

In the World Trade Organisation

**United States – Origin Marking Requirements
(DS597)**

**Third Party Written Submission
by the European Union**

Geneva, 16 July 2021

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TABLE OF CASES CITED

Short Title	Full Case Title and Citation
<i>Indonesia – Iron or Steel Products</i>	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/AB/R , WT/DS496/AB/R , and Add.1, adopted 27 August 2018
<i>Russia – Traffic in Transit</i>	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , WT/DS512/R and Add.1, adopted 26 April 2019
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R , adopted 24 April 2012, DSR 2012:XI, p. 5751
<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> , WT/DS381/AB/R , adopted 13 June 2012, DSR 2012:IV, p. 1837
<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> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

TABLE OF ABBREVIATIONS

Abbreviation	Full Name
ARO	Agreement on Rules of Origin
China	The People's Republic of China
DSU	Understanding on rules and procedures governing the settlement of disputes
EU	European Union
FWS	First Written Submission
GATT	General Agreement on Tariffs and Trade
Hong Kong	Hong Kong, China
PRC	The People's Republic of China
TBT	Agreement on Technical Barriers to Trade
UK	United Kingdom
US	United States of America
WTO	World Trade organisation

I. INTRODUCTION

1. The European Union exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular *the WTO Agreement*, the *Agreement on Rules of Origin ("ARO")*, the *General Agreement on Tariffs and Trade 1994 ("GATT 1994")* and the *Agreement on Technical Barriers to Trade ("TBT")*.
2. Whilst not taking a position on the specific facts of this case, the European Union will provide its views on certain legal issues relevant to this dispute. The European Union notes that the present submission should not be seen as exhaustive and reserves its right to submit arguments on other issues (or to further develop the arguments set out here) at the Third Party Session of the First Substantive Meeting with the Parties, or in response to questions from the Panel.
3. The present submission is structured as follows:
 - Section II will first set out some aspects of the background;
 - the EU will then briefly summarise the positions taken by Hong Kong, China ("Hong Kong") and the United States of America (the "US") respectively in their first written submissions (III.);
 - Section IV contains observations on the interpretation of Article XXI of the GATT 1994;
 - Section V will submit some observations on the applicability of the ARO in the present dispute; and
 - Section VI will present some observations on the interpretation of the 7th Recital of the preamble of the TBT Agreement.

II. BACKGROUND

4. From 1842 to 1997, the United Kingdom of Great Britain and Northern Ireland (the "UK") exercised sovereignty over Hong Kong. In 1984, the governments of the People's Republic of China (the "PRC" or "China") and the UK negotiated the Sino-British Joint Declaration on the Question of Hong Kong (Joint Declaration), which transferred control of Hong Kong to the PRC in 1997, while providing for certain rights for

Hong Kong. In particular, the Joint Declaration provides that Hong Kong must be designated a “special administrative region” of the PRC, as permitted by Article 31 of China’s Constitution. The Joint Declaration also provides that Hong Kong “will enjoy a high degree of autonomy, except in foreign and defence affairs” for fifty years after 1997.

5. Hong Kong became a Special Administrative Region of the PRC on 1 July 1997. The “One Country, Two Systems” principle stipulates that Hong Kong has a high degree of autonomy in economic, trade, financial and monetary matters. These guarantees are codified in Hong Kong’s Basic Law, adopted by the National People’s Congress of China in 1990. The Basic Law also adds that, as part of Hong Kong’s status as a separate customs territory, its “[e]xport quotas, tariff preferences and other similar arrangements [...] remain valid,” and it “may issue its own certificates of origin.” Pursuant to this arrangement, Hong Kong has remained a WTO Member¹ and has negotiated a number of trade agreements, including with China itself. Tariff preferences and other similar arrangements obtained or made by the Hong Kong are enjoyed exclusively by Hong Kong.
6. To recognise the Joint Declaration, the US enacted the US-Hong Kong Policy Act of 1992, which it later amended in the Hong Kong Human Rights and Democracy Act of 2019. Under this legal framework, the US committed to “continue to fulfil its obligations to Hong Kong under international agreements, so long as Hong Kong reciprocates,” and “respect Hong Kong’s status as a separate customs territory, and as a WTO member country.” Further, it provides that the US will “grant the products of Hong Kong non-discriminatory trade treatment by virtue of Hong Kong’s membership in the General Agreement on Tariffs and Trade” and “recognize certificates of origin for manufactured goods issued by” Hong Kong.
7. Under the US-Hong Kong Policy Act, the US President may decide to suspend application of a US law that provides Hong Kong with treatment different than that accorded to China if he determines that “Hong Kong is not sufficiently autonomous to justify” such different treatment. Such a determination is made via executive order.

