/RES/73/202.

<sup>187</sup> The draft conclusions of the ILC are always to be read together with the accompanying commentaries (see Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), p. 16, Commentary to Draft Conclusion 1, para. (1)).

<sup>188</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), p. 30, Commentary to Draft Conclusion 4, para. (13) and fn 102, (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 371).

were motivated by other considerations".<sup>189</sup> Since the application of a treaty "almost inevitably involves some element of interpretation"<sup>190</sup>, an agreement "regarding the interpretation" of a treaty or an agreement "on the application" of that treaty both imply that "the parties assume a position regarding the interpretation of the treaty".<sup>191</sup> Draft Conclusion 10 further underlines that an "agreement under article 31, paragraphs 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept".<sup>192</sup>

7.158. Like Hong Kong, China and the third parties, we consider that the very nature of the procedure in which the 1949 GATT Decision was taken (namely dispute settlement under Article XXIII), excludes that this decision bears specifically on the interpretation and application of Article XXI. This is because the subject matter of the decision is not Article XXI itself, but rather the measure at issue (export licensing) as challenged by Czechoslovakia. By its very nature, therefore, the decision concerns the application of provisions (including Article XXI) to a particular set of facts in a particular case and is binding only on the parties to the dispute.<sup>193</sup> Consistent with this, the statements made during the Council meeting, including the United States' own statements<sup>194</sup>, bear on the application of Article XXI to the facts of that case, not on the nature of the provision. Similarly, the chairman's decision to reformulate what needed to be decided by the Council merely reflects the fact that the finding encompasses not only a possible violation (as requested by Czechoslovakia), but also a possible justification under the exceptions.<sup>195</sup>

7.159. We therefore disagree with the United States that the 1949 GATT Decision should be considered a subsequent agreement pursuant to Article 31(3)(a) of the Vienna Convention.<sup>196</sup>

### 7.3.7 Conclusion on interpretation under Article 31 of the Vienna Convention

7.160. We have considered the ordinary meaning of Article XXI(b) focusing primarily on the grammatical structure of the provision. Based on the structure that we discern from the text, the phrase "which it considers" in the *chapeau* of Article XXI(b) does not extend to the subparagraphs. It follows from this reading that Article XXI(b) is only partly self-judging in that the subparagraphs are not subject solely to the invoking Member's own determination. Instead, the subparagraphs are subject to review by a panel and a finding that the circumstances set out therein do not apply, means that the action cannot be justified under the exception.

7.161. We have tested this meaning against the context of Article XXI(b) and the object and purpose of the covered agreements and have confirmed that it makes sense.<sup>197</sup>

<sup>189</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), pp. 43 and 48, Commentary to Draft Conclusion 6, paras. (2) and (18). In this context, "interpretation" is the process by which the meaning of a treaty, including of one or more of its provisions, is clarified, and "application" encompasses conduct by which the rights under a treaty are exercised or its obligations are complied with, in full or in part. (Ibid. p. 43, para. (3)).

<sup>190</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), p. 44, Commentary to Draft Conclusion 6, para. (4). See also Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/CN.4/671, 26 March 2014, para. 5: "In fact, conduct by which the acting State cannot be said to assume a position regarding the interpretation of the treaty also cannot be undertaken 'in' its 'application'."

<sup>191</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), p. 44; Commentary to Draft Conclusion 6, para. (4).

<sup>192</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10), p. 75; Draft Conclusion 10 (1).

<sup>193</sup> For GATT decisions specifically, see Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 107 (referring to GATT Panel *European Economic Community – Restrictions on Imports of Dessert Apples*, para. 12.1).

<sup>194</sup> We agree, in this regard, with Hong Kong, China that the statements made by the United States seem to imply the view that it bore the burden of demonstrating that the measures at issue were in fact within the scope of one of the subparagraphs. (See Hong Kong, China's response to Panel question No. 56, para. 202).

<sup>195</sup> See also European Union's third-party submission in DS544, (Exhibit EU-5), para. 77.

<sup>196</sup> Given this, we can leave open what would have been the applicable procedure for adopting a subsequent agreement under GATT and whether such a subsequent agreement could have been adopted by a majority vote.

<sup>197</sup> We note that the panel in *Russia – Traffic in Transit* arrives at the same overall conclusion. See Panel Report, *Russia – Traffic in Transit*, para. 7.82.

7.162. As the meaning is clear, our interpretive exercise ends here. In particular, we do not need to have recourse to supplementary means of interpretation to determine the meaning of Article XXI(b). This would be required under Article 32 of the Vienna Convention<sup>198</sup> only if the interpretation according to Article 31 had left the meaning ambiguous or obscure or had led to a result which was manifestly absurd or unreasonable. Neither is the case here.

7.163. However, as noted above, recourse to supplementary means under Article 32 may also serve to confirm the meaning that results from the application of Article 31. Referring to this function of Article 32, the United States develops extensive arguments to demonstrate that the negotiating history of Article XXI(b) confirms its own reading, namely that the clause is entirely self-judging. As we have found above, this reading is not based on the text of Article XXI(b). Therefore, there can be no confirmation of that reading; what is not in the text cannot be confirmed by any argument on negotiating history.<sup>199</sup> While we therefore see no need to discuss the United States' arguments in detail, we have considered them and the information submitted in support of them as well as arguments and relevant information submitted by Hong Kong, China and the third parties or otherwise publicly available. We have done so with a view to establishing whether our own reading of Article XXI(b) can be confirmed. We note that the panel in *Russia – Traffic in Transit* has also examined the GATT and International Trade Organization (ITO) negotiating history with the same purpose.<sup>200</sup>

### 7.3.8 Negotiating history or other supplementary means of interpretation

#### 7.3.8.1 GATT (and ITO) negotiations

7.164. We begin with the negotiating history of the GATT 1947. The parties and third parties do not contest, nor do we disagree, that this is a supplementary means of interpretation under Article 32 of the Vienna Convention in respect of Article XXI(b) of the GATT 1994.<sup>201</sup>

7.165. The background on the ITO and GATT negotiations and the context of the specific proposals on Article XXI(b) have been summarized by the panel in *Russia – Traffic in Transit*.<sup>202</sup> For the purposes of our analysis, we recall that those negotiations took place between October 1946 and March 1948, on the basis of a proposal for the ITO advanced by the United States.<sup>203</sup>

7.166. The phrase "which it considers" was incorporated into the negotiating text as a result of a proposal tabled by the United States on 4 July 1947.<sup>204</sup> Along with some minor changes introduced

<sup>198</sup> Article 32 of the Vienna Convention provides as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable

<sup>199</sup> See also Yearbook of the International Law Commission, 1966, vol. II, p. 223, para (18):

[T]he Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation. It formulated article 27 [now 31] on that basis, making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty.

<sup>200</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.83-7.100. We note that that panel also dealt with some aspects of the Uruguay Round in the Appendix to the Panel Report, see Appendix, para. 1.61.

<sup>201</sup> United States' first written submission, para. 79; Hong Kong, China's response to Panel question No. 57, paras. 203-204. See also Canada's third-party response to Panel question No. 40, paras. 102-106; European Union's third-party submission in DS544, (Exhibit EU-5), paras. 79-81; and Switzerland's, third-party submission, para. 39.

<sup>202</sup> Panel Report *Russia – Traffic in Transit*, paras. 7.84-7.88.

<sup>203</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.84.

<sup>204</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (July 4, 1947), (Exhibit USA-25), p. 13, containing the United States' proposal of 4 July 1947. The clause was worded as follows:

ARTICLE 94. General Exceptions.

by the Legal Drafting Committee<sup>205</sup>, the text was included in the final ITO Charter draft of the Geneva Round as Article 94 under the heading "General Exceptions".<sup>206</sup> This text then formed the basis for Article XXI in the GATT 1947 that was adopted on 30 October 1947.<sup>207</sup>

7.167. When submitting its July 1947 proposal, the United States did not provide any specific explanation regarding the new phrase "which it considers" or any other aspect of the proposed clause on security exceptions. The only explanations, and the only discussion on the content of the security exceptions on the record of the negotiations, therefore, are those that took place at the meeting of the negotiating committee on 24 July 1947.<sup>208</sup> As the United States notes in its submission, a discussion was triggered by the delegate from the Netherlands who requested clarification on the meaning of a Member's "essential security interests" and suggested that this reference could represent "a very big loophole" in the ITO Charter.<sup>209</sup> In this connection, we consider it worth quoting the response that the United States' delegate gave in some detail<sup>210</sup> as it confirms our understanding that the exception was intended to be only partly self-judging. The United States' delegate stated:

We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: "by any Member of measures relating to a Member's security interests," because that would permit anything under the sun. Therefore, we thought it well to draft provisions which would take care of real security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.<sup>211</sup>

7.168. To us, the statement makes it clear that the provision was intended to be self-judging insofar as it would be for a Member to determine for itself what action was necessary for the protection of its security interests, but that the subparagraphs were intended to limit the exception to certain circumstances. Thus, the subparagraphs would serve the purpose of limiting the exception to situations or circumstances which may give rise to "real security interests", thereby counterbalancing a Member's right to determine what action was needed to protect its essential security interests. The United States' delegate emphasized the need for such a "balance" and described the proposal as "the best we could produce to preserve that proper balance".<sup>212</sup>

---

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

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

<sup>205</sup> E/PC/T/159, Report of the Legal Drafting Committee of 9 August 1947 (available at: <https://docs.wto.org/gattdocs/g/UN/EPCT/159.PDF>) (accessed 29 September 2022).

<sup>206</sup> Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment – Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947), (Exhibit USA-43).

<sup>207</sup> The text of the Protocol is available at [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/prov\\_appl\\_gen\\_agree\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf) (accessed 29 September 2022).

<sup>208</sup> Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947); & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (Minutes of the 24 and 30 July 1947 Negotiation Meetings), (Exhibit USA-30).

<sup>209</sup> United States' first written submission, para. 89 (referring to Minutes of the 24 and 30 July 1947 Negotiation Meetings, at 19 (Exhibit USA-30)).

<sup>210</sup> For a more extensive quote see Panel Report, *Russia – Traffic in Transit*, paras. 7.92-7.93.

<sup>211</sup> Minutes of the 24 and 30 July 1947 Negotiation Meetings, (Exhibit USA-30), p. 20 and Corrigendum.

<sup>212</sup> Minutes of the 24 and 30 July 1947 Negotiation Meetings, (Exhibit USA-30), p. 21.

7.169. We see nothing in the further course of the discussion at that 24 July 1947 meeting that contradicts this understanding.<sup>213</sup> In particular, we do not agree with the United States that an exchange on the availability of legal redress for the security exception demonstrates that the drafters understood that essential security measures could not be challenged as violating obligations in the underlying agreement.<sup>214</sup> That exchange was triggered by a concern raised by the Australian delegate that by moving the security exception to the end of the Charter the dispute settlement provision in the Commercial Policy Chapter (which, as the United States acknowledges, did not distinguish between breach or violation claims and non-violation claims) would not be available for the exception.<sup>215</sup> As the United States points out, the United States' delegate stated that "an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the member was violating the Charter".<sup>216</sup> However, the United States' delegate, in this context, also referred to action that was "not in conflict with the terms of Article 94" to then allude to the possibility of "some kind of redress" under the then existing dispute settlement clause.<sup>217</sup> In our view, the reference to the possibility of conflict with the terms of the security exception confirms our understanding that Article XXI has elements, namely the limitations set out in the subparagraphs, against which the action taken by a Member can be reviewed. Thus, while this specific debate (as well as later discussions that the United States refers to)<sup>218</sup> was about the availability of non-

<sup>213</sup> In particular, we do not see the chairman's reaction to the discussion as a confirmation that the security exception was intended to be entirely self-judging. As the United States reports, the chairman made the following remark:

In defence of the text, we might remember that it is a paragraph of the Charter of the ITO and when the ITO is in operation I think the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind to which the Netherlands Delegate has drawn our attention. (United States' response to Panel question No. 46, para. 214 (citing Minutes of the 24 and 30 July 1947 Negotiation Meetings, (Exhibit USA-30), p. 21)).

We note, and agree with, Pinchis-Paulsen's reading of the reference to "atmosphere in the ITO":

[T]he reference to the organization's "atmosphere" signals how delegations recognized the need to embed diplomacy within the institution for the success of the embryonic dispute settlement mechanism. In other words, "atmosphere" was not viewed as an alternative to a review via the ITO dispute settlement procedure. Rather, the "atmosphere" was an assumed aspect of the structure that supported the formal process. (M. Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, *Michigan Journal of International Law*, (2020) Vol. 41, 109-193, p. 172). (fn omitted)

<sup>214</sup> United States' first written submission, para. 94. We note that the clause providing legal redress was set out in Article 35(2) and stated in relevant part as follows:

If any Member should consider that any other Member is applying any measure, whether or not it conflicts with the terms of this Charter, or that any situation exists, which has the effect of nullifying or impairing any object of this Charter, the Member or Members concerned shall give sympathetic consideration to such written representations or proposals as may be made with a view to effecting a satisfactory adjustment of the matter.

<sup>215</sup> As the United States observes, Australia, around the same time, had submitted a proposal to make that distinction, United States' first written submission, para. 95.

<sup>216</sup> United States' first written submission, para. 91.

<sup>217</sup> The full quote is as follows:

It is true that an action taken by a Member under Article 94 could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of article 94, should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands (Minutes of the 24 and 30 July 1947 Negotiation Meetings, (Exhibit USA-30), pp. 26-27.)).

<sup>218</sup> United States' first written submission, paras. 98-104, referring to discussions in 1948 about a UK proposal that would have added the following to draft Article 94 of the ITO Charter:

If any action taken by a Member under paragraph 1 of this Article nullifies or impairs any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the Member taking the action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate; ....

We note that the discussion is based on the revised text of Article 94 (later Article 99), which, as we discuss in para. 7.171 below, more clearly links the subparagraphs directly to the word "action" in the *chapeau*. Reference was made to action as circumscribed in subparagraph (iii), i.e. as taken in time of war and other international emergency which was then described as "consistent with the Charter". In our view this confirms our reading that what was set out in the subparagraphs was assumed to qualify the action in question subject to objective determination. Indeed, the Indian delegate at the meeting expressed some doubt whether under the proposed new paragraph 2 the *bona fide* of an action allegedly coming within Article 94 could be questioned (see United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948),

violation claims, it was based on a scenario that assumed that an action was consistent with the terms of Article XXI including those that are subject to objective review.<sup>219</sup>

7.170. As noted above, the United States' proposal, with some minor changes, was adopted into the final ITO draft of the Geneva Round as Article 94 and formed the basis for Article XXI in the GATT 1947, which was adopted on 30 October 1947. While the GATT 1947 provisionally entered into force on 1 January 1948, the negotiations on the ITO Charter went into a final round ending with the Havana conference in March 1948, at which the final ITO Charter (Havana Charter) was adopted. We examined certain discussions in that round because we consider them to be relevant circumstances to the GATT 1947 negotiations given the parallelism between the negotiations up to that point, the close ties between the GATT 1947 and the ITO Charter and the close temporal proximity of this final ITO Charter negotiation round to the Geneva Round.<sup>220</sup>

7.171. Of particular interest, in our view, is a modification introduced in draft Article 94, which later became Article 99 of the Havana Charter. This was a change made, as explained in the minutes of the relevant negotiating committee, "in order to indicate more clearly that the subparagraphs refer to 'action' and not to 'interests'".<sup>221</sup> Thus the final text of the Havana Charter, in Article 99, read as follows:

Nothing in this Charter shall be construed

...

(b) to prevent a Member from taking, either singly or with other States, any action which it considers necessary for the protection of its essential security interests, *where such action*

(i) *relates* to fissionable materials or to the materials from which they are derived, or

(ii) *relates* to the traffic in arms, ammunition or implements of war, or to traffic in other goods and materials carried on directly or indirectly for the purpose of supplying a military establishment of the Member or of any other country; or

(iii) *is* taken in time of war or other emergency in international relations; or ...<sup>222</sup>

7.172. This text clearly spells out what our interpretation of Article XXI(b) has also yielded, namely that the subparagraphs are not part of the relative clause in the *chapeau*, but instead directly relate to the word "action" which precedes that sentence. The United States points out that this modification was not adopted during the Uruguay Round.<sup>223</sup> Although factually correct, this does not assist us in gaining a better understanding of the intentions of the original drafters. What is significant to us, is that the ITO Charter drafters intended "to indicate more clearly" what they understood the text of the 1947 Geneva Round (which resulted in Article XXI(b)) to mean. Given

(UK proposal on Article 94), (Exhibit USA-41), p. 2; and United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948), (Exhibit USA-42), p.3)).

<sup>219</sup> Canada's third-party response to Panel question No. 55, paras. 140-142; European Union's third-party submission in DS544, (Exhibit EU-5), paras. 95-101.

<sup>220</sup> We note that neither the United States nor Hong Kong, China contests the relevance of the continued ITO Charter negotiations under Article 32 of the Vienna Convention. Hong Kong, China's response to Panel question No. 100, para. 101 (referring to circumstances surrounding the conclusion of the GATT 1947); see also United States' own reliance on Havana Charter negotiations in 1948, United States' first written submission, para. 98.

<sup>221</sup> Minutes of the Sixth Committee, Sub-Committee I (on Article 94) of 13 January 1948, p. 4 (chairman making the suggestion for the change), (available at <https://docs.wto.org/gattdocs/q/UN/ECONF2/C6-W40.PDF> (accessed 29 September 2022)) and subsequent proposal by the United Kingdom, UK proposal on Article 94, (Exhibit USA-41), p. 2.

<sup>222</sup> Emphasis added.

<sup>223</sup> On this basis the United States asserts that the difference between the text of Article XXI(b) of the GATT 1994 and Article 99 of the Havana Charter supports the reading that Article XXI(b) is self-judging, see United States' response to Panel question No. 100, paras. 111-112.



the proximity of the ITO Charter and GATT negotiations, this understanding very likely reflects the understanding of the original negotiators of this clause in the Geneva Round in July 1947.

7.173. Before turning to the negotiating history of the Uruguay Round, we consider it apposite to briefly comment on the relevance of certain internal US documents that reflect internal discussions in the United States' delegation in July 1947 regarding the proposal on Article XXI(b) and the extent of its self-judging nature. The panel in *Russia – Traffic in Transit* refers to these documents based on information contained in an academic publication.<sup>224</sup> In this proceeding the United States submitted the relevant internal US documents as exhibits.<sup>225</sup> The United States' position is that these documents do not constitute a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention because they were not in the public domain, or at least in the hands of the parties, at the time of the negotiations.<sup>226</sup> The United States also submits that these documents, when viewed in context, confirm that Article XXI(b) is self-judging.<sup>227</sup> Hong Kong, China and certain third parties take the view that these documents may qualify as a supplementary means of interpretation under Article 32.<sup>228</sup> Furthermore, like the panel in *Russia – Traffic in Transit*, they view these documents as supporting their reading, namely that the scope of unilateral action accorded to the Member invoking the security exception does not extend to the subparagraphs of Article XXI(b).<sup>229</sup>

7.174. We do not need to address the question of whether these documents fall under Article 32 of the Vienna Convention. This is because, in this case, if anything, they would merely serve to confirm a specific understanding, not to determine the meaning, of Article XXI(b).<sup>230</sup> As the United States suggests, nothing prevents us from considering any available material.<sup>231</sup> Thus, even if these documents do not qualify under Article 32 of the Vienna Convention, nothing would prevent us from considering the information for the limited purpose it serves here, namely confirmation. In our view, these documents certainly can be seen as providing information on the United States' own understanding of, and internal differences regarding, its proposal of July 1947 even if they do not shed further light on the common intention of the drafters. Furthermore, in terms of the United States' own position, these documents confirm what we see clearly expressed in the

<sup>224</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.89-7.91 (referring to K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 145-154).

<sup>225</sup> See U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – 8:00 p.m. meeting – July 2, 1947, (Exhibit USA-69); U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo, (Exhibit USA-70); U.S. Delegation (Internal), Department of State, Memorandum of Conversation, "Security Exceptions to Proposed ITO Charter" June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder "ITO Charter – Security" (June 17, 1946), (Exhibit USA-73); U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946), (Exhibit USA- 74); U.S. Delegation (Internal), Letter from Coppock to Wilcox, "National Security Provisions in the Draft Charter" July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder "ITO Charter – Security" July 3, 1946, (Exhibit USA-75); U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2, (Exhibit USA-76).

<sup>226</sup> United States' first written submission, para. 139.

<sup>227</sup> United States' first written submission, paras. 144-161.

<sup>228</sup> Hong Kong, China's response to Panel question No. 59, para. 209; European Union's third-party response to Panel question No. 42, para. 124 (referring to them as "circumstances of the conclusion of GATT 1947 or other means of interpretation, keeping in mind that the list of supplementary means of interpretation in Article 32 of the VCLT is not exhaustive"); similarly, Canada's third-party response to Panel question No. 42, paras. 108-110.

<sup>229</sup> Hong Kong, China's response to Panel question No. 59, paras. 212-215; Canada's third-party response to Panel question No. 42, para. 125; European Union's third-party submission in DS544, (Exhibit EU-5), paras. 107-115.

<sup>230</sup> See paras. 7.162-7.163 above.

<sup>231</sup> United States' response to Panel question No. 101, paras. 117-121.



explanations the United States' delegate provided to the negotiating committee during the 24 July 1947 meeting as discussed above.<sup>232</sup>

7.175. Concluding on the GATT/ITO negotiating history, we understand the relevant statements of the United States' delegate explaining the United States' proposal on Article XXI as confirming our reading that the subparagraphs were intended to limit an invoking Member's right to take any action it considered necessary for the protection of its essential security interests. Furthermore, we find confirmation for our reading of the structure of Article XXI(b) in the modification applied to the provision by the negotiators of the Havana Charter, which clearly stated that the subparagraphs refer to "action" and not to "essential security interests," thereby excluding the subparagraphs from the scope of the phrase "which it considers" in the *chapeau*.

### 7.3.8.2 Uruguay Round negotiations

7.176. We now turn to the negotiating history of the Uruguay Round. We recall that the Ministerial Declaration of Punta del Este in 1986 mandated the Uruguay Round participants to "review existing GATT Articles, provisions and disciplines as requested by interested contracting parties and, as appropriate, undertake negotiations".<sup>233</sup> On this basis several proposals were submitted, including two proposals on Article XXI, tabled by Argentina and Nicaragua.<sup>234</sup> Both Argentina's and Nicaragua's proposals aimed, *inter alia*, at providing for certain procedural disciplines when invoking Article XXI(b) but also for interpretations of specific terms in this provision, namely "emergency in international relations" (Argentina and Nicaragua) and "essential security interests" (Argentina). Neither proposal, nor for that matter any proposal on substantive modifications of provisions of the GATT 1947, was adopted at the end of the Uruguay Round.<sup>235</sup> Instead, the GATT 1994 incorporated the GATT 1947 *tel quel*, qualified through several explanatory notes (which do not concern Article XXI).