¹ Hong Kong became a separate contracting party to the General Agreement on Tariffs and Trade (GATT) in 1986. Upon the establishment of the WTO on 1 January 1995, Hong Kong became one of its founding members.

8. In May 2020 the National People’s Congress of China approved a decision authorizing its Standing Committee to enact laws to prohibit acts and activities in Hong Kong it considered to undermine national security.
9. In response, the US Secretary of State issued a report finding Hong Kong no longer sufficiently autonomous from China to warrant certain privileges under US law that allow Hong Kong not to be treated as part of China. Subsequently, President Trump announced on 30 May 2020, that his Administration would take actions to curtail these privileges.
10. US President Trump issued an Executive Order in July 2020² formally determining that Hong Kong is “no longer sufficiently autonomous to justify differential treatment in relation to [...] China.” Pursuant to this determination, certain sections of US law, including immigration, export control, and customs provisions, that provided Hong Kong with different treatment than that extended to the PRC would be suspended. To implement the Executive Order, US Customs issued on 11 August 2020 a notice requiring all products originating from Hong Kong to be marked “China” instead of “Hong Kong” after 25 September 2020 (the “Revised Origin Marking Requirement”).³ US Customs later extended the transition period to 10 November 2020.⁴
11. On 22 May 2020, the High Representative of the European Union for Foreign Affairs and Security Policy made a statement on behalf of the European Union in which he said:⁵

The European Union has a strong stake in the continued stability and prosperity of Hong Kong under the ‘One Country Two Systems’ principle. It attaches great importance to the preservation of Hong Kong’s high degree of autonomy, in line with the Basic Law and with international commitments, as well as to the respect for this principle.

The EU considers that democratic debate, consultation of key stakeholders, and respect for protected rights and freedoms in Hong Kong would represent the best way of proceeding with the adoption of national security legislation, as foreseen in Article 23 of the Basic Law, while also upholding Hong Kong’s autonomy and the One Country Two Systems’ principle.

12. On 28 July 2020, the Council of the European Union adopted conclusions expressing grave concern over the national security

² See **Exhibit HKG-13**.

³ See **Exhibit HKG-10**.

⁴ See **Exhibit HKG-11**.

⁵ **Exhibit EU-1**.

legislation for Hong Kong adopted by the Standing Committee of China's National People's Congress on 30 June 2020. The Council stated:⁶

China's actions and the new legislation are not in conformity with China's international commitments under the Sino-British Joint Declaration of 1984 or with the Hong Kong Basic Law. These actions call into question China's will to uphold its international commitments, undermine trust and impact EU-China relations.

[...]

As regards the substance, the EU is particularly concerned about the extensive erosion of rights and freedoms that were supposed to remain protected until at least 2047; about the lack of safeguards and clarity in the law; and about its extraterritorial provisions. The EU expects the Hong Kong authorities to guarantee the citizens their rights and freedoms provided in the Basic Law. The EU also expects the possibilities for cooperation on the part of the EU Office, Member States' Consulates-General and European civil society with Hong Kong's civil society and political institutions to continue unchanged following the entry into force of the new legislation.

13. The Council adopted a range of measures, stating:⁷

The purpose of the various measures and of the package as a whole is to express political support for Hong Kong's autonomy under the 'One Country, Two Systems' principle, and solidarity for the people of Hong Kong.

14. On 12 November 2020, the High Representative of the European Union for Foreign Affairs and Security Policy made a further statement on behalf of the European Union in which he said:⁸

On 11 November, the Standing Committee of China's National People's Congress adopted a "Decision on the Qualification of Members of the Legislative Council of the Hong Kong Special Administrative Region", including among others the requirement for loyalty to the Hong Kong Special Administrative Region. Under this decision, Members of the Legislative Council can be immediately disqualified by the executive without any due process, right of appeal or involvement of the judicial authorities.

The Hong Kong Government immediately declared four sitting pan-democrat lawmakers to have been disqualified under the decision. Fifteen further pan-democrat Legislative Council Members subsequently resigned in protest.

These latest steps constitute a further severe blow to political pluralism and freedom of opinion in Hong Kong. Following on from the imposition of the National Security Law on 30 June, this latest arbitrary decision from Beijing further significantly undermines Hong Kong's autonomy under the "One Country, Two Systems"

⁶ **Exhibit EU-2.**

⁷ **Exhibit EU-2**, at p. 3.

⁸ **Exhibit EU-3.**

principle, and the protection of fundamental rights and freedoms in Hong Kong, contrary to China's international commitments.

We call for the immediate reversal of these decisions by the authorities in Beijing and Hong Kong Government and for the immediate reinstatement of the Legislative Council members.

The European Union is closely following the political situation in Hong Kong, following the imposition of the National Security Law on 30 June and the postponement by 12 months of the Legislative Council elections that had been due to take place on 6 September. The EU adopted a coordinated package of measures in July to express political support for Hong Kong's autonomy under the "One Country, Two Systems" principle, and solidarity with its people.

15. In his statement of 9 June 2021, the High Representative stated furthermore:⁹

This is the latest in a series of decisions adopted by the NPC in relation to Hong Kong since June 2020 that call into question the fundamental freedoms, democratic principles and the political pluralism that are central to Hong Kong's identity and prosperity. They undermine the "One Country Two Systems" principle, contradict China's international commitments under the Sino-British Joint Declaration of 1984, for example by eroding rights and freedoms that were supposed to remain protected until at least 2047, are not in conformity with the Basic Law, and have a negative impact on the EU's legitimate expectations and interests. The arrests of pro-democracy figures also continue to be a matter of grave concern. The National Security Law is being used to stifle political pluralism in Hong Kong, and the exercise of human rights and political freedoms that are protected under Hong Kong law and international law.

The EU calls on China to act in accordance with its international commitments and its legal obligations and to respect Hong Kong's high degree of autonomy and rights and freedoms.

16. These statements – as well as other similar statements made by representatives of the European Union – show 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. These concerns are relevant to the question of the existence of an "emergency in international relations".¹⁰

III. THE SUBMISSIONS OF THE MAIN PARTIES

A. The claims brought by Hong Kong

17. In its first written submission, Hong Kong makes several claims concerning the measures at issue. In particular, Hong Kong claims that

⁹ **Exhibit EU-4.**

¹⁰ See below at paras. 39, 40 of the present submission.

the measures at issue are inconsistent with Article 2(c) and Article 2(d) of the ARO, as well as with Article 2.1 of the TBT Agreement.¹¹ Hong Kong also alleges that the measures at issue are inconsistent with Article IX:1 and with Article I:1 of the GATT 1994.¹² Hong Kong considers these claims to be “secondary” to the claims under ARO and the TBT Agreement.¹³

18. On this basis, Hong Kong requests the Panel to find that the measures at issue are inconsistent with Article 2(c) and Article 2(d) of the ARO; and – should the Panel conclude that the measures are not inconsistent with the aforementioned articles of the ARO – that they are inconsistent with Article 2.1 of the TBT Agreement.¹⁴
19. Furthermore, should the Panel conclude that the measures at issue are not inconsistent with either the ARO or the TBT Agreement, Hong Kong requests the Panel to find that they are inconsistent with Article IX:1 and Article I:1 of the GATT 1994.
20. On this basis, Hong Kong requests the Panel to recommend that the US bring the challenged measures into conformity with its obligations under the relevant covered agreements.¹⁵

B. The first written submission of the United States

21. In its first written submission, the United States submits that the actions at issue in the present case are actions which the US considers to be necessary for the protection of its essential security interests within the meaning of Article XXI.¹⁶
22. The US therefore invokes Article XXI and considers that this rule is “self-judging”. On this basis, the US considers that the only finding which the Panel may be making is that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994.¹⁷ The US considers that it would be inconsistent with the *Understanding*

¹¹ Hong Kong’s FWS, sections III and IV respectively.