7.177. On record are discussions on Argentina's and Nicaragua's proposals in the relevant negotiating group. The statements made by various delegates focused mostly on what was viewed as the political nature of action taken under the security exception.<sup>236</sup> In our view this information does not allow us to discern any common understanding of Article XXI(b) and the role of its subparagraphs, or, for that matter, the specific reasons why the proposals were not adopted. In other words, the information is not apt to confirm (nor contradict) our reading that the phrase "which it considers" does not extend to the subparagraphs.

7.178. Finally, we briefly turn to the negotiations on the GATS and TRIPS Agreement during the Uruguay Round, which concluded with the inclusion into those agreements of security exceptions that are directly modelled on Article XXI. This fact alone, however, does not tell us anything about how the drafters viewed this provision and whether they considered that the phrase "which it considers" extended to the subparagraphs. The United States points to unsuccessful attempts in the GATS negotiations to merge the security exceptions with a general exceptions clause modelled on Article XX. This would have meant that the security exceptions would also have been subject to the non-discrimination disciplines in the *chapeau* of that Article XX-like exception.<sup>237</sup> For the United States, the fact that these proposals were not adopted is proof, *inter alia*, that the GATS drafters, intended "that security exceptions were to be self-judging".<sup>238</sup> However, in our view, even accepting that the rejection of a proposal to merge the exceptions, would prove anything, it would at most show that the drafters did not intend to subject this security exception to the same disciplines as other exceptions. This is a different issue from whether what is in the subparagraphs in Article XXI

<sup>232</sup> See paras. 7.167-7.168 above.

<sup>233</sup> Ministerial Declaration at Ministerial Conference, Punta del Este, 1986, (available at <https://docs.wto.org/gattdocs/q/UR/TNCMIN86/MINDEC.PDF>) (accessed on 29 September 2022).

<sup>234</sup> Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988), (Exhibit USA-45); Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988), (Exhibit USA-44).

<sup>235</sup> See United States' response to Panel question No. 25, paras. 128-129.

<sup>236</sup> Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), (Exhibit USA-46), paras. 3-9.

<sup>237</sup> United States' first written submission, para. 114. We note that Article XIV(a) of the GATS, different from Article XX of the GATT 1994, includes a reference to measures "necessary to ... maintain public order". In footnote 5, this provision further provides that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society".

<sup>238</sup> United States' first written submission, para. 114.

may be reviewed by a panel. Accordingly, for these reasons we do not find this information and argumentation persuasive.

7.179. In conclusion, we see nothing in the negotiating history of the Uruguay Round that is of relevance to the interpretive question that we have considered in this section.<sup>239</sup>

### 7.3.9 Other information submitted by the parties or third parties

7.180. We have concluded our interpretive exercise under Articles 31, 32, and 33 of the Vienna Convention. Before turning to the overall conclusion to this section, however, we briefly address the role of other information that the parties have submitted acknowledging that it does not qualify under the Vienna Convention rules as relevant to the interpretive issue before us. The United States in particular, has submitted such information in support of its reading of Article XXI(b).<sup>240</sup> For the most part, this information concerns cases of invocation of Article XXI by individual GATT contracting parties or WTO Members, or positions taken by other GATT contracting parties or WTO Members in the context of such invocations.<sup>241</sup> In addition, the United States refers to the 1982 Decision of the GATT CONTRACTING PARTIES concerning the invocation of Article XXI.<sup>242</sup>

7.181. The United States takes the view that a panel is free to take such information into account. It argues that the DSU calls on panels to apply the customary rules of interpretation but does not otherwise limit the scope of materials that a panel may take into account when making findings in a particular dispute.<sup>243</sup> With regard to the examples of invocation of Article XXI and statements made in the context of such invocations, therefore, the United States considers that they "can inform or support the meaning of Article XXI as interpreted according to the customary rules of public international law and the Panel may find it instructive to consider such statements".<sup>244</sup> With regard specifically to the 1982 Decision of the GATT CONTRACTING PARTIES concerning the invocation of Article XXI, the United States submits that this decision is a decision within the meaning of paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement and that while the Panel is not required to take it into account as context, it may do so to the extent relevant to this dispute.<sup>245</sup>

7.182. We agree with the United States that a panel is free to consider any available information. This follows directly from its right to seek information, as set out in Article 13 of the DSU.<sup>246</sup> The question is for what purpose such information can be used or relied upon. We understand the United States to argue that it cannot be used or relied upon to arrive at an interpretation, as that exercise is governed by the customary rules of interpretation in international law; but that it may be used or relied upon to support or confirm an interpretive result. We agree. As long as such

<sup>239</sup> We note that the United States also refers to the DSU negotiations, and in particular to a proposal by Nicaragua, that aimed at achieving an outcome so that a party to a dispute would not be able to oppose examination of the applicability of GATT provisions and compliance with them (United States' first written submission, paras. 118-121). As the United States points out there was no discussion on this proposal, which was not retained. Therefore, we find it impossible to draw any relevant conclusions from it.

<sup>240</sup> United States' first written submission, paras. 189-214.

<sup>241</sup> The United States lists the following: statement by Ghana in the context of Portugal's accession in 1961; statements made in the context of Egypt's accession in 1970; statements made in the context of the Falkland/Malvinas conflict in 1982; statements made in the context of the GATT dispute *United States – Trade Measures affecting Nicaragua* in 1985; a reference to Article XXI in Switzerland's Trade Policy Review in 1996; and statements made in the context of the dispute *Nicaragua – Measures affecting Imports from Honduras and Colombia* in 2000.

<sup>242</sup> United States' first written submission, para. 201; and Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982), (Exhibit USA-52).

<sup>243</sup> United States' response to Panel question No. 101, paras. 117 and 121.

<sup>244</sup> United States' response to Panel question No. 101, para. 121.

<sup>245</sup> United States' response to Panel question No. 61, para. 255.

<sup>246</sup> See Appellate Body Report, *US – Shrimp*, para. 104 (where the Appellate Body observed the comprehensive nature of a panel's authority to seek information and technical advice and noted that "a panel also has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received").

information is not used to determine the meaning of the treaty text, we do not understand the Vienna Convention rules on treaty interpretation to somehow prohibit referring to it.<sup>247</sup>

7.183. Viewed from this perspective, however, it is also clear that referring to such information is not necessary and indeed may be altogether futile – as it would be in the present case regarding any statements made by individual Members on Article XXI(b). Those statements referred to by the United States represent only part of the debate which, when examined more comprehensively, constituted a "mixed bag" of views among the Members on how to read Article XXI.<sup>248</sup> This suggests that there was (or is) no consensus among Members on how to interpret Article XXI, which may be important background to this dispute. However, it does not relieve us of our duty to interpret the meaning of Article XXI(b), nor does it impact on the outcome of that interpretation.

7.184. As regards the 1982 Decision, we note that this decision provides for "procedural guidelines" for the application of Article XXI while explicitly acknowledging the absence of any formal interpretation of that provision.<sup>249</sup> As is clear, therefore, the decision does not address the substance of Article XXI(b). The United States finds support for its own reading that Article XXI(b) is entirely self-judging in certain language in the preamble of this decision.<sup>250</sup> Even if the United States' reading did have a basis in the text (which, we have found, it does not), the preambular language in question is of no relevance as it neither confirms nor contradicts any reading of Article XXI(b) (including our own). As the decision is not relevant to the interpretive question at issue, we can leave open whether it is a decision within the meaning of paragraph 1(b)(iv) of the GATT 1994 or Article XVI:1 of the WTO Agreement, as argued by the United States.

### 7.3.10 Overall conclusion on the interpretive question at issue

7.185. We find that Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase "which it considers" in the *chapeau* of that provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel.

7.186. We have, thus, established that there is some scope for review by a panel when Article XXI(b) has been invoked. This answers the threshold question that we had set out to address, namely whether Article XXI(b) is self-judging such that it excludes *any* review by a panel as argued by the United States.<sup>251</sup> As this is not the case, we reject the United States' request to (only) find that the United States has invoked its essential security interests and so report to the DSB.

<sup>247</sup> We note that the panel in *Russia – Traffic in Transit* comprehensively reviewed some of this information with a view to establishing whether it reflects subsequent practice under Article 31(3)(b). (See Panel Report, *Russia – Traffic in Transit*, para. 7.80 and para. 1.2 of Appendix).

<sup>248</sup> For examples of statements supporting the view that Article XXI was partly reviewable, see the European Union's third-party submission in DS544, (Exhibit EU-5), paras. 118-126. We also note that none of the statements made directly refers to the issue of the role of the subparagraphs.

<sup>249</sup> Its full wording is as follows:

Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

Noting that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement;

Recognizing that in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected;

That until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;

The CONTRACTING PARTIES decide that:

1. Subject to the exception in Article XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.

2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.

3. The Council may be requested to give further consideration to this matter in due course.

<sup>250</sup> The United States refers to recitals 1 and 3, see fn 249 above.

<sup>251</sup> We recall that reviewability of Article XXI(b) depends on two questions, namely (i) whether the clause is only partly self-judging and (ii) whether self-judging means that review by a panel is altogether

7.187. The next question is how to proceed from here. We note that the panel in *Russia – Traffic in Transit* reviewed the action under Article XXI(b) without first establishing whether there was any breach under the covered agreements. That panel took the view that an evaluation of the challenged measures under Article XXI(b) did not necessitate a prior determination that they would be WTO-inconsistent. The panel based this view on two inter-related considerations, namely that: (1) the circumstances in Article XXI(b)(iii) "involve a fundamental change of circumstances which radically alters the factual matrix in which the WTO-consistency of the measure at issue is to be evaluated"; and (2) there is "no need to determine the extent of the deviation of the challenged measure from the prescribed norm in order to evaluate the necessity of the measure."<sup>252</sup> We further note that the panel in *Saudi Arabia – IPRs* followed what it considered to be "common practice", namely to begin with an examination of the claims of inconsistency with the relevant covered agreement, to be followed, if any such inconsistency were found to exist, with an assessment of whether the aspect(s) of the measure(s) at issue would be covered by one or more exceptions.<sup>253</sup>

7.188. The United States does not take a specific position regarding these two choices consistent with its own view that a panel should not carry out any review whatsoever. Hong Kong, China<sup>254</sup> and certain third parties<sup>255</sup>, for their part, take the view that a panel is legally mandated to first establish whether the invoking Member has breached its obligations under the covered agreements before proceeding to a review of the exception in Article XXI(b).

7.189. We share Hong Kong, China's and the third parties' view. We consider, quite simply, that where there is no breach, there is nothing to justify. Moreover, as a justification under any available exception comes with a certain burden, even if minimal, we do not see how such a burden should be imposed on a Member even in the absence of any finding of breach of an obligation. That breach, therefore, must first be established.

7.190. On this basis we proceed to examining whether the United States has breached its obligation under Article IX:1 of the GATT 1994, which is the claim we have identified to be the most specific to the measure at issue.<sup>256</sup> If we find a breach of that provision, we turn to the exception in Article XXI(b) and examine what the review of that exception entails.

## **7.4 Whether the origin marking requirement is inconsistent with Article IX:1 of the GATT 1994**

### **7.4.1 Introduction**

7.191. Hong Kong, China claims that the origin marking requirement is inconsistent with Article IX:1 because it leads to goods produced in Hong Kong, China having to be marked as originating in China, a different WTO Member, and thus treats those goods less favourably than like goods of other countries.<sup>257</sup> The United States argues that Hong Kong, China fails to establish that the origin marking requirement accords "different treatment, much less 'less favorable' treatment" to products of Hong Kong, China, inconsistent with Article IX:1.<sup>258</sup>

7.192. Article IX of the GATT 1994 provides, in relevant part:

---

excluded (see para. 7.23 above). In this section we addressed the first question. Given that the conclusion to this first question answers the threshold issue of whether there is *any* reviewability, we do not need to address the second question at this juncture of our analysis. The second question will become relevant if and when a review under Article XXI(b) is due.

<sup>252</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.108.

<sup>253</sup> Panel Report, *Saudi Arabia – IPRs*, para. 7.6. The panel, however, noted that a "panel's choice on how to order and structure its analysis will often reflect, expressly or implicitly, one or more particular circumstances of the case at hand" (ibid. para. 7.3).

<sup>254</sup> Hong Kong, China's response to panel question No. 1, para. 4.

<sup>255</sup> Canada's third-party submission, para. 13; European Union's third-party statement, paras. 7-8; Norway's third-party statement, para. 21; and Switzerland's third-party submission, para. 49.

<sup>256</sup> See paras. 7.13-7.14 above.

<sup>257</sup> Hong Kong, China's second written submission, para. 123.

<sup>258</sup> United States' second written submission, para. 191. The United States provides its views "without prejudice to the U.S. position regarding Article XXI(b)" (Ibid. para. 153).

*Marks of Origin*

1. Each Member shall accord to the products of the territories of other Members treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

7.193. We need to assess the following three questions with respect to the origin marking requirement: (a) whether it is a marking requirement that falls within the scope of Article IX:1; (b) whether the products of Hong Kong, China are like products compared to those of any third country; and (c) whether the treatment accorded to the products of Hong Kong, China is less favourable than the treatment accorded to the like products of any third country. Before addressing each of these questions in turn, we set out some relevant factual background on the origin marking requirement.

**7.4.2 Factual background on the measure at issue**

7.194. We recall that the measure at issue consists of a requirement that imported goods produced in Hong Kong, China be marked to indicate that their origin is "China" and may no longer be marked to indicate that their origin is "Hong Kong".<sup>259</sup> The 11 August Federal Register Notice states that this requirement is "in light of the President's Executive Order on Hong Kong Normalization, issued on July 14, 2020, suspending the application of section 201(a) of the United States-Hong Kong Policy Act of 1992 (1992 Hong Kong Policy Act) to the marking statute, section 304 of the Tariff Act of 1930, with respect to imported goods produced in Hong Kong".<sup>260</sup>

7.195. Section 304(a) of the Tariff Act of 1930 requires that every article of foreign origin imported into the United States be marked "in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article".<sup>261</sup> Part 134 of Title 19 of the Code of Federal Regulations, which sets forth regulations implementing the country of origin marking requirements, defines "country of origin" as "the country of manufacture, production, or growth of any article of foreign origin entering the United States" and notes that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part".<sup>262</sup>

7.196. Prior to 2020, for goods produced in Hong Kong, China, USCBP accepted marks referring to "Hong Kong" without any additional requirement.<sup>263</sup> This practice appears to have been based on the combined operation of two instruments. First, Section 201(a) of the 1992 Hong Kong Policy Act provides that, after the resumption of sovereignty over Hong Kong, China by China on 1 July 1997, "the laws of the United States shall continue to apply with respect to Hong Kong ... in the same manner as the laws of the United States were applied with respect to Hong Kong before such date unless otherwise expressly provided by law or by Executive Order under section 202".<sup>264</sup> Second, a Federal Register Notice of 5 June 1997 specified that "goods produced in Hong Kong which are entered or withdrawn from warehouse for consumption into the U.S. on or after July 1, 1997, shall continue to be marked to indicate that their origin is 'Hong Kong'".<sup>265</sup> Section 202 of the 1992 Hong

<sup>259</sup> In its panel request, Hong Kong, China provides a list of five legal instruments and specifies that "[t]he measures at issue include, but are not limited to" those instruments. In its first written submission, Hong Kong, China explains that these five legal instruments "interacted with each other as described above to create the present circumstance in which the United States: (i) concludes, for the purpose of its origin marking requirement, that the People's Republic of China is the country of origin of goods manufactured or produced in the customs territory of Hong Kong, China; and (ii) requires goods imported from the customs territory of Hong Kong, China to be marked with this country of origin determination." (Hong Kong, China's first written submission, para. 20).

<sup>260</sup> 11 August Federal Register Notice, (Exhibits USA-7, HKG-10).

<sup>261</sup> Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304, (Exhibits USA-10, HKG-2).

<sup>262</sup> 19 C.F.R. Part 134, §134.1, (Exhibit HKG-3). The term "country" is defined as "the political entity known as a nation. Colonies, possessions, or protectorates outside the boundaries of the mother country are considered separate countries" (Ibid.).

<sup>263</sup> USCBP, Ruling Letter N306315 Re: The Country of Origin Marking of Body Spray Mists, (2 October 2019), (Exhibit HKG-7) and USCBP, Ruling Letter N308366 Re: The country of origin and marking of an electronic table top score board from Hong Kong, (8 January 2020), (Exhibit HKG-8).

<sup>264</sup> United States-Hong Kong Policy Act of 1992, Pub. L. 102-383, codified at 22 U.S.C. §5701-5732, (1992 Hong Kong Policy Act), (Exhibits USA-3, HKG-14).

<sup>265</sup> 62 Fed. Reg. 30927 (5 June 1995), (Exhibit HKG-6), p. 30928.



Kong Policy Act refers to this as "treatment ... different from that accorded the People's Republic of China".<sup>266</sup>

7.197. As noted above, on 14 July 2020, the US president issued Executive Order 13936 on Hong Kong Normalization (Executive Order 13936).<sup>267</sup> In that Executive Order 13936, the president determined that Hong Kong, China is no longer "sufficiently autonomous" to justify differential treatment in relation to China and suspended the application of Section 201(a) of the 1992 Hong Kong Policy Act to certain statutes, including Section 304 of the Tariff Act of 1930.<sup>268</sup> As a result, the 11 August Federal Register Notice notified the public that goods produced in Hong Kong, China "must be marked to indicate that their origin is 'China' for the purposes of 19 U.S.C. 1304".<sup>269</sup>

#### 7.4.3 Whether the challenged measure is a marking requirement under Article IX:1

7.198. Article IX of the GATT 1994 is entitled "*Marks of Origin*". Article IX:1 governs the treatment of products "with regard to marking requirements". The ordinary meaning of "mark" encompasses "[a] device, stamp, brand, label, inscription, etc., on an article ... identifying it or its holder, or indicating ownership, origin, quality, etc.". <sup>270</sup> Requirements to mark goods with an origin mark, such as the origin marking requirement at issue in this dispute, fall squarely within the scope of Article IX:1. The parties have not contested this.<sup>271</sup>

7.199. Therefore, we find that the challenged measure is a "marking requirement" that falls within the scope of Article IX:1.

#### 7.4.4 Like products

7.200. We recall that the origin marking requirement at issue applies to "goods produced in Hong Kong".<sup>272</sup> We also recall that, pursuant to Section 304 of the Tariff Act of 1930, the United States requires all imported goods (i.e. goods produced in any country and then imported into the United States) to be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of their country of origin. The two groups of products the treatment of which we need to compare are, therefore: (a) products for which the United States determines that they are produced in Hong Kong, China; and (b) products for which the United States determines that they are produced in any third country.

7.201. In prior cases, where challenged measures have distinguished between products solely on the basis of origin, panels have suggested that the likeness of the products so distinguished could be presumed.<sup>273</sup> The rationale behind this presumption of likeness is that where a measure provides

<sup>266</sup> 1992 Hong Kong Policy Act, (Exhibits USA-3, HKG-14), Section 202. We note that the "differential" nature of this treatment appears to also allow US authorities to consider Hong Kong, China as a potential "country of origin" within the meaning of the definitions in §134.1 of 19 C.F.R. Part 134, (Exhibit HKG-3)).

<sup>267</sup> Executive Order on Hong Kong Normalization of July 14, 2020, 85 Fed. Reg. 43413 (17 July 2020), (Executive Order 13936), (Exhibits USA-2, HKG-13), p. 43413.

<sup>268</sup> Section 2, Executive Order 13936, (Exhibits USA-2, HKG-13), p. 43414. The president made this determination pursuant to Section 202(a) of the United States-Hong Kong Policy Act of 1992, which provides that "whenever the President determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China, the President may issue an Executive order suspending the application of section 201(a) to such law or provision of law."

<sup>269</sup> 11 August Federal Register Notice, (Exhibits USA-7, HKG-10).

<sup>270</sup> Oxford English Dictionary online, definition of "mark": <https://www.oed.com/view/Entry/114169?rskey=CUyzXR&result=1&isAdvanced=false#eid> (accessed 29 September 2022). See also Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2999 and 7.3001.

<sup>271</sup> Hong Kong, China's first written submission, paras. 16, 20, and 71. United States' first written submission, para. 22; response to Panel question No. 4, paras. 15-17. See also para. 7.14 above.

<sup>272</sup> 11 August Federal Register Notice, (Exhibits USA-7, HKG-10).

<sup>273</sup> Most of those cases were raised under Articles I or III of the GATT 1994. See with specific reference to Article I:1, e.g. Panel Reports, *Colombia – Ports of Entry*, paras. 7.355-7.357; *US – Poultry (China)*, paras. 7.426-7.432; *Russia – Railway Equipment*, paras. 7.898-7.899; and *US – Tariff Measures (China)*, para. 7.83, appealed on 26 October 2020; with reference to Article III:2 of the GATT 1994, e.g. Panel Reports, *Argentina – Hides and Leather*, paras. 11.168-11.170; *China – Auto Parts*, para. 7.216; and *Brazil – Taxation*, paras. 7.134-7.137; and with reference to Article III:4 of the GATT 1994, e.g. Panel Reports, *Argentina – Import Measures*, paras. 6.274-6.275; *Canada – Autos*, para. 10.74; *Canada – Wheat Exports and Grain*

for a distinction based solely on origin, there will or can be products that are the same in all respects except for origin.<sup>274</sup> In these circumstances, an analysis of likeness based on a comparison of specific products would be unnecessary.

7.202. The origin marking requirement clearly distinguishes between products on the basis of their origin (Hong Kong, China or not). In addition, the origin marking requirement encompasses trade in virtually all goods of Hong Kong, China imported into the United States.<sup>275</sup> Thus, a product produced in Hong Kong, China, identical in all respects to a product produced in any third country (except for its origin) will be subject to the origin marking requirement, whereas the identical (except for its origin) product produced in any third country will not. In other words, the only distinguishing feature drawn by the origin marking requirement at issue between any product of Hong Kong, China, and any product of any third country in terms of applying the origin marking requirement, is origin.

7.203. For these reasons, we find that, products produced in Hong Kong, China, which are subject to the origin marking requirement, and products produced in any third country, which are not subject to the origin marking requirement, can be presumed to be "like products" within the meaning of Article IX:1.