¹² Hong Kong’s FWS, section V.

¹³ Hong Kong’s FWS, para. 66.

¹⁴ Hong Kong’s FWS, para. 86.

¹⁵ Hong Kong’s FWS, para. 88.

¹⁶ US’ FWS, para. 4.

¹⁷ US’ FWS, paras. 328, 329.

on rules and procedures governing the settlement of disputes (the "DSU") for the Panel to make any other findings.¹⁸

IV. INTERPRETATION OF ARTICLE XXI OF THE GATT 1994

23. The United States submits that Article XXI(b) of the GATT 1994 is a "self-judging" provision¹⁹ and considers that the panel in *Russia – Traffic in Transit* erred in deciding that it had the authority to review a responding party's invocation of Article XXI of the GATT 1994.²⁰ The US also considers that Article XXI of the GATT 1994 applies to the ARO²¹ and to the TBT Agreement.²²
24. The European Union disagrees with this interpretation of Article XXI of the GATT 1994. The panel in *Russia – Traffic in Transit* properly understood Article XXI of the GATT 1994 not to be "self-judging" and correctly applied this rule. The US' critique of the panel in that dispute is unfounded. The EU also considers that Article XXI of the GATT 1994 applies only to that specific agreement, and not to the other multilateral agreements listed in Annex 1 to the WTO Agreement.
25. The European Union notes that these issues of the correct interpretation and application of Article XXI of the GATT 1994 have been discussed at some length before in other dispute settlement cases under the DSU, and notably in a series of cases concerning measures adopted by the United States on steel and aluminium products.²³ The EU is on record in these cases on the interpretation of Article XXI of the GATT 1994 and its applicability outside of the GATT 1994 and considers its interpretation of Article XXI of the GATT 1994 to be consistent with the interpretation and application of the general exceptions contained in Article XX of the GATT 1994.
26. Against this background, the EU therefore attaches its submission as third party in DS544 as **Exhibit EU-5** and incorporates its arguments contained therein in section 4 into this present submission. This concerns both the argument that Article XXI of the GATT 1994 is not

¹⁸ US' FWS, para. 328.

¹⁹ US' FWS, section III.A.

²⁰ US' FWS, section III.B.

²¹ US' FWS, section III.D.

²² US' FWS, section III.D.

²³ DS544, DS547, DS548, DS552, DS554, DS556 and DS564.

"self-judging",²⁴ as well as the argument concerning the applicability of Article XXI in other agreements than the GATT 1994²⁵.

27. As the European Union has explained previously, and notably in its third party submission in DS544, key elements of the exception contained in Article XXI(b)(iii) of the GATT 1994 can be summarised as follows:

28. The Appellate Body has held that provisions such as Articles XX and XI:(2)(c)(i) are:

limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.²⁶

29. The same is true of Article XXI of GATT 1994. Like Article XX of GATT 1994, Article XXI is described as an "exception" in its title and stipulates that "nothing in this Agreement shall be construed to prevent" measures or actions provided for therein. It can therefore be concluded that Article XXI of GATT 1994 is also in the nature of "affirmative defence". Accordingly, it is for the respondent to invoke this provision and the respondent will bear the burden of proving that the applicable conditions are met.²⁷

30. For the application of Article XXI(b)(iii) of the GATT 1994, it is necessary to find whether an "emergency in international relations" exists. As the panel in *Russia - Traffic in Transit* explained in this respect:

it is clear that an "emergency in international relations" can only be understood, in the context of the other matters addressed in the subparagraphs, as belonging to the same category of objective facts that are amenable to objective determination.²⁸

31. The circumstances of the third subparagraph of Article XXI(b) of the GATT 1994 indeed refer to "war or other emergency in international relations" ("*guerre ou grave tension internationale*" and "*guerra o grave tensión internacional*", in the French and the Spanish versions, respectively). This circumstance is broader than the situations listed in

²⁴ See **Exhibit EU-5**, sections 4.1 – 4.6 (paras. 28 – 170).