## 7.4.5 Less favourable treatment

### 7.4.5.1 Introduction

7.204. Article IX:1 is an MFN obligation similar to other non-discrimination obligations in the GATT 1994.<sup>276</sup> It uses the terms "less favourable treatment" which appear in several provisions of the covered agreements<sup>277</sup>, and which have been extensively interpreted mostly in the context of Article III:4 of the GATT 1994.<sup>278</sup> We consider that these interpretations of the same terms – which serve a comparable function of defining the content of a non-discrimination obligation – may provide useful guidance for the interpretation of the relevant terms in Article IX:1.<sup>279</sup>

7.205. As an MFN obligation, Article IX:1 first requires a comparison between the treatment accorded to imported products from different countries<sup>280</sup> to ascertain whether there is a difference in treatment. A formal difference in treatment between imported products from different countries is, however, neither necessary, nor sufficient to establish that the imported products from the complaining party are accorded less favourable treatment than that accorded to like imported

---

*Imports*, para. 6.164 and fn 246; *China – Publications and Audiovisual Products*, paras. 7.975, 7.1446-7.1447; *India – Autos*, para. 7.174; *Thailand – Cigarettes (Philippines)*, para. 7.661; *Turkey – Rice*, paras. 7.214-7.216; *US – FSC (Article 21.5 – EC)*, paras. 8.132-8.135; and *Russia – Railway Equipment*, paras. 7.919-7.921. The Appellate Body has also applied this approach in the context of the non-discrimination obligations contained in the GATS (Appellate Body Report, *Argentina – Financial Services*, paras. 6.36-6.38).

<sup>274</sup> See, in that sense, Appellate Body Report, *Argentina – Financial Services*, para. 6.38.

<sup>275</sup> The origin marking requirement does not apply to products which are "excepted from marking" (see 11 August Federal Register Notice, (Exhibits USA-7, HKG-10)). The exemption of certain products from the requirements of marking is provided in general terms in section 3 of Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304, (Exhibit USA-10, HKG-2). We understand that the only products exempted from the origin marking requirement are those that are exempted pursuant to the general exemption, irrespective of their origin.

<sup>276</sup> Other MFN-type obligations are included in Articles I, III:7, IV(b), V:2, V:5, V:6 and XIII:1 (see Appellate Body Reports, *Canada – Autos*, para. 82, fn 72; *EC – Bananas III*, para. 231, fn 138).

<sup>277</sup> See Articles II:1(a), III:4, V:5 and V:6 of the GATT 1994, Annex C(1)(a) of the SPS Agreement; Article 2.1 of the TBT Agreement; and Article 11.4 of the TFA.

<sup>278</sup> See, for most recent examples, Panel Reports, *US – Renewable Energy*, para. 7.241-7.248, appealed on 15 August 2019; *Brazil – Taxation*, paras. 7.209-7.213.

<sup>279</sup> We are cognizant that any such guidance must take into account the specific nature of Article IX:1 as an MFN obligation and the context provided by the remaining provisions of the GATT 1994, including the immediate context of Article IX and its title "*Marks of Origin*". In that sense, we note that Article III:4 contains a national treatment rather than an MFN obligation. As the Appellate Body noted in *EC – Seal Products*, while those are "both fundamental non-discrimination obligations under the GATT 1994, their points of comparison, for the purposes of determining whether a measure discriminates between like products, are not the same" (Appellate Body Reports, *EC – Seal Products*, para. 5.79).

<sup>280</sup> In that sense, we agree with Hong Kong, China that "the need to undertake a *comparison* is inherent in the concepts of national treatment and MFN treatment – in the latter case, the one pertinent here, a comparison between the treatment accorded to the products of the complaining Member *vis-à-vis* the treatment accorded to the products of other countries" (Hong Kong, China's comments on the United States' response to Panel question No. 83, para. 32, emphasis original).



products of any third country.<sup>281</sup> The next step is to assess whether the challenged measure accords less favourable treatment by modifying the conditions of competition in the relevant market to the detriment of the imported products of the complaining party, and thus has a detrimental impact on the competitive opportunities for those products versus other imported products.<sup>282</sup> The parties seemingly agree with the elements of this legal standard.<sup>283</sup>

7.206. However, we understand the United States to argue that an assessment of less favourable treatment, including that under Article IX:1, is a holistic examination requiring assessment of "all the facts and circumstances, including the terms of the measures, its regulatory objectives, as well as the facts and circumstances illuminating such objectives and purposes".<sup>284</sup> We disagree with the United States to the extent that it suggests that the legal standard of "less favourable treatment" under Article IX:1 includes an inquiry as to whether the detrimental impact is related to, or can be explained by, the regulatory objective pursued by the measure at issue. Any such inquiry, in the context of the GATT 1994, takes place in, and is subject to, the conditions of, the exceptions in the GATT 1994.<sup>285</sup>

7.207. Accordingly, we consider that our analysis of the consistency of the origin marking requirement with Article IX:1 must focus on two elements: (a) whether the origin marking requirement accords to products of Hong Kong, China treatment that is different from the treatment accorded to products of other countries; and (b) if so, whether the origin marking requirement, by according such a different treatment, modifies the conditions of competition to the detriment of products of Hong Kong, China. We examine these two elements in turn.

#### 7.4.5.2 Difference in treatment

7.208. Hong Kong, China argues that the origin marking requirement accords less favourable treatment to goods imported from Hong Kong, China because it results in the fact that these goods "may not be marked with the full English name of their actual country of origin"<sup>286</sup>, contrary to goods from any third country. Hong Kong, China describes this less favourable treatment with respect to two aspects: (a) "the method of determining the country of origin", because the United States determines that the origin of products manufactured or processed in Hong Kong, China is "China" by applying a condition ("sufficient autonomy" from China) that it does not apply to the goods of other Members (difference in treatment with respect to origin determination); and (b) "the required

<sup>281</sup> See Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 177 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137); and *Thailand – Cigarettes (Philippines)*, para. 128 (referring to Appellate Body Report, *EC – Asbestos*, para. 100)).

<sup>282</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137).

<sup>283</sup> Hong Kong, China submits that "less favourable treatment in Article IX of the GATT 1994 exists where a measure modifies the conditions of competition in the relevant market to the detriment of the imported products of another Member." (Hong Kong, China's response to Panel question No. 17, para. 60). The United States agrees that "Article IX:1 is directed to preventing discrimination on the basis of origin" and that "a measure does not 'modif[y] the conditions of competition in the relevant market to the detriment of imported products,' if the alleged detriment is explained by factors unrelated to the foreign origin of the product." (United States' response to Panel question 17, para. 87 (quoting Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 and referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 and Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.118)).

<sup>284</sup> United States' responses to Panel question No. 75, paras. 39 and No. 17, para. 87. See also United States' responses to Panel question No. 14, para. 57, No. 74, paras. 25 and 30, and No. 75, para. 41 (with respect to Article 2.1 of the TBT Agreement). According to Hong Kong, China, "the reason why the United States accords less favourable treatment to the goods of Hong Kong, China ... does not change the fact that the United States is acting in violation of its obligation under Article IX:1." (Hong Kong, China's comments on the United States' response to Panel question No. 83, para. 44).

<sup>285</sup> See also the Appellate Body's reply to a similar argument raised by the European Union in the context of Articles I:1 and III:4 of the GATT 1994, Appellate Body Report, *EC – Seal Products*, paras. 5.92-5.130 (in particular, para. 5.125). See also Appellate Body Report, *US – Clove Cigarettes*, para. 179 and fn 372 (where the Appellate Body rejected an argument raised by the United States that is similar to the one discussed above) (referring to Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 and *Thailand – Cigarettes (Philippines)*, para. 134). We do not consider it necessary to express a view as to how this inquiry is addressed under Article 2.1 of the TBT Agreement. We also do not express a view as to whether, and how, the assessment of "less favourable treatment" under Article IX:1 would include an examination of other "facts and circumstances" mentioned by the United States.

<sup>286</sup> Hong Kong, China's first written submission, para. 72.

terminology to indicate that country of origin", because, if the United States determines that the origin of these products is "Hong Kong, China", it prohibits them from being marked with that name (difference of treatment with respect to terminology).<sup>287</sup>

7.209. We understand these two lines of argumentation to be based on two alternative scenarios, which represent mutually exclusive readings of the facts: either the United States determines that the origin of the affected products is "China", or the United States determines that the origin of the affected products is "Hong Kong, China". For that reason, to address Hong Kong, China's two lines of argumentation, we consider it necessary to examine each of the two alternative scenarios and make the relevant factual findings in the process.

#### **7.4.5.2.1 Whether there is a difference in treatment with respect to origin determination**

##### **7.4.5.2.1.1 Arguments of the parties<sup>288</sup> and the third parties**

7.210. According to Hong Kong, China, the United States determines that, for the purposes of origin marking, China is the "actual country of origin" of goods manufactured or processed in Hong Kong, China. This determination is based on the condition that Hong Kong, China be "sufficiently autonomous" from China. The United States does not apply such condition to determine the country of origin of the goods of any third country or other Member.<sup>289</sup>

7.211. Hong Kong, China's argument rests on the assertion that the origin marking requirement is necessarily based on a determination by the United States that goods manufactured or processed in Hong Kong, China originate in China. According to Hong Kong, China, this conclusion follows as a matter of US law and is confirmed by how the United States has interpreted and applied the origin marking requirement in practice.<sup>290</sup> Under US law, Hong Kong, China argues, origin marking requires to mark the imported article "[not] with the name of *any* country or *some* country, but specifically *the country of origin*"<sup>291</sup> as determined by USCBP.<sup>292</sup> Accordingly, a requirement to mark goods as made in "China" is necessarily based upon a determination that those goods originate in China.<sup>293</sup>

7.212. Hong Kong, China also argues that the origin marking requirement, by requiring goods from Hong Kong, China to be marked as made in "China", entails a determination *in fact* that goods manufactured or processed in Hong Kong, China originate in China.<sup>294</sup> Hong Kong, China considers

<sup>287</sup> Hong Kong, China's second written submission, paras. 121 -123. See also Hong Kong, China's opening statement at the second meeting of the Panel, paras. 19-20.

<sup>288</sup> We note that the parties' arguments on whether the origin marking requirement is inconsistent with the United States' MFN obligation are mostly developed with respect to Hong Kong, China's claims under Article 2(d) of the ARO and Article 2.1 of the TBT Agreement. Both parties refer to or incorporate those arguments when discussing the claim under Article IX:1. We therefore rely directly on the arguments under the ARO and the TBT Agreement to the extent relevant to our analysis under Article IX:1.

<sup>289</sup> Hong Kong, China's second written submission, para. 122.

<sup>290</sup> Hong Kong, China's second written submission, para. 30.

<sup>291</sup> Hong Kong, China's second written submission, para. 32. (emphasis original)

<sup>292</sup> Hong Kong, China's second written submission, paras. 33 and 34.

<sup>293</sup> Hong Kong, China's second written submission, para. 35. Hong Kong, China argues that the suspension of Section 201(a) of the 1992 Hong Kong Policy Act as it applies to Section 304 of the Tariff Act of 1930 required USCBP "to determine that the country of origin of goods manufactured or produced in Hong Kong, China is the People's Republic of China for the purpose of the origin marking requirement." (Hong Kong, China's first written submission, para. 19). For Hong Kong, China, the legal basis for this determination is to be found in the "sufficient autonomy" condition contained in Section 202(a) of the 1992 Hong Kong Policy Act, (Exhibits USA-3, HKG-14), as implemented through Executive Order 13936, (Exhibits USA-2, HKG-13) (Hong Kong, China's first written submission, para. 47). Hong Kong, China considers that the determination that the goods originate in China is made in the 11 August Federal Register Notice (Hong Kong, China's response to Panel question No. 8, para. 17).

<sup>294</sup> Hong Kong, China's second written submission, para. 36. See also Hong Kong, China's second written submission, paras. 48 and 50: "where a Member treats a good in practice as having the origin of a particular country, that treatment is necessarily based on a determination by that Member that the goods in question originate within that particular country. ... Requiring goods to be marked as having an origin of Country B necessarily reflects a determination by the importing Member that the goods have an origin of Country B."

this to be confirmed by USCBP's rejection, in 2020, of a request to use "Hong Kong" or "Hong Kong, China" as marks of origin.<sup>295</sup>

7.213. The United States disagrees that the application of the origin marking requirement involves a determination that the affected products are of origin "China". According to the United States, the requirement as to what marking is acceptable with respect to a particular country or territory is distinct from the determination that a specific country is the country of origin for marking purposes. Moreover, 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.<sup>296</sup>

7.214. For the United States, neither the 11 August Federal Register Notice nor Executive Order 13936 determines that any country is the country of origin with respect to any particular import.<sup>297</sup> The United States asserts that there is no separate marking requirement requiring a distinct determination that a good is from Hong Kong, China. Rather, the United States applies the same analysis that would apply to determine the origin of any good from any source.<sup>298</sup> The United States explains that this analysis is conducted on a case-by-case basis, using the US "normal rules of origin", and that if, as a result of this analysis, a finished good is "a product of Hong Kong, China", that product would be marked with "China".<sup>299</sup> According to the United States, the origin marking requirement involves only the "terminology used for marking goods produced in the geographic area Hong Kong, China".<sup>300</sup>

7.215. Among the third parties, China agrees with Hong Kong, China that the United States determines that imported goods manufactured or produced in Hong Kong, China have an origin of the People's Republic of China.<sup>301</sup> Canada, the European Union, and Japan emphasize the difference between the application of domestic rules of origin to determine the country of origin of a product and the requirement to mark this origin on the product.<sup>302</sup>

#### 7.4.5.2.1.2 Panel's assessment

7.216. Hong Kong, China's argument that the origin marking requirement accords less favourable treatment in respect of the method by which the United States determines the country of origin of goods produced in Hong Kong, China is based on the premise that the United States determines the origin of these products to be "China" (and not "Hong Kong, China"). We will therefore begin our analysis by assessing if that premise is correct, from a factual perspective.

7.217. It is undisputed that the origin marking requirement (a) applies to a set of products identified by the common trait of being "goods produced in Hong Kong"<sup>303</sup>; and (b) requires that these products be marked "to indicate that their origin is 'China' for the purposes of 19 U.S.C. 1304".<sup>304</sup>

7.218. The parties disagree whether this factual situation amounts to a determination by the United States that the products subject to the origin marking requirement are of "Hong Kong, China" or of "China" origin. The parties' disagreement appears to stem from their differing views on whether the requirement to use a certain mark of origin (in this case, the mark "China") is indicative of the origin determined by US authorities. Hong Kong, China argues that "the origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the

<sup>295</sup> Hong Kong, China's opening statement at the second meeting of the Panel, paras. 15-16 (referring to Information Letter dated 8 October 2020 from USCBP to Ms Brenda A. Jacobs, Re: Country of origin marking of goods produced in Hong Kong, HQ H313080, (8 October 2020 USCBP Letter), (Exhibit HKG-17)). See also response to Panel question No. 8, para. 19; second written submission, paras. 39-44; comments on the United States' response to Panel question No. 83, para. 35.

<sup>296</sup> United States' response to Panel question No. 5, paras. 18-19.

<sup>297</sup> United States' response to Panel question No. 5, para. 20; second written submission, paras. 164-165.

<sup>298</sup> United States' response to Panel question No. 4, para. 16.

<sup>299</sup> United States' response to Panel question No. 4, para. 16.

<sup>300</sup> United States' response to Panel question 9 para. 38.

<sup>301</sup> China's third-party submission, para. 9.

<sup>302</sup> Canada's third-party response to Panel question No. 1, paras. 1-2. European Union's third-party submission, paras. 45-46; response to Panel question No. 2, para. 5. Japan's third-party response to Panel question No. 1 to 6, para. 6. See also fn 326 below.

<sup>303</sup> 11 August Federal Register Notice, (Exhibits USA-7, HKG-10).

<sup>304</sup> 11 August Federal Register Notice, (Exhibits USA-7, HKG-10).

good".<sup>305</sup> The United States argues that "the decision as to the name with which a good must be marked is distinct from a determination as to in what geographic area a good was produced, and the rules applied to make that determination".<sup>306</sup>

7.219. We consider that the determination of the origin of a product is distinct from, and should not be conflated with, the trade policy instrument that makes use of this origin determination.<sup>307</sup> In other words, as the United States and several third parties emphasize, the determination that a specific country is the country of origin for marking purposes is distinct from the requirement to use a mark of origin on imported products.<sup>308</sup> The determination of origin is the result of the application of a Member's origin criteria, which leads to "a conclusion as to the country from which the goods are considered to originate"<sup>309</sup> and allows, on that basis, to "specify to which treatment [a] good will be subjected because of the country it stems from".<sup>310</sup> Origin is used for the implementation of trade policy instruments of various types, including origin marking requirements.

7.220. The distinction between origin determination and the trade instrument that makes use of this origin determination is complicated in the case of origin marking requirements, because these requirements by their nature are intended to indicate the origin of a product.<sup>311</sup> In that sense, a requirement to use the mark of origin "China" could be perceived by purchasers as an indication that the US authorities have determined China to be the product's country of origin.<sup>312</sup> Nevertheless, we do not consider that this should result in a conflation between origin determination and an origin marking requirement, which is a trade policy instrument, in the application of which the origin determination is used.<sup>313</sup>

7.221. We, therefore, turn to the question of what is the origin determination that the United States uses to apply the origin marking requirement at issue. For the purposes of origin marking, the United States considers as the country of origin of a product the country in which this product was manufactured, produced, grown, or substantially transformed. Under US law, only one country of origin can be determined.<sup>314</sup> The United States explains that to determine whether a product is a "product of Hong Kong, China", it applies the same analysis that would apply to determine the origin of any good from any source.<sup>315</sup> We understand this to mean that to establish whether a product would be subject to the origin marking requirement, the United States uses its "normal rules of

<sup>305</sup> Hong Kong, China's first written submission, para. 24.

<sup>306</sup> United States' second written submission, para. 165.

<sup>307</sup> This also follows from the definition of rules of origin in Article 1 of the ARO, referring to rules "applied ... to determine the country of origin of goods", which are then "used ... in the application of" various trade policy instruments, including origin marking.

<sup>308</sup> See United States' response to Panel question No. 5, para. 18 and No. 68, para. 10. Canada's third-party response to Panel question No. 2, para. 3; European Union's third-party response to Panel question No. 1, para. 2.

<sup>309</sup> Canada's third-party response to Panel question No. 2, para. 3.

<sup>310</sup> European Union's third-party response to Panel question No. 2, para. 5.

<sup>311</sup> This is also noted by some third parties. Canada remarks that WTO Members use their rules of origin to determine a country of origin for a particular good, "which is then used by producers to satisfy a Member's origin marking requirements" (Canada's third-party response to Panel question No. 1, para. 1). The European Union similarly notes that the origin marking "must reflect origin in accordance with said determination" (European Union's third-party response to Panel question No. 1, para. 1).

<sup>312</sup> This is particularly relevant in light of a response provided by USCBP to a request whether different markings identifying both Hong Kong, China and China would be acceptable for goods produced in Hong Kong (8 October 2020 USCBP Letter, (Exhibit HKG-17)). The examples of markings suggested by the request were: "Made in China (Hong Kong)", "Made in Hong Kong (China)", "Made in Hong Kong, China", "Made in Hong Kong (CN)", "Made in Hong Kong – China", "Made in China – Hong Kong", "Made in CN (Hong Kong)", "Made in CN-Hong Kong" and "China (Made in Hong Kong)". According to USCBP, the use of such marks may "mislead or deceive the ultimate purchaser as to the actual country of origin of the article".

<sup>313</sup> In that sense, we agree with the European Union that Article IX:1 "contains an MFN obligation with regard to origin marking requirements" and that "[b]eyond this, Article IX:1 GATT 1994 does not impose any particular disciplines on the content of the rules that are applied to determine the country of origin for the purpose of origin marking." (European Union's third-party response to Panel question No. 13, para. 41).

<sup>314</sup> This stems from the use of the article "the" and the term "country of origin" in the singular, both in Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304, (Exhibits USA-10, HKG-2) and in §134.1 of 19 C.F.R. Part 134, (Exhibit HKG-3). As indicated in a USCBP ruling, the inclusion of more than one mark of origin "adds to the potential confusion of the ultimate purchaser, since he would not know which statement of article's country of origin is accurate". (USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Children's Computer Games (26 January 1990), (Exhibit HKG-4)).

<sup>315</sup> United States' responses to Panel question No. 4, para. 16 and No. 18, para. 92. See also second written submission, para. 194.

origin" to determine whether that product was manufactured, produced, grown, or substantially transformed in Hong Kong, China.

7.222. We note a certain level of ambiguity in the specific legal characterizations of that process under US law. It remains unclear to us whether the process of determining that the products subject to the origin marking requirement are manufactured, produced, grown, or substantially transformed in Hong Kong, China, is characterized as a determination of country of origin under US law. It is our understanding that, due to the suspension of differential treatment for origin marking, as described above<sup>316</sup>, it may be impossible for US authorities to determine that Hong Kong, China is a country of origin for origin marking purposes under Section 304.<sup>317</sup> It is in this context that USCBP, referring to "the new policy that was specified in the Executive Order and reiterated in the Federal Register Notice", states that "[t]he reference to Hong Kong under the current policy may mislead or deceive the ultimate purchaser as to the actual country of origin of the article and, therefore, is not acceptable for the purposes of 19 U.S.C. § 130".<sup>318</sup>

7.223. We understand the complexity of this situation to be related to the status of Hong Kong, China as both a WTO Member in its own right (as a separate customs territory, different from China)<sup>319</sup> and "an inalienable part of the People's Republic of China"<sup>320</sup>, and to the United States' assessment that "Hong Kong ... is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China" under certain US laws and provisions thereof.<sup>321</sup> We note, in that respect, that the United States refers to its determinations that goods have been manufactured, produced, grown, or substantially transformed in "the geographic region of Hong Kong, China"<sup>322</sup> or "the area of Hong Kong, China".<sup>323</sup>

7.224. Even if the legal characterization of that process under US law is ambiguous, it remains a fact that the United States uses its normal rules of origin to determine that the products were manufactured, produced, grown, or substantially transformed in Hong Kong, China, so as to apply the origin marking requirement at issue.<sup>324</sup> We note that Hong Kong, China is a WTO Member in its own right, separately from China.<sup>325</sup> Furthermore, we understand that any disagreement between the parties on the consistency of the origin marking requirement with Article IX:1 does not extend to a disagreement as to (a) the status of Hong Kong, China as a separate WTO Member and a

<sup>316</sup> See para. 7.196 above.

<sup>317</sup> In this context, we note that the United States confirms that it continues to treat goods manufactured, produced, or substantially transformed, in Hong Kong, China, as goods originating in Hong Kong, China, for the purposes of determining the applicable tariff rate, for the purposes of assessing ordinary customs duties, or temporary or additional duties, provided for in the US Harmonized Tariff Schedule, or for the purposes of Outward Processing Arrangements. Entry summary procedures have also not changed. (United States' response to Panel question No. 3, para. 12, referring to USCBP, Frequently Asked Questions – Guidance on Marking of Goods of Hong Kong – Executive Order 13936 (last modified 6 October 2020), (USCBP Guidance on Marking of Goods of HKG – Executive Order 13936), (Exhibit HKG-12)). Furthermore, we note that in Exhibit HKG-12, in a response that USCBP provided to a question on the tariff treatment of goods from Hong Kong, China, it is observed that "goods that are products of Hong Kong should continue to report International Organization for Standardization (ISO) country code 'HK' as the country of origin when required".

<sup>318</sup> 8 October 2020 USCBP Letter, (Exhibit HKG-17), p. 3.

<sup>319</sup> Pursuant to the first explanatory note to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), "[t]he terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO."

<sup>320</sup> Hong Kong, China's first written submission, para. 3. The United States refers to Hong Kong, China as a "Chinese city" (United States' opening statement at the second meeting of the Panel, para. 74).

<sup>321</sup> Executive Order 13936, (Exhibits USA-2, HKG-13).

<sup>322</sup> United States' response to Panel question No. 7, para. 25.

<sup>323</sup> United States' second written submission, para. 165.

<sup>324</sup> We understand Hong Kong, China's description of the operation of the origin marking requirement to also reflect a two-step process: (a) an identification of "goods manufactured or produced in the separate customs territory of Hong Kong, China"; and (b) a determination that these goods have an origin of China, and that they should be marked to indicate that their origin is China. (see Hong Kong, China's second written submission, paras. 42-43). Therefore, even under Hong Kong, China's theory of how the origin marking requirement operates, the measure applies specifically to a set of products that the United States determines to be "goods of Hong Kong, China" (i.e. in the first step).

<sup>325</sup> The United States itself recognizes the status of Hong Kong, China as a separate WTO Member. This is stated in Section 102(3) of the 1992 Hong Kong Policy Act, (Exhibit USA-3, HKG-14), as confirmed in the 2021 Hong Kong Policy Act Report (March 31, 2021) (2021 Hong Kong Policy Act Report), (Exhibit USA-6), p. 12.

"country" within the meaning of the WTO Agreement and the covered agreements; and (b) the territorial boundaries of Hong Kong, China.<sup>326</sup>

7.225. For these reasons, we find that, to apply the origin marking requirement to a set of products that it has determined have been manufactured, produced, grown, or substantially transformed in Hong Kong, China, the United States first determines that the origin of these products is "Hong Kong, China".

7.226. To sum up, Hong Kong, China's argument that the origin marking requirement accords less favourable treatment in respect of the method by which the United States determines the country of origin of goods produced in Hong Kong, China is based on the premise that the United States determines the origin of these products to be "China" (and not "Hong Kong, China"). We have found that that premise is incorrect. Therefore, we find that there is no difference in treatment with respect to origin determination.<sup>327</sup> We, therefore, turn to examining Hong Kong, China's second argument, that products of Hong Kong, China are accorded different treatment in respect of the required terminology to indicate their country of origin. This argument is based on the premise which we have found to be factually correct, namely that the United States determines the origin of products of Hong Kong, China to be Hong Kong, China.<sup>328</sup>

#### **7.4.5.2.2 Whether there is a difference in treatment with respect to terminology**

##### **7.4.5.2.2.1 Arguments of the parties and the third parties**

7.227. According to Hong Kong, China, the origin marking requirement draws a "*de jure* distinction" between goods imported from Hong Kong, China and goods originating in other Members because goods of Hong Kong, China may not be marked with the name of the country of origin in which they were produced, whereas goods from all other countries must be marked with the full English name of their country of manufacture, production, or growth.<sup>329</sup>

7.228. The United States argues that marks of origin, by their nature make distinctions on the basis of origin.<sup>330</sup> Furthermore, the United States submits that Article IX:1 does not require a Member to use a particular mark to identify a country.<sup>331</sup> Accordingly, for the United States the fact that goods are marked with country of origin "China" simply reflects that all imports must be marked using the terminology determined by the United States.<sup>332</sup> The United States asserts, thus, that it requires goods of Hong Kong, China to be "marked with 'the full English name' of their country of origin as determined under U.S. law" just as it does for goods of other sources.<sup>333</sup> According to the United States, Hong Kong, China takes issue with the fact that the goods are marked with the name

<sup>326</sup> Hong Kong, China's response to Panel question No. 9, para. 26 and United States' response to Panel question No. 9, para. 38. We also note the following views of Canada and the European Union. The European Union observes that "[n]othing in the WTO Agreement suggests that the Members intended it to displace the existing arrangements in public international law on [public international law disputes of a territorial or boundary nature]." (European Union's response to Panel question No. 3, para. 8). Canada argues that "while Hong Kong is included within the definition of 'country' as a separate customs territory, the definition does not preclude a Member from considering the relationship between a separate customs territory and the country with which it is associated in determining what constitutes a 'country' for the purposes of identifying the country of origin. Rather, in Canada's view, this is a determination that is firmly within the right of WTO Members to make." (Canada's third-party statement, para. 6). While taking note of these points, we consider that the dispute before us does not concern the status of Hong Kong, China as a separate WTO Member while also being a part of China.

<sup>327</sup> In light of this finding, we do not need to decide, and therefore can leave open, the question whether a potential difference in treatment with respect to origin determination could amount to a difference in treatment with respect to marking requirements under Article IX:1.

<sup>328</sup> We note that Hong Kong, China's arguments that the origin marking requirement is inconsistent with the ARO are based on the factual premise that the United States determines that the products subject to the origin marking requirement originate in China. Our finding that the United States determines their origin to be Hong Kong, China means that the factual basis for contending that the present dispute involves the application of "rules of origin" within the meaning of Article 1 of the ARO is incorrect.

<sup>329</sup> Hong Kong, China's second written submission, paras. 120-121; comments on the United States' response to Panel question 83, para. 43.

<sup>330</sup> United States' response to Panel question 83, para. 66.

<sup>331</sup> United States' response to Panel question 83, para. 67. See also second written submission, para. 200.

<sup>332</sup> United States' response to Panel question 68, para. 7.

<sup>333</sup> United States' response to Panel question 83, para. 69.



"China", but "that does not mean that such marking is a breach of the WTO Agreement, or that 'China' may not be the English name for marking purposes".<sup>334</sup>

#### 7.4.5.2.2.2 Panel's assessment

7.229. We begin by noting that the United States requires all imported goods to be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of their country of origin. We understand that when the United States determines that a product has been manufactured, produced, grown, or substantially transformed in a specific country (i.e. the "country of origin" as defined in Part 134 of title 19 of the Code of Federal Regulations<sup>335</sup>), it requires that the mark of origin indicate to the ultimate purchaser the name of *that* country of origin. US law, thus, requires correspondence between the origin as determined by the United States and the origin indicated on the mark.

7.230. We understand the United States to argue that the treatment it accords to products of Hong Kong, China is not different from the treatment it accords to products of any third country. The United States' arguments on this point stem from its assertion that the origin marking requirement involves only the "terminology used for marking goods produced in the geographic area Hong Kong, China".<sup>336</sup> According to the United States, the fact that these goods are marked with "China" simply reflects the fact that all imports must be marked using the terminology determined under US law.<sup>337</sup> On the basis of that assertion, we understand that the United States develops two arguments: first, that origin marks by definition use different terms to indicate different countries, and therefore involve a certain level of difference that cannot be equated to a difference in treatment for the purposes of a non-discrimination provision such as Article IX; and second, that origin marks reflect a name that the adopting Member has chosen to associate with a certain area, and, in the present case, the United States has chosen to associate Hong Kong, China with the name "China".

7.231. We agree with the United States that a measure disciplined under Article IX, by its nature, "makes distinctions on the basis of origin".<sup>338</sup> Given the specific nature of marks of origin, which use different names to indicate different countries of origin, we consider that a purely formal distinction between products originating in different countries does not automatically mean that those two products are accorded different treatment. In other words, pursuant to an origin marking requirement, products originating in country A would be marked with a mark of origin that is different from that required for products originating in country B. However, Hong Kong, China does not take issue with its products not being marked with the same origin mark as products from any third country. Rather, we understand Hong Kong, China's concern to be that while the products of any third country are required (and therefore allowed) to be marked with a mark indicating the name of that country, products of Hong Kong, China are not allowed to be marked with a mark indicating the name "Hong Kong, China" (or any iteration thereof), but are required to be marked with a mark of origin indicating the name of another WTO Member (China).

7.232. This takes us to the second argument raised by the United States – that the treatment it accords to products of Hong Kong, China is not different from the treatment it accords to products of any third country, because the United States has chosen the name "China" to be associated with the region of Hong Kong, China.<sup>339</sup> According to the United States, imports from Hong Kong, China,

<sup>334</sup> United States' second written submission, para. 198.

<sup>335</sup> 19 C.F.R. Part 134, (Exhibit HKG-3).

<sup>336</sup> United States' response to Panel question 9, para. 38.

<sup>337</sup> United States' response to Panel question No. 68, para. 7.

<sup>338</sup> United States' responses to Panel question No 68, para. 9, and No. 83, paras. 66 and 69; second written submission, para. 180; and opening statement at the second meeting of the Panel, para. 65. However, we do not agree with the United States to the extent that it appears to argue that, for that reason, the requirement to indicate a specific name on the origin mark is necessarily not subject to the disciplines of Article IX:1. The United States argues that a requirement that the products of one Member be marked in a certain way – such as etching on the product itself, while products from other Members need not be so marked, might be shown to constitute less favourable treatment for the purposes of Article IX:1, but that this hypothetical requirement "is a function of the treatment to which the product is subject, not whether the Member at issue is a 'country', or what 'country' the territory in which the goods originate belongs to" (United States' response to Panel question No. 9, para. 40). We see nothing in the text of Article IX:1 that would restrict its scope in that way.

<sup>339</sup> United States' response to Panel question No. 7, para. 25. The United States explains that it has made this choice "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" (Ibid).



as imports from other countries, are required to be marked with terminology as determined by the United States.<sup>340</sup> It is factually correct that the United States requires all products, including products of Hong Kong, China, to be marked with a name that the United States has determined. However, we do not understand Hong Kong, China to disagree merely "with the name that the United States has chosen for marking purposes".<sup>341</sup> Rather, Hong Kong, China takes issue with the fact that the United States requires that products of Hong Kong, China be marked to indicate the origin of *another WTO Member* (China).

7.233. We disagree with the United States to the extent that it appears to suggest that the name "China" may be the United States' way of designating Hong Kong, China rather than the People's Republic of China.<sup>342</sup> This would neither reflect the uncontested evidence of the United States using that name to designate the origin of products from the People's Republic of China<sup>343</sup>, nor would it be consistent with what we understand to be the logic of suspending differential treatment for Hong Kong, China in respect of origin marking.<sup>344</sup> As previously noted, the complexity of this situation is related to the fact that Hong Kong, China is part of China. We recall, however, that Hong Kong, China is also a separate customs territory WTO Member, distinct from China.

7.234. Therefore, whereas US law provides that for products of all other countries there should be correspondence between the origin determined and the origin marked, it does not provide for such correspondence for products of Hong Kong, China, but instead requires that these products be marked to indicate the origin of another WTO Member. This constitutes different treatment for the purposes of our analysis under Article IX:1.

7.235. We therefore conclude that the United States requires goods of Hong Kong, China to be marked with a mark of origin indicating the name of another WTO Member, whereas the United States requires goods of any third country or Member to be marked with a name that corresponds to their origin. We consider that this amounts to the United States according goods that it identifies as manufactured, produced, grown, or substantially transformed in Hong Kong, China treatment different from that which it accords to goods that it identifies (on the basis of the same rules of origin) as manufactured, produced, grown, or substantially transformed in any third country or Member.

#### **7.4.5.3 Detrimental impact**

##### **7.4.5.3.1 Arguments of the parties and the third parties**

7.236. Hong Kong, China argues that "it is an advantage for exporters to be able to mark their products with the full English name of their actual country of origin".<sup>345</sup> According to Hong Kong, China, while such advantage for manufacturers and exporters is undeniable, "it is a disadvantage to be required to mark those goods with the name of a customs territory other than the one in which the goods were manufactured or produced".<sup>346</sup> Hong Kong, China submits several reasons why it is advantageous for an exporter to be able to mark its products with the name of their actual country of origin and why denying such a possibility adversely modifies the conditions of competition for Hong Kong, China products in the US market. Those include the considerable brand and reputational value derived from marking a product as one having the origin of a particular Member, the additional

<sup>340</sup> United States' opening statement at the second meeting of the Panel, para. 65. See also United States' response to Panel question No. 68, para. 10: "[a]ll countries are subject to the same requirements under both these aspects; that is, imports from all countries are required to be marked, and imports from all sources must be marked with terminology that CBP considers permissible."

<sup>341</sup> United States' response to Panel question No. 68, para. 11.

<sup>342</sup> United States' response to Panel question No. 6, paras. 24-25; second written submission, para. 198.

<sup>343</sup> See USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Children's Computer Games (26 January 1990), (Exhibit HKG-4) and USCBP Ruling Letter HQ 731701 Re: Country of origin marking for products of Hong Kong imported on or after July 1, 1997 (27 June 1997), (Exhibit HKG-5).

<sup>344</sup> See para. 7.197 above. See also United States' first written submission, paras. 8 and 18-23; opening statement at the first meeting of the Panel, paras. 18-32; response to Panel question No. 9, para. 41; and second written submission, para. 170.

<sup>345</sup> Hong Kong, China's first written submission, para. 60; response to Panel question 18, para. 63. In support of its argument, Hong Kong, China refers to a GATT document adopted in 1958 (Marks of Origin, Report by the Working Party as adopted by the CONTRACTING PARTIES at their meeting of 21 November 1958, GATT document L/912/Rev.1 (22 November 1958), (1958 GATT Decision), (Exhibit HKG-20)); first written submission, para. 74; and response to Panel question No. 18, paras. 65-66.

<sup>346</sup> Hong Kong, China's comments on the United States' response to Panel question 83, para. 41.

cost and complexity of exportation for Hong Kong enterprises, and the risks of "confusion and potential error in the regulatory treatment" of goods of Hong Kong, China.<sup>347</sup>

7.237. The United States argues that Hong Kong, China has failed to produce sufficient evidence to demonstrate detrimental impact. According to the United States, Hong Kong, China has not provided evidence of actual market and consumer views or economic and trade data on the impact of the measure. Moreover, the United States submits that Hong Kong, China, has not provided any actual data associating the increased costs with the disputed measure. The United States notes that the "anecdotal evidence" submitted by Hong Kong, China does not take into account the impact of the COVID-19 pandemic on trade.<sup>348</sup>

7.238. Among the third parties, China argues that the application of the origin marking requirement results in the inability of Hong Kong, China enterprises to correctly mark their goods, which detrimentally modifies the conditions of competition in the US market for these goods *vis-à-vis* the treatment accorded to like products originating in other Members.<sup>349</sup> The European Union asserts that imposing an obligation to mark as origin a different WTO Member is detrimental because the like products imported from another WTO Member do not face that requirement. According to the European Union, "[t]he fact alone of being subject to a requirement that otherwise would not apply, can already be detrimental."<sup>350</sup>

#### 7.4.5.3.2 Panel's assessment

7.239. We begin by recalling some of the clarifications that panels and the Appellate Body have made in past cases – and that the parties do not express disagreement with – regarding how the detrimental impact of a measure can be demonstrated and assessed.

7.240. An assessment of less favourable treatment must be founded on an examination of the design, structure, and expected operation of the measure at issue.<sup>351</sup> Such assessment aims to discern the measure's implications for the equality of competitive conditions between products imported from different countries<sup>352</sup>, and to determine whether the measure modifies the conditions of competition in the market to the detriment of imported products.<sup>353</sup> Importantly, an analysis of less favourable treatment "does not require ... an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market"<sup>354</sup>, nor should it be "anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize."<sup>355</sup> A measure can be found to accord less favourable treatment because of its potential discriminatory impact on imported products from a given Member.<sup>356</sup>

7.241. In light of these elements, we consider that to demonstrate that the origin marking requirement modifies the conditions of competition to the detriment of products of Hong Kong, China *vis-à-vis* products of any third country, Hong Kong, China has to show that the competitive opportunities for products of Hong Kong, China in the US market are adversely impacted by the difference in treatment established by the origin marking requirement.

<sup>347</sup> Hong Kong, China's first written submission, paras. 60-63. See also Hong Kong, China's second written submission, paras. 97-98.

<sup>348</sup> United States' opening statement at the second meeting of the Panel, paras. 72-75.

<sup>349</sup> China's third-party response to Panel question No. 9, para. 5.

<sup>350</sup> European Union's third-party response to Panel question No. 9, para. 25.

<sup>351</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 130 and 134.

<sup>352</sup> See Appellate Body Reports, *EC – Seal Products*, para. 5.101 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 177 and 179; *Thailand – Cigarettes (Philippines)*, para. 129; and *Korea – Various Measures on Beef*, para. 137). See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215, referring to the implications of the measure "in the marketplace".

<sup>353</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137).

<sup>354</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 110).

<sup>355</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.

<sup>356</sup> Panel Report, *Canada – Autos*, para. 10.78 (referring to GATT Panel Report, *US – Section 337 of the Tariff Act of 1930*, paras. 5.11 and 5.13).

7.242. We understand the parties to have somewhat diverging views on how Hong Kong, China can demonstrate detrimental impact. In particular, they disagree on whether Hong Kong, China is required to submit evidence regarding, for example, the value of an origin mark "Hong Kong, China" in the US market, or the economic and trade impact ensuing from a requirement to use an origin mark indicating the name of another Member. The United States argues that Hong Kong, China has not produced sufficient evidence to demonstrate such impact and distinguish it from other impacts such as those resulting from the COVID-19 pandemic.<sup>357</sup> While Hong Kong, China presents some elements of evidence in that direction, we understand it to also contend that detrimental impact can be demonstrated, more generally, on the basis of the design, structure and expected operation of the measure.

7.243. More specifically Hong Kong, China asserts that there is "an inherent advantage for exporters in being able to mark their products with the actual country of origin of the product, as opposed to the origin of a different Member" and that WTO Members and their enterprises have an interest in ensuring that "their goods are accurately marked with the customs origin of the good".<sup>358</sup> We understand Hong Kong, China to make a point of principle, arguing that the competitive opportunities for products of Hong Kong, China in the US market are affected because products of Hong Kong, China are denied an advantage ("to be able to mark their goods with the name of the customs territory in which the goods were manufactured or produced"<sup>359</sup>) that products of third countries are accorded.

7.244. To fully address Hong Kong, China's argument that there is an "inherent advantage", we find it necessary to take a step back and to consider the role that origin and origin marks play as an element of competition. In our view, the origin of a product, and how that origin is indicated to the ultimate purchaser in the import market, affect the competitive relationship between imported products, to the extent that when origin is indicated, it becomes a relevant factor in purchasing decisions. In that sense, an origin mark, as argued by Hong Kong, China, has an inherent value in the import market.<sup>360</sup>

7.245. When a WTO Member requires all imported goods to be marked with a mark of origin, as the United States does, it introduces origin marking, an element that affects the choice of an ultimate purchaser, into the conditions of competition between imported products on the import market. In other words, imported products compete in the US market with an indication of their origin and this indication affects their competitive opportunities.

7.246. Differentiating the application of that element of competition between products imported from different countries logically alters the competitive relationship between those products. In that sense, the origin marking requirement alters the competitive relationship between goods imported from any third country, which can be marked with the name of their country of origin, and like goods of Hong Kong, China, which must be marked as China origin.

7.247. As a result of this alteration, goods of Hong Kong, China are not allowed to compete in the US market with an indication of their origin as it is determined by the United States<sup>361</sup>, i.e. to compete under Hong Kong, China's "own name". This in turn means that, following the introduction of the origin marking requirement, a marking indicating Hong Kong, China as the country of origin of the products is no longer available in the US market. Contrary to exporters of goods of any third country, exporters of goods of Hong Kong, China are denied the possibility to influence, develop, or benefit from, any value that may be attached, currently or in the future, to the origin of their goods. This adversely affects the competitive opportunities of these products in the US market. For products

<sup>357</sup> United States' opening statement at the second meeting of the Panel, paras. 74-75; second written submission, para. 176; and response to Panel question No. 75, para. 40.

<sup>358</sup> Hong Kong, China's first written submission, para. 63. See also Hong Kong, China's comments on the United States' response to Panel question No. 83, para. 41.

<sup>359</sup> Hong Kong, China's comments on the United States' response to Panel question No. 83, para. 41.

<sup>360</sup> See Panel Reports, *Japan – Film*, para. 10.338 (where the panel referred to the "possibility that a discriminatory country-of-origin designation requirement could result in impairment of competitive relationships"); and *Australia – Tobacco Plain Packaging*, para. 7.1167 (where the panel considered that by preventing the use of certain features on tobacco products and their retail packaging, the challenged measures "limit the opportunity for producers to differentiate their products", which limits the "opportunity for tobacco manufacturers to compete on the basis of such brand differentiation").

<sup>361</sup> See paras. 7.221-7.226 above, where this factual finding is explained.

of Hong Kong, China, compliance with the origin marking requirement would thus involve a competitive disadvantage compared with products of any third country.

7.248. We consider that Hong Kong, China has therefore demonstrated, on the basis of the design, structure and expected operation of the measure, that the origin marking requirement modifies the conditions of competition to the detriment of products of Hong Kong, China. We consider this to be sufficient to demonstrate detrimental impact.

7.249. We nevertheless note that Hong Kong, China has described several other elements in support of its argument that the origin marking requirement detrimentally modifies the conditions of competition in the US market for products of Hong Kong, China. First, Hong Kong, China asserts that there is often considerable brand and reputational value derived from marking a product with the origin of a particular Member.<sup>362</sup> Second, Hong Kong, China asserts that having to mark goods exported from Hong Kong, China as of 'China' origin, when destined for the United States, has increased the cost and complexity of exportation for Hong Kong enterprises.<sup>363</sup> Third, in connection with its view about the inherent advantage of exporters being able to mark their products with their actual country of origin, Hong Kong, China notes that "inaccurate marking of the customs origin of a good is liable to cause confusion and potential error in the regulatory treatment of that good, and in fact has already had those effects pursuant to the revised origin marking requirement".<sup>364</sup> As noted above, we do not find it necessary to consider these elements presented by Hong Kong, China for the purposes of assessing whether Hong Kong, China has met its burden of proof of demonstrating detrimental impact. We, however, note that they illustrate – to varying degrees and with varying relevance – the fact that the mere exclusion of the possibility for products of Hong Kong, China origin to compete in the US market with an indication of their origin as determined by the United States, when products of third countries are granted that same possibility, affects the competitive opportunities to the detriment of products of Hong Kong, China.

7.250. For these reasons, we find that the origin marking requirement, by requiring that products of Hong Kong, China compete in the US market with an indication that their origin is that of another WTO Member (China) and not with an indication of their origin as determined by the United States (i.e. Hong Kong, China), modifies the conditions of competition to the detriment of products of Hong Kong, China.