²⁵ See **Exhibit EU-5**, section 4.7 (paras. 171 – 174).

²⁶ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

²⁷ It is generally accepted in most jurisdictions that the burden of proof rests on a party invoking an exception (*reus in excipiendo fit actor*).

²⁸ Panel Report, *Russia – Traffic in Transit*, para. 7.71.

the first two subparagraphs of Article XXI(b) and is not defined by reference to particular types of products, but instead by reference to the occurrence of certain events.

32. The terms "war" and "other emergency in international relations" refer to objective factual situations, the existence of which is independent from the assessment made by the invoking Member in each case and can be fully reviewed by panels.²⁹
33. The terms "war" and "other emergency in international relations" should be interpreted taking into account relevant international law. In essence, the term "war" describes a situation when one or more States have used armed force against each other, irrespective of the reasons or intensity of the conflict.³⁰ Its scope extends not only to declared war, but to any armed conflict.
34. The notion of "emergency in international relations" is broader than that of "war". In determining whether a particular situation constitutes an "other emergency in international relations", a panel would need to assess in particular the gravity of the situation ("grave tension internationale" in French; "grave tensión internacional" in Spanish).
35. Concerning the relationship required between the situations envisaged in the subparagraphs and the action taken, it is significant that, unlike subparagraphs i) and ii) (starting with "relating to"), subparagraph iii) starts with the terms "taken in time". It might be argued that those terms only require that the action is taken during a period of time in which the "war" or "other emergency" exists. However, such an interpretation would be untenable, as it would allow for the adoption of measures unrelated in fact to the war/emergency, but disguised as security measures, for the simple reason that they are adopted during that period of time. It may be that almost at any moment there is a war going on in a certain part of the globe. However, that in itself cannot constitute one of the qualifying objective elements in Article XXI(b)(iii) for a trade dispute between two Members disconnected geographically and from a security perspective from that situation.
36. For this reason, the European Union is of the view that the terms "in time" ("en cas" and "en caso" in the French and Spanish versions,

²⁹ Panel Report, *Russia – Traffic in Transit*, paras. 7.71 and 7.82.

³⁰ See the UN General Assembly Resolution 3314 (XXIX) (Definition of Aggression), 14 December 1974.

respectively, as regards emergencies) require a sufficient nexus between the action taken by the invoking Member and the situation of war or emergency in international relations, including in temporal terms. This means that a panel must carefully and objectively consider the temporal aspects of the relationship between the war or emergency in international relations on the one hand, and the specific timing of the challenged measure on the other hand.

37. This interpretation is supported by the use of the term "protection" in the chapeau of Article XXI(b), which implies the existence of a specific threat or event to which the action of the invoking Member responds. That threat or event must, at a minimum, consist of one of the situations identified in subparagraph (iii) or result from one of those situations, and be sufficiently connected, including in temporal terms, with the challenged measure.
38. Furthermore, as the term "emergency" suggests,³¹ an emergency situation cannot cover a measure that is (supposedly) taken as a response to an action that occurred in the distant past. If years have passed, it is highly questionable that such an historical event may constitute an "emergency".
39. On the basis of the above, the European Union considers that 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. The European Union refers in this respect to the statements made on behalf of the European Union with respect to the situation in Hong Kong.³² The EU recalls in particular the conclusions of the Council of the European Union of 28 July 2020 which stated that China's actions are not in conformity with China's international commitments and call into question China's will to uphold its international commitments as well as undermining trust and impacting EU-China relations.³³ The EU also recalls the strong concerns expressed by the Council of the European Union and by the High Representative of the European Union on Foreign Affairs and Security about the extensive erosion of rights and freedoms protected by

³¹ Emergency is defined as "A serious, unexpected, and often dangerous situation requiring immediate action." Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/emergency>.

³² See above at paras. 11 - 16 of the present submission.