#### **7.4.6 Conclusion on Article IX of the GATT 1994**

7.251. The origin marking requirement accords to products that the United States has determined to originate in Hong Kong, China treatment that is different from the treatment accorded by the United States to like products of any third country. This difference in treatment results from the United States requiring that products of Hong Kong, China be marked with a mark of origin indicating the name of another WTO Member (China), whereas goods of any third country must be marked with the name of that third country, and not with the name of another WTO Member. This difference in treatment modifies the conditions of competition to the detriment of products of Hong Kong, China, because, as a result, products of Hong Kong, China are required to compete in the US market with an indication that their origin is that of another WTO Member (China) and not with an indication of their origin as determined by the United States (i.e. Hong Kong, China). Those products are thus denied the possibility to compete in the US market under their own name, and thus to influence, develop, or benefit from, any value that may be attached, currently or in the future, to their origin.

7.252. We thus find that the origin marking requirement accords to products of Hong Kong, China treatment with regard to marking requirements that is less favourable than the treatment accorded to like products of any third country and is thus inconsistent with Article IX:1 of the GATT 1994.

---

<sup>362</sup> Hong Kong, China's first written submission, para. 61. In Annex A to its first written submission, Hong Kong, China provided "some examples of Hong Kong, China enterprises that export goods to the United States whose brand and reputational values are inextricably linked to the fact that they are of Hong Kong, China origin." (Ibid. para. 61).

<sup>363</sup> Hong Kong, China's first written submission, para. 62.

<sup>364</sup> Hong Kong, China's first written submission, para. 63.

## 7.5 Whether the origin marking requirement is justified under Article XXI(b)(iii) of the GATT 1994

### 7.5.1 Introduction

7.253. Having concluded that the origin marking requirement is inconsistent with Article IX:1, we now turn to assessing the United States' invocation of Article XXI(b).

7.254. The United States refers to actions by the Government of China and Hong Kong, China's authorities since November 2019, including the adoption of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law) in June 2020. For the United States, these actions have eroded democracy and human rights in Hong Kong, China, which, it considers, represents a threat to its own national security. As noted above, the United States made a finding in US law, that Hong Kong, China lacks "sufficient autonomy" *vis-à-vis* China, which has led, *inter alia*, to the origin marking requirement at issue.<sup>365</sup> Consistent with its position that Article XXI(b) is entirely self-judging, the United States takes the view that a panel is not to review the merits of this defence and submits arguments only in response to questions by the Panel.<sup>366</sup>

7.255. For Hong Kong, China, the United States has not demonstrated the objective applicability of any of the subparagraphs of Article XXI(b).<sup>367</sup> Hong Kong, China also submits that the United States has not demonstrated that its alleged concerns about freedom and democracy in Hong Kong, China meet the conditions of Article XXI(b).<sup>368</sup> Hong Kong, China defines those conditions in line with the legal standard developed by the panel in *Russia – Traffic in Transit*. First, a panel should determine whether the action was taken in time of an emergency in international relations, such that the events at issue directly implicate defence or military interests, or maintenance of law and public order interests, within the territory of the invoking Member.<sup>369</sup> Second, a panel should examine whether the invoking Member took its action in good faith. To that effect, the invoking Member must articulate its essential security interests "sufficiently enough to demonstrate their veracity" and demonstrate that the action for which justification is sought meets a "minimum requirement of plausibility" in relation to those proffered essential security interests.<sup>370</sup>

7.256. We recall our previous finding that Article XXI(b), contrary to the United States' view, is only partly self-judging in that the subparagraphs are not subject to the phrase "which it considers" in the *chapeau*. The circumstances set out in the subparagraphs, therefore, are not subject to the invoking Member's own determination, and can be reviewed by a panel. As we noted above, our interpretive analysis of Article XXI(b) was limited to that specific question in order to ascertain whether there was *any* scope of review by a panel. Our analysis, therefore, left open what the exact scope of that review is and how such a review is to be carried out. These questions, which arise now that such review is due, raise further interpretive issues regarding Article XXI(b). We recall that our duty is to assist the DSB in resolving a dispute, rather than to clarify every issue of systemic importance. Our approach, therefore, is to proceed step by step in the review of the United States' defence and address interpretive issues as and when they arise at each step.

7.257. Before undertaking these steps, however, we need to first ascertain that the United States has identified the specific subparagraph on which it bases its security defence under Article XXI(b).

<sup>365</sup> See para. 7.197 above. See also United States' first written submission, paras. 1-5; closing statement at the first meeting of the Panel, para. 3; and second written submission, para. 5.

<sup>366</sup> See United States' introduction to responses to Panel questions after the first meeting of the Panel, para. 1; introduction to responses to Panel questions after the second meeting of the Panel, para. 1; and closing statement at the second meeting of the Panel, paras. 7-13.

<sup>367</sup> Hong Kong, China's second written submission, para. 6; comments on the United States' responses to Panel questions, introductory comments, para. 8.

<sup>368</sup> Hong Kong, China's opening statement at the second meeting of the Panel, paras. 8-9; responses to Panel question No. 102, para. 105, and No. 109, para. 115; and comments on the United States' responses to Panel question No. 103, para. 75, No. 114, paras. 87-88, and No. 116, paras. 90-92.

<sup>369</sup> See Hong Kong, China's response to Panel question No. 104, paras. 107-108. See also opening statement at the second meeting of the Panel, para. 8.

<sup>370</sup> Hong Kong, China's opening statement at the second meeting of the Panel, para. 8; responses to Panel question No. 118, para. 124; and No. 119, para. 125 (commenting on Panel Report, *Russia – Traffic in Transit*, paras. 7.132-7.134 and 7.138).

Otherwise, it would not be clear what it is we are to review. Once this question is resolved, we turn to assessing the order in which to review that defence, i.e. to identifying the first step in that review.

### 7.5.2 Which subparagraph to review in Article XXI(b)

7.258. Consistent with its position that Article XXI(b) is entirely self-judging, the United States does not identify in its first written submission which subparagraph of Article XXI(b) it is relying on for its defence. Hong Kong, China and some third parties challenge this as a failure to make a *prima facie* case that a subparagraph of Article XXI(b) applies. In their view, this falls short of the United States' burden of proof as the Member invoking this defence.<sup>371</sup> In its second written submission, the United States argues that the information it provided to the Panel could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii).<sup>372</sup> In response to questions after the second meeting of the Panel, the United States further argues that such information supports the existence of an emergency in international relations in this case.<sup>373</sup>

7.259. In our view, Hong Kong, China and the third parties are correct in signalling that a Member invoking a defence under Article XXI(b) must identify the subparagraph under which it is raising its defence. Without the Member invoking Article XXI(b) identifying the relevant subparagraph, a panel would not be in a position to review whether the relevant conditions for the defence are satisfied.

7.260. Here, the United States' indication about the information on record most naturally relating to Article XXI(b)(iii), together with its indication that such information supports the existence of an emergency in international relations, makes it clear that its invocation of Article XXI(b) pertains to subparagraph (iii). In our view, this identification of the subparagraph at issue in this dispute is sufficient for us to conduct our review of the United States' defence. We agree with Hong Kong, China that the United States, as the Member invoking Article XXI(b), bears the burden of demonstrating that the elements of the relevant subparagraph are satisfied.<sup>374</sup> Whether the United States has met that burden, is a separate question that we address in section 7.5.4.2 below.

### 7.5.3 Order of analysis under Article XXI(b)

7.261. Having identified subparagraph (iii) as the relevant subparagraph under which to review the defence under Article XXI(b), we turn to the question of the order in which to review this defence.

7.262. Hong Kong, China<sup>375</sup> and certain third parties<sup>376</sup> submit that the most logical approach would be to first examine whether the circumstances in one of the subparagraphs are present before turning to an examination of the conditions in the *chapeau* of Article XXI(b). The United States disagrees, as in its view, unlike Article XX, the requirement for the applicability of Article XXI(b) is that the Member taking the action must consider such action necessary for the protection of its essential security interests.<sup>377</sup>

7.263. We agree with Hong Kong, China and the third parties that the most logical way to structure our analysis would be to first examine whether the conditions of the relevant subparagraph are met before reviewing the *chapeau*. It follows from our analysis of Article XXI(b) above that the subparagraphs limit the circumstances in which a Member can take unilateral action under this

<sup>371</sup> See Hong Kong, China's opening statement at the first meeting of the Panel, para. 40, and second written submission, para. 150; China's third-party submission, para. 14; and Switzerland's third-party submission, paras. 52-53.

<sup>372</sup> United States' second written submission, para. 61.

<sup>373</sup> United States' response to Panel question No. 111, para. 163, and comments on Hong Kong, China's response to Panel question No. 110, para. 96.

<sup>374</sup> We understand Hong Kong, China to be concerned about the United States submitting elements of its defence too late in the proceedings (Hong Kong, China, opening statement at the second meeting of the Panel, para. 9). We do not consider that the identification of the subparagraph in the United States' second written submission raises any due process concerns because the United States raised its defence under Article XXI(b) from the outset of these proceedings and the parties had ample opportunity to exchange views on the matter.

<sup>375</sup> See Hong Kong, China's opening statement at the second meeting of the Panel, para. 8.

<sup>376</sup> Brazil's third-party submission, para. 11, and third-party responses to Panel question No. 48, para. 69, and No. 59, paras. 83-85. Canada's third-party response to Panel question No. 59, paras. 145-146. Norway's third-party responses to Panel question No. 54, para. 23, and No. 59, para. 37. Switzerland's third-party response to Panel question No. 48, paras. 44-46.

<sup>377</sup> See United States' first written submission, para. 57; second written submission, paras. 68-70.



provision. Accordingly, only if a panel is satisfied that the conditions for applying one or more of the subparagraphs are fulfilled would it make sense for that panel to move on to the *chapeau*. We note that the previous two panels that have made findings with respect to the invocation of the security exception followed this same order of analysis.<sup>378</sup>

7.264. We observe that this order of first examining the subparagraphs also resembles the order in which defences raised under Article XX have been examined in the past.<sup>379</sup> We would underline, however, that by following the same order as in Article XX, we are not finding or implying that the analysis under Article XXI is like that under Article XX. In particular, we are not suggesting that Article XXI requires the same review in the *chapeau* as the review conducted under the *chapeau* in Article XX.<sup>380</sup> What review may be required under the *chapeau* of Article XXI(b) is a question of its interpretation, which we will undertake as and when we get to it.

7.265. Accordingly, we will first address the interpretive and evidentiary aspects of subparagraph (iii) arising from the United States' invocation of Article XXI(b).

#### 7.5.4 Review of subparagraph (iii)

7.266. We recall that Article XXI(b)(iii) provides, in relevant part:

Nothing in this agreement shall be construed ...

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

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

7.267. We see two elements that must be satisfied for an action to be justified under this provision: (a) there must be a "war or other emergency in international relations"; and (b) the action must be "taken in time of" that "war or other emergency in international relations".

7.268. Neither the United States nor Hong Kong, China have argued that the situation in this case is one of war. Thus, at issue here is whether there is an "other emergency in international relations". This is the issue we begin with in our step-by-step analysis. We therefore first clarify the meaning of these terms and then assess whether the situation in this dispute is one that constitutes an "emergency in international relations". If it does, we would then turn to the terms "taken in time of", clarify their meaning and assess whether the action was taken in time of such an emergency.

##### 7.5.4.1 Interpretation of the phrase "emergency in international relations"

7.269. As with the interpretive issues in section 7.3 above, pursuant to Article 3.2 of the DSU, we interpret the phrase "emergency in international relations" in accordance with the customary rules of interpretation of public international law codified in Articles 31, 32, and 33 of the Vienna Convention.

<sup>378</sup> Panel Reports, *Russia – Traffic in Transit*, paras. 7.120-7.125 (where the panel first examined the existence of an emergency in international relations under subparagraph (iii) and whether the measures at issue were taken in time of that emergency) and 7.127-7.148 (where the panel next examined whether the conditions in the *chapeau* of Article XXI(b) were satisfied); and *Saudi Arabia – IPRs*, paras. 7.241-7.243 (referring to the order of analysis within Article 73(b) of the TRIPS Agreement, which is identical to Article XXI(b) of the GATT 1994).

<sup>379</sup> See Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras. 5.94-5.99 (where the Appellate Body explains the logic under Article XX of the GATT 1994 to follow a two-tier test to determine whether a measure is justified under that provision, starting with the provisional application of the paragraphs, and finishing with the requirements of the *chapeau*).

<sup>380</sup> As discussed in para. 7.111 above, Article XX and Article XXI(b), each have their own structure and logic. Notably, Article XX does not include the phrase "which it considers" in qualifying the type of action that a Member could take to pursue certain policy objectives. In turn, Article XXI(b) does not include a limitation requiring that a measure not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.



#### 7.5.4.1.1 Arguments of the parties and the third parties

7.270. In reply to a question from the Panel<sup>381</sup>, the United States submits that the ordinary meaning of the phrase "emergency in international relations" is broad. According to the United States, this phrase "can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention".<sup>382</sup> Such meaning, according to the United States, is confirmed by the ordinary meaning of the authentic French and Spanish texts of Article XXI(b)(iii).<sup>383</sup> In the United States' view, "the question of whether a situation is 'serious, unexpected, and often dangerous' and 'requires action' is inherently subjective".<sup>384</sup>

7.271. A broad understanding of the term "emergency" in Article XXI(b)(iii) is supported, in the United States' view, by the context provided by other provisions of the GATT 1994 and other covered agreements. In particular, the United States refers to Article XII of the GATT<sup>385</sup>, Article 11.1(b) of the Agreement on Safeguards<sup>386</sup>, and Article 4.2 and footnote 1 of the Agreement on Agriculture<sup>387</sup>, all of which contain the word "similar" with respect to an item in an enumerated list. The United States contends that Article XXI(b)(iii), in contrast, does not refer to "war or other *similar* emergency in international relations".<sup>388</sup>

7.272. Moreover, the United States considers that the subparagraphs in Article XXI(b) are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph is integrated with the main text of Article XXI(b), while containing a different subject matter and scope in relation to the other subparagraphs.<sup>389</sup> Moreover, subparagraphs (i) and (ii) indicate the particular types of essential security interests a Member considers to be implicated by the action taken. In contrast, subparagraph (iii) does not speak to the nature of the security interests. In the United States' view, this reflects an understanding that a wide range of interests may become essential to a Member's security when considering that a war or other emergency in international relations exists.<sup>390</sup>

7.273. Hong Kong, China agrees with the definition of an emergency in international relations set out by the panel in *Russia – Traffic in Transit*, according to which this term refers "generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general

<sup>381</sup> The Panel asked both parties to comment on the definition of "emergency in international relations" offered by the panel in *Russia – Traffic in Transit*, according to which such phrase refers "generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state". (Panel Report, *Russia – Traffic in Transit*, para. 7.76).

<sup>382</sup> United States' response to Panel question No. 103, paras. 136-137, quoting the definition of the words "emergency" (The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806, (Exhibit USA-193), we note that the dictionary refers to "urgent action" and not "urgent attention" as quoted by the United States), "relations" (The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 2534, (Exhibit USA-227)), and "international" (The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 1397, (Exhibit USA-227)). See also United States' response to Panel question No. 105, para. 145.

<sup>383</sup> United States' response to Panel question No. 106, paras. 147-149; comments on Hong Kong, China's response to Panel question No. 106, para. 86.

<sup>384</sup> United States' response to Panel question No. 104, para. 142.

<sup>385</sup> Providing that Members applying restrictions for the balance of payments undertake "not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or *similar* procedures". (emphasis added)

<sup>386</sup> Referring to "voluntary export restraints, orderly marketing arrangements or any other *similar* measures on the export or import side". (emphasis added)

<sup>387</sup> Placing limits on "any measures of the kind which have been required to be converted into ordinary customs duties", and providing that "[t]hese measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and *similar* border measures other than ordinary customs duties". (emphasis added)

<sup>388</sup> United States' response to Panel question No. 103, para. 136 (emphasis original); and comments on Hong Kong, China's response to Panel question No. 117, para. 113.

<sup>389</sup> United States' response to Panel question No. 117, para. 190, and comments on Hong Kong, China's responses to Panel question No. 112, para. 99, and No. 117, para. 112.

<sup>390</sup> United States' comments on Hong Kong, China's response to Panel question No. 112, para. 100, and No. 117, para. 112.

instability engulfing or surrounding a state".<sup>391</sup> This interpretation, in Hong Kong, China's view, is confirmed by the ordinary meaning of the French and Spanish texts of Article XXI.<sup>392</sup> Moreover, Hong Kong, China considers that the existence of an emergency in international relations is an objective matter for a panel to determine.<sup>393</sup>

7.274. In Hong Kong, China's view, whether a situation could constitute an emergency in international relations depends on the facts and circumstances of the individual case. However, events occurring in other countries that do not directly implicate defence or military interests, or maintenance of law and public order interests, within the territory of the invoking Member do not constitute such an emergency.<sup>394</sup>

7.275. Hong Kong, China submits that, when properly interpreted in its context, the phrase "other emergency in international relations" refers to a situation in international relations that implicates defence or military interests, or maintenance of law and public order interests<sup>395</sup>, as correctly found by the panel in *Russia – Traffic in Transit*.<sup>396</sup>

7.276. Among the third parties, Brazil, Canada, the European Union, Norway, Russia, and Singapore largely agree with the definition of emergency in international relations set out by the panel in *Russia – Traffic in Transit*.<sup>397</sup>

#### 7.5.4.1.2 Panel's assessment

7.277. We will develop our interpretation of the phrase "emergency in international relations" on the basis of the ordinary meaning of its terms, in their context and in light of the object and purpose of the GATT 1994, and the WTO Agreement more generally.<sup>398</sup>

##### 7.5.4.1.2.1 Ordinary meaning

7.278. We begin our interpretation of Article XXI(b)(iii) by examining the ordinary meaning of the phrase "emergency in international relations".

7.279. The word "emergency" is defined as "[a] juncture that arises or 'turns up'; esp. a state of things unexpectedly arising, and urgently demanding immediate action".<sup>399</sup> We note that the United States referred to a slightly different definition from an earlier edition of the New Shorter Oxford English dictionary, which defines "emergency" as "[a] situation, esp. of danger or conflict,

<sup>391</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.76. See Hong Kong, China's response to Panel question No. 103, para. 106.

<sup>392</sup> Hong Kong, China's response to Panel question No. 106, para. 110. See Hong Kong, China's response to Panel question No. 107, para. 111.

<sup>393</sup> Hong Kong, China's response to Panel question No. 108, para. 112 (referring to Panel Report, *Russia – Traffic in Transit*, para. 7.77). See Hong Kong, China's response to Panel question No. 113, para. 119.

<sup>394</sup> Hong Kong, China's response to Panel question No. 104, paras. 107-108; comments on the United States' response to Panel question No. 103, para. 74.

<sup>395</sup> Hong Kong, China's response to Panel question No. 105, para. 109.

<sup>396</sup> Hong Kong, China's responses to Panel question No. 103, para. 106 (quoting Panel Report, *Russia – Traffic in Transit*, paras. 7.74-7.75), No. 112, para. 118, and No. 117, paras. 122-123; and comments on the United States' response to Panel question No. 103, para. 73.

<sup>397</sup> Brazil's third-party submission, paras. 11-18 (referring to Panel Report, *Russia – Traffic in Transit*, paras. 7.74-7.75); third-party responses to Panel question No. 48, para. 69, No. 52, paras. 74-75, and No. 54, para. 76. Canada's third-party submission, para. 26; and third-party responses to Panel question No. 52, paras. 135-136, No. 53, para. 137, and No. 54, paras. 138-139. European Union's third-party submission, paras. 34-36; third-party responses to Panel question No. 50, para. 157, No. 51, paras. 158-160, No. 52, paras. 164-165, No. 53, para. 166, and No. 54, paras. 167-168. Norway's third-party responses to Panel question No. 53, paras. 21-22, and No. 54, paras. 25-28. See Norway's third-party statement, paras. 13-16. Russia's third-party statement, para. 7; third-party response to Panel question No. 50. Singapore's third-party response to Panel question No. 52. See Singapore's third-party statement, paras. 12 and 15-17.

<sup>398</sup> As for the interpretive question discussed in section 7.3 above, in undertaking this interpretive process, we will be mindful of the analysis that the panel in *Russia – Traffic in Transit* has carried out with respect to the definition of emergency in international relations (Panel Report, *Russia – Traffic in Transit*, paras. 7.71-7.76) and which features centrally in the parties' arguments. We also note, however, that that panel was faced with different legal and factual issues as well as different arguments (see also para. 7.33 above).

<sup>399</sup> Oxford English Dictionary online, definition of "emergency": <https://www.oed.com/view/Entry/61130?redirectedFrom=emergency+#eid> (accessed 29 September 2022).

that arises unexpectedly and requires urgent action".<sup>400</sup> While they differ to some extent, both definitions, in our view, refer to a juncture or situation, involving danger or conflict, that can be understood to be one outside the ordinary course of events. Moreover, these definitions suggest a degree or magnitude of seriousness, as reflected by the need for urgent or immediate action. We, therefore, understand these elements as describing a serious state of affairs requiring urgent action.

7.280. In subparagraph (iii), the noun "emergency" is presented with the compound noun "international relations", which is defined as "relations between nations, national governments, international organizations, etc., esp. involving political, economic, social, and cultural exchanges".<sup>401</sup> This definition suggests that the relations relevant for this inquiry are those between states and other participants in international relations, including Members of the WTO, and may involve diverse matters, such as political, economic, social, or cultural exchanges. Furthermore, we note the open reference to "international relations" rather than a narrower formulation that might have sought to limit it to some specific types of international relations, for example the exclusively bilateral relations between the invoking Member and the Member affected by the action.

7.281. The term "emergency" is linked to "international relations" through the preposition "in".<sup>402</sup> Accordingly, not any emergency would qualify under Article XXI(b)(iii), but only those occurring in international relations. Thus, the emergency must directly concern those relations.

7.282. The ordinary meaning of the terms in the phrase "emergency in international relations" therefore suggests a reference to a serious state of affairs, which occurs in relations between states or other participants in international relations and which requires urgent action.

7.283. We recall that pursuant to Article 33 of the Vienna Convention, the terms in treaties that are authentic in more than one language, are presumed to have the same meaning in each authentic language.<sup>403</sup> Consistent with this interpretive principle, we turn to examining the meaning of the phrase "emergency in international relations" as it may be derived from the authentic French and Spanish versions of subparagraph (iii). The French and Spanish versions of subparagraph (iii) read as follows:

French: appliquées en temps de guerre ou *en cas de grave tension internationale*;

Spanish: a las aplicadas en tiempos de guerra o *en caso de grave tensión internacional*;<sup>404</sup>

7.284. In French, the word "grave" is defined as "[s]usceptible de suites fâcheuses, dangereuses".<sup>405</sup> The word "tension" is defined as "[é]tat de ce qui menace de rompre".<sup>406</sup> The word "internationale" is defined as "[q]ui a lieu de nation à nation, entre plusieurs nations; qui concerne les rapports entre nations".<sup>407</sup>

<sup>400</sup> United States' response to Panel question No. 103, para. 136, quoting the definition of the word "emergency" (The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806, (Exhibit USA-193)).

<sup>401</sup> Oxford English Dictionary online, definition of "international relations" <https://www.oed.com/view/Entry/98072?redirectedFrom=international+relations#eid1171748060> (accessed 29 September 2022).

<sup>402</sup> The preposition "in" is defined as "[e]xpressing the situation of something that is or appears to be enclosed by something else: within the limits or bounds of, within (any place or thing)", Oxford English Dictionary online, definition of "in": <https://www.oed.com/view/Entry/92970?rskey=BUGtFV&result=7#eid> (accessed 29 September 2022). Accordingly, the construct "emergency in international relations" means that the emergency must be in international relations.

<sup>403</sup> We recall that according to Article 33 of the Vienna Convention, unless otherwise provided, the authentic text of treaties in more than one language is equally authoritative. See fn 108 above.

<sup>404</sup> Emphasis added.

<sup>405</sup> Le Robert dico en ligne, definition of "grave" <https://dictionnaire.lerobert.com/definition/grave> (accessed 29 September 2022).

<sup>406</sup> Le Robert dico en ligne, definition of "tension" <https://dictionnaire.lerobert.com/definition/tension> (accessed 29 September 2022).

<sup>407</sup> Le Robert dico en ligne, definition of "internationale" <https://dictionnaire.lerobert.com/definition/internationale> (accessed 29 September 2022).

7.285. In Spanish, the word "grave" is defined as "[g]rande, de mucha entidad o importancia".<sup>408</sup> The word "tensión" is defined as "[e]stado de oposición u hostilidad latente entre personas o grupos humanos, como naciones, clases, razas, etc".<sup>409</sup> The word "internacional" is defined as "[p]erteneciente o relativo a dos o más naciones ... [o] a países distintos del propio" and as "[q]ue trasciende o ha trascendido las fronteras de su país".<sup>410</sup>

7.286. We note that the three authentic versions of Article XXI(b)(iii) have in common that the emergency or "grave tension" or "grave tensión" occurs in international relations. We see no difference in meaning in the reference to the words "internationale" (in French) or "internacional" (in Spanish), when compared to "international relations" (in English), which as noted above, refers to relations between states and other participants in international relations.

7.287. We further note that the French and Spanish authentic versions of Article XXI(b)(iii) depart from the notion of "emergency" in the English authentic version and use the notion of "grave tension" or "grave tensión". These differences suggest to us that, pursuant to Article 33 of the Vienna Convention, to the extent possible, we need to read these meanings harmoniously to clarify the meaning of the phrase "emergency in international relations" in subparagraph (iii) as set out in its three authentic versions.<sup>411</sup>

7.288. The United States suggests that the ordinary meaning of the terms in French and Spanish (i.e. *grave tension* and *grave tensión*) refers to "serious tension" in English.<sup>412</sup> The United States further submits that based on the ordinary meaning of these terms in French and Spanish, the definition of "emergency in international relations" could be consistently read with the English as referring to a situation of danger or conflict concerning political or economic contact occurring between nations that arises unexpectedly and requires urgent attention. Furthermore, the United States contends that nothing in the French or Spanish text would suggest that Article XXI(b) is available only in certain types of tensions in international relations.<sup>413</sup>

7.289. We note, first of all, that the drafters chose the word "emergency" rather than the word "tension" in English.<sup>414</sup> It is this word, "emergency", that the French and Spanish versions translate into "tension grave" (French) and "grave tensión" (Spanish). We recall that the elements of the ordinary meaning of the word "emergency" in English suggest that it refers to a serious state of affairs requiring urgent action. In our view, the above meaning of the relevant words in French and Spanish, suggests that the seriousness of the state of affairs requiring urgent action can be best understood as referring to situations of the utmost gravity. Indeed the above definitions of the relevant terms in French and Spanish refer to a state that threatens to break ("*État de ce qui menace de rompre*") and state of opposition or latent hostility ("*estado de oposición u hostilidad latente*").<sup>415</sup> Therefore, tensions and differences in international relations cannot be characterized as resulting in an emergency in international relations unless the situation they give rise to is of a

<sup>408</sup> Diccionario de la Real Academia Española de la Lengua on line, definition of "grave" <https://dle.rae.es/grave> (accessed 29 September 2022).

<sup>409</sup> Diccionario de la Real Academia Española de la Lengua on line, definition of "tensión" <https://dle.rae.es/tensi%C3%B3n> (accessed 29 September 2022).

<sup>410</sup> Diccionario de la Real Academia Española de la Lengua on line, definition of "internacional" <https://dle.rae.es/internacional> (accessed 29 September 2022).

<sup>411</sup> We recall that Article 33(3) of the Vienna Convention provides that the terms of the treaty are presumed to have the same meaning in each authentic text. At this stage, we are using the authentic texts of the three languages to discern the ordinary meaning of Article XXI(b)(iii).

<sup>412</sup> United States' response to Panel question No. 106, paras. 147-148.

<sup>413</sup> United States' response to Panel question No. 106, para. 149.

<sup>414</sup> The word "tension" in English is defined as "[n]ervous or emotional strain; intense suppressed excitement; a strained condition of feeling or mutual relations which is for the time outwardly calm, but is likely to result in a sudden collapse, or in an outburst of anger or violent action of some kind", English Oxford Dictionary on line, "tension" <https://www.oed.com/view/Entry/199184?rskey=NBb10m&result=1&isAdvanced=false#eid> (accessed 29 September 2022).

<sup>415</sup> See Hong Kong, China's response to Panel question No. 106, para. 110 (where Hong Kong, China submits that the French and Spanish texts of Article XXI(b) confirm that the phrase "other emergency in international relations" refers not to any situation in international affairs, but, as defined by the panel in *Russia – Traffic in Transit* to a "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state" (citing Panel Report, *Russia- Traffic in Transit*, para. 7.76).

truly grave character for the relevant international relations that the situation implicates, in effect, a situation representing a breakdown or near-breakdown in those relations.<sup>416</sup>

7.290. Having examined the ordinary meaning of the relevant terms in the three authentic languages, we consider that a harmonious interpretation of such ordinary meaning suggests that an emergency in international relations refers to a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown in those relations. We next turn to examining this reading in the treaty's context and in light of its object and purpose.

#### 7.5.4.1.2.2 Context and object and purpose

7.291. We recall that we are called upon to consider whether the reading that we have discerned from the ordinary meaning of the phrase "emergency in international relations", "makes sense" in the context of the other relevant provisions in the GATT 1994 and elsewhere in the covered agreements, and in light of its object and purpose.<sup>417</sup>

7.292. We first turn to the immediate context in subparagraph (iii) itself. We recall the wording of the subparagraph which is "taken in time of war or other emergency in international relations" in English, "*appliquées en temps de guerre ou en cas de grave tension internationale*" in French, and "*a las aplicadas en tiempos de guerra o en caso de grave tensión internacional*" in Spanish. In the three authentic texts, the terms "war" and "other emergency" (or its equivalent in French and Spanish) are connected by the conjunction "or", which in the three languages is used to connect two or more clauses in a sentence.<sup>418</sup>

7.293. We disagree with the United States to the extent that it suggests that the absence of the word *similar*, indicating "war or other *similar* emergency", means that these terms cannot impart meaning to each other. In our view, the inclusion of the words "or other" before "emergency in international relations" in the English text, makes clear that war is directly connected to such other emergency in international relations, even in the absence of the word "similar". Indeed, we agree with the panel in *Russia – Traffic in Transit*, that war is one example of the larger category of "emergency in international relations".<sup>419</sup> We therefore consider that the words "war" and "other emergency in international relations" are included in Article XXI(b)(iii) in a manner that supports a reading under which those words impart meaning to each other.

7.294. War is defined as "[h]ostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed

<sup>416</sup> See Panel Report, *Russia – Traffic in Transit*, para. 7.75 (where the panel observed that "it is normal to expect that Members will, from time to time, encounter political or economic conflicts with other Members or states. While such conflicts could sometimes be considered urgent or serious in a political sense, they will not be 'emergencies in international relations' within the meaning of subparagraph (iii)").

<sup>417</sup> See paras. 7.91- 7.92 above.

<sup>418</sup> The conjunction "or" in English is defined as "[u]sed to coordinate two (or more) sentence elements between which there is an alternative" (English Oxford Dictionary online, "or" <https://www.oed.com/view/Entry/132129?rskey=fSnqDQ&result=9&isAdvanced=false#eid> (accessed 29 September 2022)); the conjunction "ou" in French is defined as "[c]onjonction qui joint des termes, membres de phrases ou propositions analogues, en séparant les idées exprimées" (Le Robert dico en ligne, "ou" <https://dictionnaire.lerobert.com/definition/ou> (accessed 29 September 2022)); and the conjunction "o" in Spanish is defined as "[d]iferencia, separación o alternativa entre dos o más personas, cosas o ideas" (Diccionario de la Real Academia Española en línea, "o", <https://dle.rae.es/o> (accessed 29 September 2022)).

<sup>419</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.72. See Hong Kong, China's response to Panel question No. 117, para. 112. We note that the adjective "other" is defined as "being the one or ones distinct from that or those first mentioned or implied" (Merriam Webster Dictionary online, definition of "other": <https://www.merriam-webster.com/dictionary/other> (accessed 29 September 2022)), and in subparagraph (iii) it is preceded by the conjunction "or", which as noted above, is used to coordinate two (or more) elements in a sentence.

We further note that the word "other" is not present in the authentic text of Article XXI(b)(iii) in French and Spanish. However, as discussed in para. 7.292 above, the use of the conjunction "ou" and "o", respectively, in the French and Spanish authentic text denotes a link between the two situations described in subparagraph (iii).



forces against a foreign power, or against an opposing party in the state".<sup>420</sup> Based on its ordinary meaning, and irrespective of a broader debate on the definition of this term in public international law<sup>421</sup>, we understand the term "war" to generally refer to armed conflict.<sup>422</sup>

7.295. We recall that, consistent with our assessment of the ordinary meaning of its terms, an emergency under subparagraph (iii) must be *in* international relations – which, as noted above, are those relations between states or other participants in international relations. The contextual role of war must therefore be framed within the remit of the impact of such type of situation on those international relations. In this regard, a state of war illustrates the exact opposite of peaceful and friendly interaction between states.<sup>423</sup> Indeed, a state of war between two or more countries represents the ultimate breakdown of their relations.

7.296. As noted above, the reference to war in subparagraph (iii) suggests that the emergency in international relations is a broader category than war, and in our view also serves to support conceptually the notion of war as an example of an ultimate emergency in international relations. The context provided by the word "war", suggests that an emergency in international relations must represent a situation of breakdown or near-breakdown in the relations between states or other participants in international relations.

7.297. The above does not suggest that for a situation to constitute an emergency in international relations it must amount to war. Rather, it should reflect a near-comparable gravity or magnitude as concerns its adverse impact on the relations between states or other participants in international relations. In this regard, we note that war will affect conflicting parties directly, but may also affect international relations more broadly. We recall that, the open reference to "international relations" suggests that the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations. Thus, a war taking place between two or more countries, could also give rise to an emergency in international relations affecting other countries.<sup>424</sup>

7.298. The context offered by the rest of subparagraph (iii) thus confirms our reading, based on the ordinary meaning of the three authentic texts, that an emergency in international relations generally refers to a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation that represents a breakdown in those relations.<sup>425</sup> Such a state of affairs, just as in a war, could lead to a situation where a Member or Members may well find themselves in a context where they may not, in relation to

---

<sup>420</sup> Oxford English Dictionary online, definition of "war": <https://www.oed.com/view/Entry/225589?rskey=VIMgYM&result=1&isAdvanced=false#eid> (accessed 29 September 2022). In public international law, there have been discussions on how to define this term.

<sup>421</sup> For a discussion on the various definitions of this term, see A. Clapham, *War*, (Oxford University Press, 2021); particularly, Chapter 1: The Multiple Meanings of War.

<sup>422</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.72.

<sup>423</sup> See preamble of the UN Charter (which states "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest") and Article 1; and General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (A/8082), 24 October 1970 (particularly the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations).

<sup>424</sup> We find confirmation for this view in the negotiation history of Article XXI(b). When asked about the meaning of the terms "emergency in international relations" at the meeting of the negotiating committee on 24 July 1947, the US delegate replied:

As to the second provision, "or other emergency in international relations", we had in mind particularly the situation which existed before the last war, before our own participation in the last war, which was not until the end of 1941. War had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter. Our exports and imports were under rigid control. They were under rigid control because of the war then going on.

Minutes of the 24 and 30 July 1947 Negotiation Meetings, (Exhibit USA-30), p. 20.

To us this statement suggests that in the United States' view, the war going on in Europe (to which it was not yet a party at the outset) represented a type of situation that would constitute an emergency in international relations for purposes of Article XXI(b)(iii).

<sup>425</sup> See para. 7.290 above.



another Member or Members, be expected to act in accordance with the relevant GATT obligations that would normally apply outside of such war or "other emergency in international relations".

7.299. We next turn to the broader context of Article XXI(b), namely, subparagraphs (i) and (ii). The first subparagraph refers to "fissionable materials or the materials from which they are derived". The second subparagraph refers to "traffic in arms, ammunition and implements of war" and to "such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment".

7.300. In our view, unlike subparagraph (iii) that refers to a specific situation, subparagraphs (i) and (ii) refer to areas of action where particular aspects of essential security interests may be implicated. To that extent, these subparagraphs do not speak to the magnitude or gravity of the situation, as the terms "war or other emergency in international relations" do in the context of subparagraph (iii).

7.301. We further note that the subject matters covered in subparagraphs (i) and (ii) are clearly related to the defence and military sector. They are thus closely connected to the situation of war set out in subparagraph (iii). In our view, given the gravity of the situation that we believe the concept of "emergency in international relations" entails, we would expect defence and military matters to normally be implicated. At the same time, recognizing that each situation will need to be considered on its individual merits, we would refrain from suggesting that an emergency must necessarily involve defence and military interests, as the panel in *Russia – Traffic in Transit* seems to suggest and as Hong Kong, China argues.<sup>426</sup>

7.302. Finally, we turn to Article XXI(c), which offers additional context that may be helpful in informing the meaning of the phrase "emergency in international relations". Article XXI(c) provides that "[n]othing in this Agreement shall be construed to ... prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter (UN Charter) for the maintenance of international peace and security". Chapter VII of the UN Charter, entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", sets out the framework for action by the Security Council with respect to the maintenance of international peace and security. Article 39 of the UN Charter describes the types of situations that fall within the Security Council's competence in this regard. Those situations are "any threat to the peace, breach of the peace, or act of aggression".<sup>427</sup>

7.303. We are cognizant that Article XXI(c) acknowledges that Members may be required to take action against another Member or Members pursuant to their obligations under the UN Charter for the maintenance of international peace and security. Where such actions flowing from such obligations would otherwise be contrary to a Member's GATT obligations, Article XXI(c) provides for a defence to a claim of GATT inconsistency. Action under Article XXI(b) is, in contrast, unilaterally determined by the invoking Member, rather than resulting from the Member's UN Charter obligations. At the same time, Article XXI(c), forms part of the context of Article XXI(b). Accordingly, for the purposes of identifying the meaning of the phrase "emergency in international relations", Article XXI(c) can be seen as illustrating the seriousness and gravity of the type of situations that are covered by Article XXI more generally.

7.304. In light of the contextual analysis, we consider that the phrase "emergency in international relations" refers to a state of affairs, of the utmost gravity, that represents a breakdown or near-breakdown in the relations between states or other participants in international relations.<sup>428</sup>

<sup>426</sup> See Panel Report, *Russia – Traffic in Transit*, para. 7.74 (where the panel observed that those interests identified in subparagraphs (i) and (ii), like the interests that arise from a situation of war in subparagraph (iii) itself, are all defence and military interests, as well as maintenance of law and public order interests). We observe that that panel identified the subject matter in subparagraphs (i) and (ii) of Article XXI(b) as "interests", whereas we understand them as areas of action related to a specific subject, given our reading of Article XXI(b) that the subparagraphs of Article XXI(b) only refer to the word "action" in the *chapeau*.

<sup>427</sup> See B. Conforti, *The Law and Practice of the United Nations* 3<sup>rd</sup> edn (Martinus Nijhoff Publishers, 2005), pp. 149-152 and 170-172.

<sup>428</sup> To the extent that the United States suggests that Article XXI(a) is also relevant context (see United States' response to Panel question No. 113, para. 170), we consider that Article XXI(a) does not provide

7.305. We see nothing in the object and purpose of the GATT 1994 or the WTO Agreement, as identified above<sup>429</sup>, which would contradict the meaning that we have discerned.<sup>430</sup>

#### **7.5.4.1.2.3 Conclusion on the interpretation of the phrase "emergency in international relations"**

7.306. Where we, thus, have come to in our analysis under Article 31 of the Vienna Convention is that the phrase "emergency in international relations" refers to a state of affairs, of the utmost gravity, in effect a situation representing a breakdown or near-breakdown in the relations between states or other participants in international relations.

7.307. In light of this meaning, a panel's inquiry will concern the relations between states and other participants in international relations, and the extent to which underlying circumstances have led to a state of affairs that is of the utmost gravity representing a breakdown or near-breakdown in those relations. As we noted earlier, the emergency does not necessarily have to originate in the invoking Member's own territory and bilateral relations but could happen more broadly in relations among a wider group of WTO Members.

7.308. We consider that the focus under subparagraph (iii) is therefore not about the underlying circumstances from which such a state of affairs appears to result, but rather about the gravity of the impact that such state of affairs has on the relations between two or more countries, or Members. In other words, the wording of the subparagraph enjoins a panel to examine the extent of the deterioration in relations between states or other participants in international relations, irrespective of what caused that deterioration. Although the underlying circumstances may inform a panel's assessment of whether a given situation constitutes an emergency in international relations, a panel would not review the merits or the veracity of such underlying circumstances or alleged circumstances that may have given rise to the situation examined.<sup>431</sup>

7.309. As regards the assessment of the gravity of the situation, the United States submits that "the question of whether a situation is 'serious, unexpected, and often dangerous' and 'requires action' is inherently subjective".<sup>432</sup> We acknowledge that the invoking Member's view, as well as that of other countries or Members implicated in the emergency in international relations, are relevant for a panel's examination under Article XXI(b)(iii). However, this does not mean that a panel must solely rely on the invoking Member's appreciation of the situation, or that a panel cannot refer to objective parameters to conclude on the existence or not of such an emergency. To that extent, and consistent with our view that Article XXI(b) is only partly self-judging, we do not consider that it would be solely up to the invoking Member to determine the existence of an emergency in international relations.

7.310. Just as with respect to other inherently subjective human experiences, for example, how we experience whether it is warm or cold, there are parameters to establish when a situation constitutes an emergency in international relations. In our view, such parameters could be conceptualized in a spectrum covering friendly and peaceful interaction between Members, at one end, and the breakdown of relations between two or more countries, or Members, at the other end. This spectrum would serve a similar role for an emergency in international relations, in the same way that a

context relevant for the interpretation of the phrase "emergency in international relations". As discussed above, we disagree with the United States that Article XXI(a) confirms its view that Article XXI(b) is entirely self-judging. (See paras. 7.101- 7.103 above.)

<sup>429</sup> We recall that the object and purpose of the GATT 1994 and the WTO Agreement more generally identified above concerns the "mutually advantageous arrangements", referred to in the preamble of the GATT 1994, which describe the balance struck between the various rights and obligations; and the security and predictability of the multilateral trading system specifically referred to in Article 3.2 of the DSU. See para. 7.142 above.

<sup>430</sup> We recall that the parties raised arguments regarding the object and purpose of the GATT 1994 and the WTO Agreement more generally in the context of their views on whether Article XXI(b) is entirely or partly self-judging. See section 7.3.5.1 above.

<sup>431</sup> See Panel Report, *Saudi Arabia – IPRs*, para. 7.263 (where the panel noted that it "expresses or implies no position concerning any of" Saudi Arabia's allegations in respect of Qatar, and that it "suffices to observe that the nature of the allegations constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia's security interests").

<sup>432</sup> United States' response to Panel question No. 104, para. 142. See United States' response to Panel question No. 111, para. 161.

thermometer does for measuring temperature. They both provide a framework to assess how a particular phenomenon has been manifested.

7.311. Based on the meaning we have discerned above, an emergency in international relations on that spectrum lies closer to the extreme of a breakdown in relations between two or more countries, or Members. In contrast, most political tensions and differences among countries, even those that may appear to be of a quite serious nature, would, in our view, normally not be situated close enough to that end of the spectrum and would therefore not necessarily constitute an emergency.<sup>433</sup> As we know from daily media reports, we live in a world driven by a range of political, economic, social, and environmental tensions and divergences. At the same time, in the midst of these tensions and divergences Members will in most cases continue to manage their relationships within a range of international legal frameworks aimed at ensuring predictability and stability within the international system. Article XXI(b)(iii) stands for the principle that situations of war or other emergency in international relations represent an exception to this. If the existence of tensions or policy divergences of any magnitude, however, were to constitute an emergency in international relations, the character of Article XXI as an exception to apply in the gravest of circumstances would fundamentally change.

7.312. However, we consider that it would neither be possible nor helpful to attempt to provide a list of events that fall under this definition in the abstract. A determination of whether a given situation constitutes an emergency in international relations is to be examined on a case-by-case basis, considering the circumstances and context in which Article XXI(b)(iii) is invoked. In this context, we consider that the further removed that a situation is from war or comparable threat to international peace and security, the more explanation a respondent would usually need to provide as to why a given situation is close to the breakdown in relations between two or more countries, or Members, in the sense of Article XXI(b)(iii).