³³ See above at para. 12.

international agreements.³⁴ As the High Representative declared, these actions have a negative impact on the EU's legitimate expectations and interests.³⁵

40. The European Union also notes the strong link (and in particular temporal link) between China's actions referred to in the statements made on behalf of the European Union and the US' measures at issue in the present case.³⁶

V. APPLICABILITY OF THE ARO

41. The Panel has an obligation to verify that Hong Kong made a valid prima facie case with respect to all of the claims it makes.³⁷ In the absence of that, it is improper for a panel to uphold a claim by making violation findings, even where a responding party does not comment on the (validity of the) claims in question.
42. Furthermore, pursuant to Article 11 DSU, the Panel is required to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute.³⁸
43. In its first written submission, Hong Kong claims that the measures at issue are inconsistent with Article 2(c) and Article 2(d) of the ARO.³⁹ It asserts that the ARO applies to origin marking requirements by virtue of Article 1 ARO.
44. Article 1 ARO provides as follows:
1. For the purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.
 2. Rules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such

³⁴ See above at paras. 11, 12, 14 and 15.

³⁵ See above at para. 15.

³⁶ See above at paras. 11 - 16, and US' FWS, paras. 8 - 9, 18 - 22.

³⁷ In its First Written Submission Hong Kong makes claims under Article 2(c) and Article 2(d) ARO. Hong Kong, China, did not present any facts or arguments with respect to Article 2(e) ARO in its first written submission.

³⁸ Appellate Body Report, *Indonesia –Iron or Steel Products*, paras. 5.32-5.33.

³⁹ Hong Kong's FWS, paras 23-48.

as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.[1]

45. Hong Kong's interpretation of Article 1 is that origin marking requirements are the same as rules of origin. This reading is not supported by the text, which clearly draws a distinction between "rules of origin, which are defined in Article 1.1 ARO and "origin marking requirements".
46. In accordance with Article 1.2 ARO it is not the origin marking requirements, but the rules of origin *used in the application thereof* that fall within the scope of the ARO.

VI. THE 7TH RECITAL OF THE PREAMBLE TO THE TBT AGREEMENT

47. As the European Union has explained, Article XXI of the GATT 1994 is not applicable to claims under the other multilateral agreements mentioned in Annex 1 to the WTO Agreement, such as the ARO and the TBT Agreement.⁴⁰
48. The European Union wishes however to submit observations on the correct interpretation of the TBT Agreement in light of also the 7th Recital of the preamble to the TBT Agreement, to which the US make explicit reference.⁴¹ This recital has the following text:

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;
49. The EU notes the following with regard to the interpretation of the TBT Agreement in the light of also this recital:
50. *First*, the difference between an operative article of an agreement and a recital as part of the preamble of an agreement must be recognised. A recital can enlighten as to the object and purpose of an agreement, but it is not as such part of the disciplines (or rights and obligations) stipulated in that agreement.

⁴⁰ See mutatis mutandis **Exhibit EU-5**, section 4.7 (paras. 171 – 174).

⁴¹ US' FWS, paras. 299 – 302.

51. *Second*, while the 7th Recital makes references to the “essential security interests” and therefore contains language which is similar to and recalls Article XXI of the GATT 1994, there are also important differences between the text of Article XXI and of the 7th Recital. In particular, the 7th Recital does not contain the specific wording contained in subparagraphs (i) to (iii) of Article XXI(b), which are constituent elements and necessary conditions for a successful invocation of Article XXI. Furthermore, the 7th Recital does not contain the words “which it considers necessary”, which are present in Article XXI(b).
52. *Third*, the EU considers, based on the foregoing, that the 7th Recital can be useful in interpreting Article 2.1 of the TBT Agreement. The EU submits that the interpretation of Article 2.1 in the Appellate-Body’s case-law concerning the implications of the 6th Recital of the preamble to the TBT Agreement are transposable to the 7th Recital. The Appellate Body has held as follows concerning the disciplines of Article 2.1 of the TBT Agreement:⁴²

[W]here the technical regulation at issue does not de jure discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.

53. And more specifically with regard to the role of the 6th Recital in this respect:⁴³

The sixth recital suggests that Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in

⁴² Appellate Body Report, *US – Clove Cigarettes*, para. 182. Emphasis added here.

⁴³ Appellate Body Report, *US – Clove Cigarettes*, para. 95. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 213.