7.313. We further note that two previous panels have concluded that the circumstances in those cases constituted an emergency in international relations. The first instance was the situation between Ukraine and Russia in 2014, examined by the panel in *Russia – Traffic in Transit*. That panel considered that there was evidence on record that, between March 2014 and the end of 2016, "relations between Ukraine and Russia had deteriorated to such degree that they were a matter of concern to the international community", such that by December 2016, the "situation between Ukraine and Russia was recognized by the UN General Assembly as involving armed conflict". That panel further noted that additional evidence of the gravity of the situation was the fact that, since 2014, several countries had imposed sanctions against Russia in connection with that situation.<sup>434</sup>

7.314. The second instance concerned the relations between Qatar, on the one hand, and Saudi Arabia and other countries in the Middle East and North Africa region, on the other hand, examined by the panel in *Saudi Arabia – IPRs*. That panel concluded "that 'a situation ... of heightened tension or crisis' exists in the circumstances in this dispute, and is related to Saudi Arabia's 'defence or military interests, or maintenance of law and public order interests' (i.e. essential security interests), sufficient to establish the existence of an 'emergency in international relations' that has persisted since at least 5 June 2017."<sup>435</sup> The panel's conclusion took into account, *inter alia*, Saudi Arabia's severance of diplomatic, consular and economic ties with Qatar, which the panel qualified as action that "can be characterized in terms of an exceptional and serious crisis in the relations between two or more States".<sup>436</sup> The panel also considered that the nature of the allegations made by Saudi Arabia, on which the panel expressed or implied no position and that were strongly denied by Qatar, "constitutes further evidence of the grave and serious nature of the deterioration and rupture in relations between these Members, and is also explicitly related to Saudi Arabia's security". In this

<sup>433</sup> See Panel Report, *Russia – Traffic in Transit*, para. 7.75. In this regard, we note that the United States would not expect that a Member would consider every situation of concern in international relations to be an "emergency in international relations" such that it would need to act to protect its essential security interests. In the United States' view, this is "evidenced by the fact that for the past 70 years Members (formerly contracting parties) have sought to resolve certain trade concerns through both the monitoring and dispute settlement functions of the multilateral trading system, and essential security interests have not been invoked in every dispute". (United States' response to Panel question No. 109, para. 153).

<sup>434</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.122-7.123.

<sup>435</sup> Panel Report, *Saudi Arabia – IPRs*, para. 7.257 (quoting Panel Report, *Russia – Traffic in Transit*, para. 7.76).

<sup>436</sup> Panel Report, *Saudi Arabia – IPRs*, para. 7.262. (See *ibid.* paras. 7.258-7.261).

regard the panel disagreed with Qatar that those events could be characterized as a "mere political or economic" dispute.<sup>437</sup>

7.315. Although both panels relied on a slightly different definition of emergency in international relations than the one elaborated here<sup>438</sup>, the elements identified by both panels clearly reflect a similar understanding to ours of the type of situation that constitutes an emergency in international relations. That is, a state of affairs, of the utmost gravity, which represents a breakdown or near-breakdown in the relations between states or other participants in international relations.

7.316. We next turn to examining the facts of this case to determine whether the situation at issue satisfies the parameters of an emergency in international relations under Article XXI(b)(iii).

#### **7.5.4.2 Whether the situation at issue is one that constitutes an emergency in international relations**

##### **7.5.4.2.1 Arguments of the parties and the third parties**

7.317. The United States submits that to the extent that the Panel chooses to assess the merits of the United States' invocation of Article XXI(b)(iii), it has submitted extensive evidence on the record that supports such invocation, as well as evidence on the existence of an emergency in international relations.<sup>439</sup> According to the United States, the views of other countries regarding the situation with respect to Hong Kong, China could support a finding that there is such an emergency.<sup>440</sup> The United States submits that it would expect the Panel to consider the evidence on record regarding the basis for the measures at issue and the circumstances and context in which they were taken.<sup>441</sup>

7.318. Hong Kong, China contends that the United States has failed to demonstrate that its alleged concerns about freedom and democracy in Hong Kong, China constitute an emergency in international relations. According to Hong Kong, China, the United States failed to demonstrate that these alleged concerns implicate any defence or military interest, or maintenance of law and public order interest, of the United States.<sup>442</sup> Moreover, Hong Kong, China submits that the relations between the United States and Hong Kong, China continue as before, including on trade matters with the exception of the specific origin-marking requirement that is the subject of the current dispute (as well as the other actions taken pursuant to Executive Order 13936 not at issue in this dispute). In this regard, Hong Kong, China notes that most pertinently, the United States continues to treat goods manufactured or produced in Hong Kong, China as goods of Hong Kong, China origin for the purpose of duty assessment.<sup>443</sup>

<sup>437</sup> Panel Report, *Saudi Arabia – IPRs*, para. 7.263.

<sup>438</sup> The panel in *Russia – Traffic in Transit* considered that an emergency in international relations generally refers to "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state". In that panel's view, "such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests". (Panel Report, *Russia – Traffic in Transit*, paras. 7.76-7.77). The panel in *Saudi Arabia – IPRs* followed this definition. (Panel Report, *Saudi Arabia – IPRs*, paras. 7.245 and 7.257). For the reasons explained in this section, we do not consider that an emergency in international relations will necessarily only arise from situations related to a Member's defence or military interests, or to maintenance of law and public order interests; nor do we consider that an emergency in international relations necessarily has to refer to a situation of "general instability engulfing or surrounding a state".

<sup>439</sup> United States' responses to Panel question No. 110, paras. 155-156, No. 111, para. 163, and No. 114, para. 175. See United States' responses to Panel question No. 119, para. 209 and 215, and No. 120, para. 218. See United States' comments on Hong Kong, China's response to Panel question No. 102, paras. 79-80.

<sup>440</sup> United States' response to Panel question No. 111, para. 163; and comments on Hong Kong, China's response to Panel question No. 110, para. 96.

<sup>441</sup> United States' comments on Hong Kong, China's response to Panel question No. 124, para. 134.

<sup>442</sup> Hong Kong, China's opening statement at the second meeting of the Panel, para. 8; response to Panel question No. 109, para. 115; and comments on the United States' response to Panel question No. 103, para. 75, No. 114, paras. 87-88, and No. 116, paras. 90-92. See Hong Kong, China's responses to Panel question No. 110, paras. 116-117, No. 115, para. 121, and No. 120, paras. 127-128.

<sup>443</sup> Hong Kong, China's comments on United States' response to question No. 125, paras. 104-105. See USCBP Guidance on Marking of Goods of HKG – Executive Order 13936, (Exhibit HKG-12).

7.319. Canada comments that the concerns of the United States, which Canada shares, regarding the degree of autonomy of Hong Kong, China and the respect for rights and freedoms in Hong Kong, China are relevant to the question of the existence of an emergency in international relations.<sup>444</sup>

7.320. China states that the National Security Law (which came into effect on 30 June 2020) and relevant measures taken to safeguard the security and stability of Hong Kong, China are fully in line with the Basic Law and "one country, two systems" policy. China further notes that these measures have not changed the status of Hong Kong, China as a separate customs territory, nor do they affect its qualifications and status as a WTO Member. According to China, these measures have nothing to do with the so-called national security of other WTO Members.<sup>445</sup>

7.321. The European Union argues that there are significant elements to indicate that the situation to which the United States sought to respond by its measures is one of an emergency in international relations within the meaning of Article XXI(b)(iii) of the GATT 1994.<sup>446</sup>

#### 7.5.4.2.2 Panel's assessment

7.322. Our task is to examine whether in the specific circumstances of this dispute the situation at issue is one that constitutes an emergency in international relations. To that effect, in this section we examine the evidence and arguments submitted by the United States, as well as Hong Kong, China's arguments and those arguments and evidence submitted by certain third parties. In undertaking this task, we focus on whether international relations reached a state of breakdown or near-breakdown consistent with the meaning of "emergency in international relations" clarified above. We recall that our inquiry will not be focused on the underlying events in Hong Kong, China referred to by the United States, but rather on how we see their effect reflected in international relations and whether the standard of an "other emergency in international relations" is met.

##### 7.5.4.2.2.1 Evidence submitted by the United States

7.323. The United States generally asserts that the evidence that it submitted to the Panel supports the existence of an emergency in international relations.<sup>447</sup> The United States emphasizes that it considered that the situation in Hong Kong, China, resulting from China's actions (including the adoption of the National Security Law) and from actions of Hong Kong, China's authorities, poses a threat to its essential security interests.<sup>448</sup> In this way, the United States argument appears to be focused principally on the *chapeau* to Article XXI and the reference to action it considered necessary in relation to its essential security interests. At the same time, we understand that according to the United States, "an erosion of freedoms and rights of the people in Hong Kong, China, as well as the institutional degradation of democracy in Hong Kong, China"<sup>449</sup> in and of itself constitutes an emergency in international relations under Article XXI(b)(iii). We therefore turn to examining whether the evidence on the record demonstrates this to be the case.

7.324. We recall that the relevant international relations may include those between the parties to this dispute or between other Members. Based on the United States' arguments, we consider that our inquiry in the context of the current dispute concerns the United States' relations with China and Hong Kong, China, as well as those between other Members, on the one hand, and China and Hong Kong, China, on the other hand.

7.325. The evidence before us can be grouped in four categories: US domestic instruments; reports and statement by United States' officials on the situation in Hong Kong, China; statements by other

<sup>444</sup> Canada's third-party statement, para. 19.

<sup>445</sup> China's third-party submission, para. 3; third-party statement, para. 2; and response to Panel question Nos. 51, 52, and 53, para. 16.

<sup>446</sup> European Union's third-party submission, para. 39. See *ibid.* paras. 11-16.

<sup>447</sup> United States' responses to Panel question No. 110, para. 156. See United States' responses to Panel question No. 111, paras. 162-163, and No. 114, para. 175. See also United States' responses to Panel question No. 119, paras. 209 and 215, and No. 120, para. 218; and comments on Hong Kong, China's response to Panel question No. 102, paras. 79-80.

<sup>448</sup> United States' first written submission, para. 2.

<sup>449</sup> United States' closing statement at the first meeting of the Panel, para. 3; second written submission, para. 5.

countries and Members on the situation in Hong Kong, China; and press articles. We turn to examining each of those categories.

### *US domestic instruments*

7.326. Under the first category, the United States refers to the 1992 Hong Kong Policy Act<sup>450</sup>, the 2019 Hong Kong Human Rights and Democracy Act<sup>451</sup>, the 2020 State Department Hong Kong Policy Act Report (2020 Hong Kong Policy Act Report)<sup>452</sup>, Executive Order 13936<sup>453</sup>, the 2020 Hong Kong Autonomy Act<sup>454</sup>, and the 2021 State Department Hong Kong Policy Act Report (2021 Hong Kong Policy Act Report).<sup>455</sup> We briefly survey each instrument.

7.327. Through the 1992 Hong Kong Policy Act, the United States Congress set out the policy of the United States with respect to Hong Kong, China following the resumption of the exercise of the People's Republic of China's sovereignty over Hong Kong, China on 1 July 1997. Among its findings and declarations, the US Congress recognized the 1984 Sino-British Joint Declaration and the parties' commitments set out therein. The US Congress also noted that "[s]upport for democratization is a fundamental principle of United States foreign policy. As such, it naturally applies to United States policy towards Hong Kong. This will remain equally true after June 30, 1997".<sup>456</sup> Moreover, the US Congress observed 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."<sup>457</sup> This Act also sets out the conditions under which the US president may determine that Hong Kong, China no longer warrants differential treatment from China as a result of a finding that Hong Kong, China is no longer sufficiently autonomous.<sup>458</sup>

7.328. The 2019 Hong Kong Human Rights and Democracy Act, reaffirms some of the principles of the 1992 Hong Kong Policy Act, including the protection of democracy and human rights.<sup>459</sup> It also expresses that it is the United States' policy to "urge the Government of [China] to uphold its commitments to Hong Kong", including democratic elections. As well as to "draw international attention to any violations by the Government of [China] of the fundamental rights of the people of Hong Kong" and to "coordinate with allies, including the United Kingdom, Australia, Canada, Japan, and the Republic of Korea, to promote democracy and human rights in Hong Kong".<sup>460</sup> Notably, the 2019 Hong Kong Human Rights and Democracy Act sets out the conditions under which the secretary of state would report to Congress the situation regarding the autonomy of Hong Kong.<sup>461</sup>

7.329. On 28 May 2020, the State Department issued the 2020 Hong Kong Policy Act Report, covering developments in Hong Kong from March 2019 through May 2020. The report observes that "[a]fter careful consideration, as required by section 301 of the Hong Kong Policy Act, I can no longer certify that Hong Kong continues to warrant" differential treatment under US law. This report further notes that since the last report was issued, where it was found that Hong Kong, China maintained sufficient – although diminished – degree of autonomy, "China has shed any pretense that the people of Hong Kong enjoy the high degree of autonomy, democratic institutions, and civil liberties guaranteed to them by the Sino-British Joint Declaration and the Basic Law".<sup>462</sup>

7.330. The report supports the foregoing statements with reference to three elements. First, a statement issued by the Legislative Affairs Commission of the National People's Congress Standing Committee (NPCSC) on November 2019 "asserting that only the NPCSC has the power to decide

<sup>450</sup> 1992 Hong Kong Policy Act, (Exhibits USA-3, HKG-14).

<sup>451</sup> Hong Kong Human Rights and Democracy Act of 2019, Pub. L. 116-76, (2019 Hong Kong Human Rights and Democracy Act), (Exhibit USA-4). See 22 U.S.C. § 5725, Secretary of State report regarding the autonomy of Hong Kong (27 November 2019), (Exhibit HKG-16).

<sup>452</sup> 2020 Hong Kong Policy Act Report (28 May 2020), (2020 Hong Kong Policy Act Report), (Exhibit USA-5).

<sup>453</sup> Executive Order 13936, (Exhibits USA-2, HKG-13).

<sup>454</sup> Hong Kong Autonomy Act, Pub. L. 116-149, (2020 Hong Kong Autonomy Act), (Exhibit USA-9).

<sup>455</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6).

<sup>456</sup> Section 2(5), 1992 Hong Kong Policy Act, (Exhibits USA-3, HKG-14).

<sup>457</sup> Section 2(6), 1992 Hong Kong Policy Act, (Exhibits USA-3, HKG-14).

<sup>458</sup> See paras. 7.196 and 7.197 above, where this is explained in more detail.

<sup>459</sup> Section 3(1), 2019 Hong Kong Human Rights and Democracy Act, (Exhibit USA-4).

<sup>460</sup> Sections 3(4), 3(8), and 3(11), 2019 Hong Kong Human Rights and Democracy Act, (Exhibit USA-4).

<sup>461</sup> Section 4(2), 2019 Hong Kong Human Rights and Democracy Act, (Exhibit USA-4).

<sup>462</sup> 2020 Hong Kong Policy Act Report, (Exhibit USA-5), pp. 1-2.



whether Hong Kong laws comply with the Basic Law". Second, a statement issued by the Chinese government's Central Government Liaison Office (CGLO) on 17 April 2020, "claiming that CGLO and the central government's Hong Kong and Macau Affairs Office in Beijing are not bound by a provision of the Basic Law which states that 'no department of the Central People's Government ... may interfere with the affairs' of Hong Kong". Third, that on 22 May 2020, the National People's Congress proposed to "unilaterally and arbitrarily impose national security legislation on Hong Kong", which the report describes as "a procedural step which contradicts the spirit and practice of the Sino-British Joint Declaration and the One Country, Two Systems Framework". The report also refers to the protests that ensued, as well as reactions from Hong Kong, China and Chinese authorities.<sup>463</sup>

7.331. On 14 July 2020 Executive Order 13936 was issued. The US president determined that Hong Kong, China was "no longer sufficiently autonomous to justify differential treatment in relation to [China (PRC)] under the particular United States laws and provisions thereof set out in this order". Executive Order 13936 refers to the events described in the 2020 Hong Kong Policy Act Report, and supplements them indicating that "China has since followed through on its threat to impose national security legislation on Hong Kong". On that basis, the US president determined that "the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong's autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States", and declared "a national emergency with respect to that threat".<sup>464</sup>

7.332. Through Executive Order 13936 several measures were put in place in response to the situation in Hong Kong, China. Notably, as explained above, it mandated the suspension of differential treatment regarding country of origin marking at issue in this dispute. Other measures included: suspending certain US laws; amending implementing regulations on immigration, and arms and exports control; and suspending or terminating extradition treaties, provision of training to members of the Hong Kong Police Force or other Hong Kong security services, cooperation on scientific and educational matters, and tax exemptions. Action was mandated regarding Hong Kong citizens seeking refugee status in the United States for humanitarian reasons. Measures concerning individuals or entities linked to certain types of events in Hong Kong, China including asset blocks, were also introduced.<sup>465</sup>

7.333. The 2020 Hong Kong Autonomy Act was enacted, "to impose sanctions with respect to foreign persons involved in the erosion of certain obligations of China with respect to Hong Kong".<sup>466</sup> The US Congress referred to instances where "the Government of China has undertaken actions that have contravened the letter or intent"<sup>467</sup> of some of the obligations in the 1984 Sino-British Joint Declaration and the Basic Law. In particular, the findings refer to judicial independence, maintaining the social and economic system in Hong Kong, China, human rights, and the democratic system in Hong Kong, China. The US Congress further indicates that its findings are "deeply concerning to the people of Hong Kong, the United States, and members of the international community who support the autonomy of Hong Kong".<sup>468</sup>

7.334. The 2020 Hong Kong Autonomy Act refines the framework to establish penalties with respect to foreign individuals and to entities found to be involved in the contravention of the obligations of China under the 1984 Sino-British Joint Declaration and the Basic Law and the financial institutions transacting with those foreign individuals or entities.<sup>469</sup> At the same time, the imposition of sanctions on the importation of goods from Hong Kong, China is expressly excluded from the authority provided in this Act.<sup>470</sup> Moreover, it is stated that "[n]othing in this Act shall be construed as an authorization of military force against China".<sup>471</sup>

<sup>463</sup> 2020 Hong Kong Policy Act Report, (Exhibit USA-5), pp. 2-3.

<sup>464</sup> Introduction, Executive Order 13936, (Exhibits USA-2, HKG-13).

<sup>465</sup> Sections 2 to 8, Executive Order 13936, (Exhibits USA-2, HKG-13). See Revisions to the Export Administration Regulations: Suspension of License Exceptions for Hong Kong, 85 Fed. Reg. 45998 (July 31, 2020), (Exhibit USA-8).

<sup>466</sup> Title, 2020 Hong Kong Autonomy Act, (Exhibit USA-9)

<sup>467</sup> Sections 3(9) to 3(16), 2020 Hong Kong Autonomy Act, (Exhibit USA-9).

<sup>468</sup> Section 3(16), 2020 Hong Kong Autonomy Act, (Exhibit USA-9).

<sup>469</sup> Sections 5, 6, 7, and 8, 2020 Hong Kong Autonomy Act, (Exhibit USA-9).

<sup>470</sup> Section 8(d)(1), 2020 Hong Kong Autonomy Act, (Exhibit USA-9).

<sup>471</sup> Section 10, 2020 Hong Kong Autonomy Act, (Exhibit USA-9).

7.335. On 31 March 2021, the State Department issued the 2021 Hong Kong Policy Act Report, on the conditions in Hong Kong from June 2020 to February 2021. This report, like the one for 2020, considers that new actions taken by China led to Hong Kong, China not warranting "treatment under U.S. law in the same manner as U.S. laws were applied to Hong Kong before July 1, 1997".<sup>472</sup> The report bases its conclusion on three main elements. First, by unilaterally imposing the National Security Law, China "dramatically undermined rights and freedoms in Hong Kong". Second, following the imposition of the National Security Law, Hong Kong police arrested at least 99 opposition politicians, activists, and protestors on charges of secession, subversion, terrorism, and collusion with a foreign country or external elements. Third, the Hong Kong Government used COVID-19-related restrictions to deny authorizations for public demonstrations and postponed Hong Kong's Legislative Council elections for at least one year.<sup>473</sup>

7.336. The report provides additional details on the State Department's assessment of the situation in Hong Kong, China in several areas.<sup>474</sup> Detailed views expressed in the report on two topics are of particular relevance to our analysis of whether an emergency in international relations exists in the current context. The first concerns areas of remaining autonomy. Salient among those are: Hong Kong, China's continued exercise of its "authority in the implementation of commercial agreements"; the continuation of the Hong Kong, China's legal system being based on common law, despite concerns about the judicial system's continued independence; the protection of property rights in law and practice; the maintenance of Hong Kong, China's own currency pegged to the US dollar; Hong Kong's autonomous monetary policy; and Hong Kong, China's participation, separately from China, in 24 international organizations and multilateral entities, including the Financial Action Task Force, the Asia-Pacific Economic Cooperation Forum, the International Olympic Committee, and the WTO.<sup>475</sup>

7.337. The second topic concerns US – Hong Kong, China Cooperation and Agreements. The report notes that the United States and Hong Kong, China continue to maintain several bilateral agreements regarding issues such as taxation, parcel delivery, and air services. The report refers to the United States' notification of the suspension or termination of extradition agreements and tax exemptions in August 2020, pursuant to Executive Order 13936. The report further notes that Hong Kong, China's Government notified the United States of its purported suspension of the agreement concerning mutual legal assistance in criminal affairs. The lack of engagement or cooperation on law enforcement and related areas is also noted.<sup>476</sup>

7.338. The US instruments reviewed above show the following key aspects for our analysis of the existence of an emergency in international relations under Article XXI(b)(iii). First, the United States, as a matter of foreign policy, attaches great importance to the protection of human rights and democracy generally, and in Hong Kong, China particularly. Second, the United States considered that certain actions by the Government of China with respect to Hong Kong, China and by Hong Kong, China's authorities, undermined human rights and democracy in Hong Kong, China and raised serious concerns. Third, in response to such action, the United States took certain measures that include the origin marking requirement at issue in this dispute, amending US laws and regulations as they apply to Hong Kong, China in areas such as immigration and arms and exports control, as well as imposing sanctions on individuals or entities linked to certain events in Hong Kong, China. Fourth, the 2020 Hong Kong Autonomy Act expressly excluded restrictions on importations of Hong Kong, China products from the sanctions to be applied and underscored that its terms should not be construed as an authorization to use military force against China. Fifth, the United States and Hong Kong, China continue to maintain several bilateral agreements regarding issues such as taxation, parcel delivery, and air services. Sixth, Hong Kong, China continues to participate, separately from China, in 24 international organizations and multilateral entities, including the WTO.

<sup>472</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), pp. 1-2.

<sup>473</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), p. 2. See 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, (Exhibit USA-117).

<sup>474</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), pp. 2-12.

<sup>475</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), p. 12.

<sup>476</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), p. 12.

***Reports and statements of United States' officials on the situation in Hong Kong, China***

7.339. We next turn to the second category of evidence that the United States submitted. Such evidence includes some government reports and statements of government officials, referring to the situation in Hong Kong, China between July 2020 and December 2021.

7.340. The United States exhibited the US Department of State Hong Kong 2020 Human Rights Report, which refers to events regarding the protection of human rights and the democratic system in Hong Kong, China.<sup>477</sup> In our view, this report, while providing an assessment by the United States of the human rights situation in Hong Kong, China, does not offer meaningful information on the specific issue of how the human rights situation in Hong Kong, China has affected international relations between the United States, Hong Kong, China and China.

7.341. Also on record is a press statement of the US secretary of state on the amendment to the electoral system in Hong Kong, China of March 2021. According to the secretary of state "[t]he United States condemns the PRC's continuing assault on democratic institutions in Hong Kong", and called on "the PRC to uphold its international obligations and commitments and to act consistently with Hong Kong's Basic Law". The statement further remarked that the "United States stands united with our allies and partners in speaking out for the rights and freedoms of people in Hong Kong".<sup>478</sup>

7.342. The last statement submitted by the United States is from the US president. The statement referring to the events of June 2021 regarding a media outlet in Hong Kong, China, remarked that "[p]eople in Hong Kong, have the right to freedom of the press. Instead, Beijing is denying basic liberties and assaulting Hong Kong's autonomy and democratic institutions and processes, inconsistent with its international obligations. The United States will not waver in our support of people in Hong Kong and all those who stand up for the basic freedoms all people deserve".<sup>479</sup>

7.343. The reports and statements referred to above, clearly underscore the importance that the United States attaches to the protection of human rights and democracy in Hong Kong, China. Although some of these documents post-date the adoption of the origin marking requirement, they are informative of the concern that the United States expressed with respect to the events in Hong Kong, China.

***Statements of other countries on the situation in Hong Kong, China***

7.344. Regarding the third category of evidence, the United States submitted a statement from the Media Freedom Coalition<sup>480</sup>, and the views expressed by Canada and the European Union in their submissions in these proceedings.<sup>481</sup>

7.345. The Media Freedom Coalition statement is dated 8 February 2022, over a year after the adoption of the origin marking requirement. This statement signed by the governments of 21 countries, expresses "deep concern at the Hong Kong and mainland Chinese authorities' attacks on freedom of the press and their suppression of independent local media in Hong Kong". This sentiment relates to events following the adoption of the National Security Law. The statement further notes that these "ongoing actions further undermine confidence in Hong Kong's international reputation through the suppression of human rights, freedom of speech and free flow and exchange of opinions and information".<sup>482</sup>

<sup>477</sup> Hong Kong 2020 Human Rights Report, (Exhibit USA-112).

<sup>478</sup> "Assault on Democracy in Hong Kong", Press Statement, Anthony J. Blinken, Secretary of State, (Exhibit USA-125).

<sup>479</sup> Statement by President Joe Biden on Hong Kong's Apple Daily, The White House Press Releases (June 24 2021), (Exhibit USA-134).

<sup>480</sup> United States' opening statement at the second meeting of the Panel, para. 3 (referring to *Media Freedom Coalition Statement on Closure of Media Outlets in Hong Kong*, Office of the Spokesperson, U.S. Department of State (February 9, 2022), (Exhibit USA-210)).

<sup>481</sup> United States' response to Panel question No. 110, para. 160.

<sup>482</sup> Media Freedom, Coalition Statement on Closure of Media Outlets in Hong Kong, Office of the Spokesperson, U.S. Department of State (February 8, 2022), (Exhibit USA-210).

7.346. Canada's statement referred to by the United States is that "Canada wishes to take this opportunity to join the United States and the European Union in expressing serious concern regarding recent developments in Hong Kong that have affected its degree of autonomy from mainland China and the respect for rights and freedoms in Hong Kong".<sup>483</sup> Canada did not submit any evidence in support of this view. However, evidence on record suggests that Canada, similar to the United States, suspended extradition treaties with Hong Kong, China.<sup>484</sup>

7.347. In turn, the European Union's view referred to by the United States is that "the EU shares the concerns of the United States regarding the degree of autonomy of Hong Kong and regarding the respect for protected rights and freedoms in Hong Kong".<sup>485</sup>

7.348. We further note in this context that the European Union, itself, in this proceeding, submitted statements of officials in support of its view referred to above.<sup>486</sup> One of those statements announced that the European Union, similar to the United States, adopted a response package that included measures regarding: exports of specific sensitive equipment and technologies; extradition; asylum, migration, visa, and residency policy; scholarships and academic exchanges involving Hong Kong, China students and universities; and support to civil society.<sup>487</sup>

7.349. The statement referred to by the United States and the evidence on record confirm that some countries and entities expressed high levels of concern about the events in Hong Kong, China, especially on how such events affect the human rights of its residents and its democratic system, and adopted certain measures in response *vis-à-vis* Hong Kong, China.

### **Press articles**

7.350. The last category of evidence submitted by the United States is press articles. Most of those press articles concern reports on the human rights situation in Hong Kong, China, including on limitations on freedom of the press, freedom of speech, democratic elections, and independence of the judiciary.<sup>488</sup> These articles highlight events in Hong Kong, China during the period indicated

<sup>483</sup> Canada's third-party statement, para. 3, referred to in United States' response to Panel question No. 110, para. 160, fn 126.

<sup>484</sup> "Hong Kong security law: Four students arrested for 'inciting secession'", *BBC News* (July 30, 2020), (Exhibit USA-130), p. 4.

<sup>485</sup> European Union's third-party submission, para. 16, referred to in United States' response to Panel question No. 110, para. 160, fn 126. See also European Union's third-party statement, para. 39, where the European Union indicates there are significant elements which can indicate that the situation to which the United States sought to respond by its measures is one of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994.

<sup>486</sup> Declaration by the High Representative, on behalf of the European Union, on the announcement by China's National People's Congress spokesperson regarding Hong Kong (22 May 2020), (Exhibit EU-1); Hong Kong: Council expresses grave concern over national security law (28 July 2020), (Exhibit EU-2); Hong Kong: Declaration by the High Representative on behalf of the EU on the disqualification of Members of the Hong Kong Legislative Council security law (12 November 2020), (Exhibit EU-3); and Hong Kong: Statement by the High Representative / Vice-President Josep Borrell on the changes to Hong Kong's electoral system (9 June 2021), (Exhibit EU-4).

<sup>487</sup> Hong Kong: Council expresses grave concern over national security law (28 July 2020), (Exhibit EU-2). See also Hong Kong: Statement by the High Representative / Vice-President Josep Borrell on the changes to Hong Kong's electoral system (9 June 2021), (Exhibit EU-4) (where the High Representative indicates that "[t]he EU will continue implementing the initial response package agreed in July 2020").

<sup>488</sup> See "Leading democracy campaigner Nathan Law leaves Hong Kong", *The Guardian* (July 2, 2020), (Exhibit USA-118); "Pro-democracy leader Nathan Law leaves Hong Kong", *CNN* (July 3, 2020), (Exhibit USA-119); "Hong Kong Activists Sentenced For Their Role In Anti-Government Protest", *NPR* (December 2, 2020), (Exhibit USA-120); "Beijing's Hong Kong office warns pro-democracy poll could violate new security law", *Reuters* (July 13, 2020), (Exhibit USA-121); "Hong Kong bars 12 opposition candidates from election", *BBC News* (July 30, 2020), (Exhibit USA-122); "Hong Kong opposition lawmakers all quit after four members ousted", *The Guardian* (November 11, 2020), (Exhibit USA-123); "EU calls for 'immediate release of Hong Kong activists'", *AP News* (January 6, 2021), (Exhibit USA-124); "Hong Kong announces more electoral system changes favouring pro-Beijing camp", *Reuters* (April 13, 2021), (Exhibit USA-126); "Hong Kong Says Common Protest Slogan Calling for 'Revolution' is Now Illegal Under National Security Law", *Time* (July 3, 2020), (Exhibit USA-127); "Hong Kong bans protests anthem in schools as fears over freedoms intensify", *Reuters* (July 8, 2020), (Exhibit USA-129); "Hong Kong security law: Four students arrested for 'inciting secession'", *BBC News* (July 30, 2020), (Exhibit USA-130); "Prominent Hong Kong Publisher Arrested Under New National Security Law", *NPR* (August 10, 2020), (Exhibit USA-131); "Hong Kong: Jimmy Lai sentenced to 14 months for pro-democracy protests", *BBC News* (April 16, 2021), (Exhibit USA-132); "Two Apple Daily

above, however, except those mentioned below, they do not indicate how such events impacted international relations, including those between the United States, on the one hand, and China and Hong Kong, China, on the other.

7.351. Some press articles do, however, refer to reports of reactions of certain governments with respect to the events in Hong Kong, China. Some governments were reported to have announced immigration measures to ease emigration from Hong Kong, China<sup>489</sup>; to be reviewing or suspending extradition treaties with Hong Kong, China and "offering more visas to its citizens"; cautioning citizens over an "increased risk of arbitrary detention in Hong Kong"<sup>490</sup>; expressing concern with respect to the situation in Hong Kong, China<sup>491</sup>; and condemning the National Security Law and ensuing actions in Hong Kong, China.<sup>492</sup>

7.352. The press articles on record report that certain countries share a high level of concern with respect to the human rights situation in Hong Kong, China and its democratic system, and that some countries adopted certain measures in response *vis-à-vis* Hong Kong, China. More generally, these press articles indicate that the human rights situation in Hong Kong, China has featured as a concern in public opinion within a number of WTO Members.

#### 7.5.4.2.2.2 Overall assessment

7.353. As we have noted above, we must examine the specific circumstances of this dispute in light of the evidence and arguments on record. In the specific context before us, we consider that it is clear that events in Hong Kong, China, as pointed to by the United States, are, and remain, the subject of tensions and expressions of concern at the international level. It is also evident that the United States has taken certain actions in response to this situation, and specifically the measure at issue in this dispute; other countries have also adopted measures in response to the events in Hong Kong, China *vis-à-vis* Hong Kong, China. Accordingly, looked at broadly, these events have impacted on international relations between China, Hong Kong, China and a range of other WTO Members, some of whom have adjusted policy settings. At the same time, based on our review of all the evidence on record, we do not consider that the situation the United States points to meets the requisite level of gravity to constitute an emergency in international relations under Article XXI(b)(iii).

7.354. In particular we are of the view that the following considerations tend to run counter to a conclusion that the situation has escalated to a point of breakdown or near-breakdown in the relations between states or other participants in international relations. We recall that the evidence before us shows that the United States and other Members took measures *vis-à-vis* Hong Kong, China (there is no evidence before us that there were measures taken *vis-à-vis* China). Those measures adopted *vis-à-vis* Hong Kong, China targeted only certain areas of their relations and not others. Indeed, the evidence on record shows that the United States and Hong Kong, China's

---

executives charged with collusion with foreign country", *Reuters* (June 18, 2021), (Exhibit USA-133); "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), (Exhibit USA-135); "Hong Kong teachers' union to disband due to 'drastic' political situation", *Reuters* (August 10, 2021), (Exhibit USA-137); "Hong Kong University orders removal of Tiananmen Square massacre statue", *The Guardian* (October 8, 2021), (Exhibit USA-197); "China Loyalty Oath Drives 72% of Hong Kong Councillors From Seats", *Bloomberg News* (October 21, 2021), (Exhibit USA-198); "Amnesty International to close Hong Kong offices due to national security law", *The Guardian* (October 25, 2021), (Exhibit USA-199); "Hong Kong police tell marathon runners to cover up 'political' clothing and tattoos", *The Guardian* (October 25, 2021), (Exhibit USA-200); and "Hong Kong pro-democracy news site closes after raid, arrests" *AP News* (December 29, 2021), (Exhibit USA-209). See also The Government of the Hong Kong Special Administrative Region, Government Statement (July 2, 2020), (Exhibit USA-128).

<sup>489</sup> "Leading democracy campaigner Nathan Law leaves Hong Kong", *The Guardian* (July 2, 2020), (Exhibit USA-118), p. 2.

<sup>490</sup> "Beijing's Hong Kong office warns pro-democracy poll could violate new security law", *Reuters* (July 13, 2020), (Exhibit USA-121), p. 3; "Hong Kong security law: Four students arrested for 'inciting secession'", *BBC News* (July 30, 2020), (Exhibit USA-130), p. 4.

<sup>491</sup> "Beijing's Hong Kong office warns pro-democracy poll could violate new security law", *Reuters* (July 13, 2020), (Exhibit USA-121), pp. 2-3.

<sup>492</sup> "Hong Kong bars 12 opposition candidates from election", *BBC News* (July 30, 2020), (Exhibit USA-122), p. 3; "Hong Kong opposition lawmakers all quit after four members ousted", *The Guardian* (November 11, 2020), (Exhibit USA-123) pp. 2-3.

international relations continue to involve cooperation in a number of policy areas.<sup>493</sup> We further note that trade has carried on between the United States and Hong Kong, China, largely as before, with the exception of the origin marking requirement and some export controls.<sup>494</sup> In our view, all of this militates against a conclusion of a breakdown or near-breakdown in international relations that we have found to be consonant with an emergency in such relations.

7.355. We also find it helpful to further compare the situation before us with the previous cases where situations were found to constitute an emergency in international relations, as earlier discussed<sup>495</sup>, to the extent that these may assist in determining whether the United States has demonstrated that the situation at issue is one that falls under Article XXI(b)(iii).

7.356. The situation between Ukraine and Russia in 2014 as considered by the panel in *Russia – Traffic in Transit* involved a significant breakdown in relations between the two disputing Members, which had been the subject of a resolution in the UN General Assembly that considered the situation as involving armed conflict. In contrast, the 2021 Hong Kong Policy Act Report, refers to the areas of ongoing cooperation between the United States and Hong Kong, China.<sup>496</sup> Moreover, contrary to sanctions imposed on Russia following the crisis in 2014, there is no evidence on record of the United States or other countries imposing sanctions on the importation of goods from Hong Kong, China.<sup>497</sup> Goods from Hong Kong, China, although required to be marked as "China" origin, continue to be subject to the same tariff treatment as prior to the imposition of the origin marking requirement.<sup>498</sup> We therefore do not see a parallel between the two situations as we understand the United States to suggest.<sup>499</sup>

7.357. Turning to a comparison with the second case, there is no evidence or argument on the record that the United States or any other Member has severed its diplomatic, consular, or economic relations with China or Hong Kong, China. Such a step was among the considerations that, in the view of the panel in *Saudi Arabia – IPRs*, demonstrated that the situation between Qatar and Saudi Arabia constituted an emergency in international relations. While Saudi Arabia's allegations against Qatar resulted in a total collapse of their relations, including economic relations, the events in Hong Kong, China condemned by the United States and other Members have not had an equivalent effect on the relations between the United States and other Members, on the one hand, and China and Hong Kong, China, on the other hand.

7.358. In summary, we consider that although there is evidence of the United States and other Members being highly concerned about the human rights situation in Hong Kong, China, the situation has not escalated to a threshold of requisite gravity to constitute an emergency in international relations that would provide justification for taking actions that are inconsistent with obligations under the GATT 1994.

<sup>493</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), p. 12.

<sup>494</sup> See USCBP Guidance on Marking of Goods of Hong Kong – Executive Order 13936, (Exhibit HKG-12), which implies that trade is still ongoing between the United States and Hong Kong, China. See also Hong Kong, China's comments on United States' response to question No. 125, paras. 104-105.

<sup>495</sup> See paras. 7.313 and 7.314 above.

<sup>496</sup> 2021 Hong Kong Policy Act Report, (Exhibit USA-6), p. 12.

<sup>497</sup> 2020 Hong Kong Autonomy Act, (Exhibit USA-9), as set out in Section 8(d)(1), the imposition of sanctions on the importation of goods from Hong Kong, China is excluded from the sanctions authorized under this Act.

<sup>498</sup> USCBP Guidance on Marking of Goods of Hong Kong – Executive Order 13936, (Exhibit HKG-12) (where in response to the question "How does the marking rule affect the country of origin for purposes of assessing ordinary duties under Chap 1-97 of the Harmonized Tariff Schedule of the United States (HTSUS) or temporary or additional duties under Chapter 99 of the HTSUS?" it is stated that "[t]he change in marking requirements does not affect country of origin determinations for purposes of assessing ordinary duties under Chapters 1-97 of the HTSUS or temporary or additional duties under Chapter 99 of the HTSUS").

<sup>499</sup> United States' response to Panel question No. 120, para. 220, where the United States observed: "[i]n *Russia – Traffic in Transit*, Russia invoked Article XXI(b)(iii) and the panel found there to be an emergency in international relations, noting that the situation was "recognized by the UN General Assembly as involving armed conflict." Here, the United States has invoked Article XXI(b) after having taken action as an urgent response to an overseas crisis – which was (and is) a matter of public knowledge, as evidenced by the extensive publicly available evidence that the United States has submitted regarding the factual basis for the measures at issue and the U.S. consideration that the actions it was taking were necessary for the protection of its essential security interests". (footnote omitted)



7.359. Finally, we underscore that in arriving at this conclusion, we are in no way questioning the importance placed by the United States and other WTO Members, on the protection of human rights and democratic principles, or other values or interests they consider important, which may find reflection in their articulation of their essential security interests. At the same time, measures adopted by Members to advance such interests, if defended on the basis of Article XXI, will need to meet the conditions for its application, which WTO panels will continue to have the responsibility to assess in any dispute brought by WTO Members to the DSB in relation thereto.

### 7.5.5 Conclusion on Article XXI(b)(iii) of the GATT 1994

7.360. Based on the foregoing, we conclude that the United States has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii).

7.361. We recall that our duty is to assist the DSB in securing a positive solution to this dispute, rather than clarifying every issue of systemic importance arising from this dispute. Having reached the conclusion that the situation at issue does not constitute an emergency in international relations, we do not need to assess the measure under the remaining elements of Article XXI(b).

### 7.6 Other claims under the GATT 1994, the ARO, and the TBT Agreement

7.362. We recall that Hong Kong, China also raised claims under Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2.1 of the TBT Agreement.

7.363. In this regard, we note that Article 3.7 of the DSU provides that the "[a]im of the dispute settlement mechanism is to secure a positive solution to a dispute". In turn, Article 11 of the DSU provides that one of the functions of panels is to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Panels are therefore free to limit their findings to those needed to assist the DSB in making recommendations or rulings on each dispute.<sup>500</sup>

7.364. In this context, we agree with the Appellate Body that to provide a partial resolution of the matter at issue would be an exercise of false judicial economy. Panels should therefore address those claims for which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those findings "in order to ensure effective resolution of disputes to the benefit of all Members".<sup>501</sup> We note that, on this basis, the Appellate Body found that a panel exercised false judicial economy by (a) not making findings on a claim that would have offered a different remedy from the one resulting from the claims in respect of which the panel made findings<sup>502</sup>; and (b) not making findings on claims that had a different scope and content.<sup>503</sup>

7.365. We have found that the origin marking requirement is inconsistent with Article IX:1 (MFN obligation) of the GATT 1994 and that this measure is not justified under Article XXI(b)(iii).<sup>504</sup> We do not consider that an additional finding under Article I:1<sup>505</sup> would be necessary to assist the

<sup>500</sup> See Appellate Body Reports, *US – Wool Shirts and Blouses*, DSR 1997: I, pp. 338-341 (where the Appellate Body upheld the panel's exercise of judicial economy in that dispute); and *India – Patents (US)*, para. 87.

<sup>501</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>502</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335 (where the Appellate Body considered that by exercising judicial economy on claims under Article 3.1(a) of the SCM Agreement, the panel had precluded the possibility of a remedy being made available to the complaining parties, pursuant to Article 4.7 SCM Agreement).

<sup>503</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 405 (where the Appellate Body considered that the panel engaged in false judicial economy by not examining claims under Articles I:1 and III:4 of the GATT 1994 after having found that the measure at issue was not inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body disagreed with the panel that Articles I:1 and III:4 of the GATT 1994 are substantially the same as Article 2.1 of the TBT Agreement).

<sup>504</sup> See paras. 7.251-7.252 (regarding our findings under Article IX:1) and para. 7.360 (regarding our findings under Article XXI(b)(iii)) above.

<sup>505</sup> Article I:1 of the GATT 1994 provides:

DSB in making sufficiently precise recommendations and rulings. In our view, our findings under Article IX:1 capture the discriminatory dimension of the origin marking requirement that Hong Kong, China has challenged under Article I:1, and we have found it not to be justified under Article XXI(b)(iii).

7.366. We are cognizant that claims under Article 2.1 (non-discrimination obligations regarding technical regulations)<sup>506</sup> of the TBT Agreement and non-discrimination provisions in the GATT 1994, such as Article IX:1, differ in some respects.<sup>507</sup> However, similar to our view with respect to claims under Article I:1 of the GATT 1994, we do not consider that findings on an MFN violation under Article 2.1 of the TBT Agreement would be necessary to assist the DSB in making sufficiently precise recommendations and rulings. We do not see, and the parties have not argued, any significant difference on how the United States could implement the DSB's recommendations and rulings if they were based solely on a finding of inconsistency with Article IX:1, when compared with a finding of inconsistency both under Article IX:1 and Article 2.1 of the TBT Agreement.

7.367. Hong Kong, China brought claims under the ARO with respect to Articles 2(c)<sup>508</sup> (with respect to rules of origin not requiring certain conditions for the determination of the country of origin) and 2(d) (a non-discrimination provision on the application of rules of origin).<sup>509</sup> We recall that Hong Kong, China's arguments that the origin marking requirement is inconsistent with the ARO are based on the factual premise that the United States determines that the products subject to the origin marking requirement originate in China. As we noted above, our finding that the United States determines their origin to be Hong Kong, China means that the factual basis for contending that the present dispute involves "rules of origin" within the meaning of Article 1 of the ARO is incorrect.<sup>510</sup> We therefore do not consider it necessary to make additional findings under the ARO to assist the DSB in making sufficiently precise recommendations and rulings.

7.368. In light of the above, we exercise judicial economy on Hong Kong, China's claims that the origin marking requirement is inconsistent with Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2.1 of the TBT Agreement.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase "which it considers" in the *chapeau* of that

---

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

<sup>506</sup> Article 2.1 of the TBT Agreement provides:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

<sup>507</sup> As noted in para. 7.14 above, while Article IX:1 applies to origin marking requirements only, the TBT Agreement applies more generally to a wide variety of technical regulations, including those providing generally for "marking .... requirements" (Annex 1.1, second sentence of the TBT Agreement). Furthermore, Article 2.1 of the TBT Agreement has been interpreted to allow for the consideration of legitimate objectives in the assessment of less favourable treatment, whereas the legal standard in Article IX:1 itself does not include such consideration (see para. 7.206 above and Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.277-7.278 (with respect to the difference of analysis under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994)).

<sup>508</sup> Article 2(c) of the ARO provides, in relevant part:

[R]ules of origin ... shall not ... require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.

<sup>509</sup> Article 2(d) of the ARO provides, in relevant part:

[T]he rules of origin that they apply to imports and exports ... shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned.

<sup>510</sup> See para. 7.226 above.

provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel.

- b. The origin marking requirement is inconsistent with Article IX:1 of the GATT 1994 because it accords to products of Hong Kong, China treatment with regard to marking requirements that is less favourable than the treatment accorded to like products of any third country.
- c. The United States has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii).

8.2. The Panel exercises judicial economy on Hong Kong, China's claims that the origin marking requirement is inconsistent with Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2.1 of the TBT Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent with Article IX:1 of the GATT 1994, it has nullified or impaired benefits accruing to Hong Kong, China under that agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under the GATT 1994.

---