In the World Trade Organisation
Panel Proceedings

UNITED STATES – ORIGIN MARKING REQUIREMENT

(DS 597)

Responses by the European Union to Questions from the Panel to the Third Parties

Geneva, 14 October 2021

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1. CLAIMS UNDER ANNEX 1A AGREEMENTS

1.1. Agreement on Rules of Origin (ARO)

Question 1

To all third parties: Article 1.2 of the ARO indicates that rules of origin are "used … in the application of … origin marking requirements under Article IX of [the] GATT 1994"? Please explain how rules of origin are used in such application of origin marking requirements.

1. As origin can be understood as expressing the economic nationality of goods, rules of origin are the rules used to identify or attribute such nationality. Rules of origin can be used to determine the source country or territory of the imported product also for the purpose of origin marking requirements. Origin is determined based on the conditions or "origin criteria" contained in the rules of origin, following which the origin marking must reflect origin in accordance with said determination.

2. Rules of origin must be distinguished from origin marking and origin marking requirements. For example, the requirement that "all articles of foreign origin, must be marked permanently, legibly and in a conspicuous place, so as to inform an ultimate purchaser of the English name of the article's country of origin" is a marking requirement. This requirement imposes the obligation to mark the origin, but it cannot be applied in practice without corresponding rules of origin, which set out how origin is determined for imported goods. These two sets of rules are interdependent, but distinct.

3. Another act that is separate and distinct from the act of determination of origin is recognition. Whether for example state A recognises state B (in its integrity), may affect the outcome of a determination of rules of origin, but is not a matter governed by rules of origin. In international law, the recognition of a state is a non-obligatory act by which one state acknowledges that another state possesses the essential elements of sovereign statehood. The decision of a state to recognise or not a territory of another state or entity as being a part of that state or entity (disputed territories)[1] or to recognise the state or entity as a whole is distinct from the determination of origin of goods within the meaning of ARO. It may be a step that precedes the determination

[1] Thus, a WTO Member can refuse to recognise that a particular territory of another Member is part of that country for the purposes of ARO while being in full compliance with its obligations under the ARO.

of origin within the meaning of ARO and is not governed by the ARO disciplines (see also the response to Question 3).

Question 2

To all third parties: What constitutes a "determination" of origin within the meaning of Article 1.1 of the ARO ("applied … to determine the country of origin of goods …")?

4. As noted by the panel in *Thailand - Cigarettes (Philippines)*, the Appellate Body has previously interpreted the word "determine" in the context of the Anti-Dumping Agreement, as well as in the context of the DSU. It observed that dictionary definitions of the verb "determine" include "[c]onclude from reasoning or investigation, deduce" as well as "[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter".[2] The panel in *EC – Salmon (Norway)* recalled the above dictionary definitions relied upon by the Appellate Body, and further stated that the "range of slightly varying definitions indicates that the verb "determine" may have a slightly different meaning depending on the context in which it is found."[3]

5. In the view of the European Union, in the context of the ARO, a determination of origin constitutes the act of applying[4] the rules of origin in order to legally identify the country of origin of the goods and on that basis specify to which treatment the good will be subjected because of the country it stems from.

Question 3

To all third parties: In paragraph 296 of its first written submission, the United States argues that "Hong Kong, China, appears to seek a finding that the Agreement on Rules of Origin not only disciplines how Members determine the country of origin, but also obligates Members to recognize particular claims of sovereignty or territory. Hong Kong, China, would require an importing Member agree with an exporting Member's claims as to territorial boundaries, for purposes of its origin marking requirements. Put simply, this is not a determination that WTO Members agreed to assign to dispute settlement panels." Similarly, in paragraph 6 of its third-party statement, Canada states that the determination of what constitutes a country "is not a 'rule of origin' per se, and therefore not governed by the ARO. The ARO governs rules that determine whether a product originates in a particular country, not the identification of that particular country."[5]

a. Is the determination of "what constitutes a 'country' for country of origin marking purposes" a question of interpretation of the term "country" in Articles 1 and 2 of the ARO? In this context, what is the relevance of the Explanatory Notes to the WTO Agreement, discussed by Hong Kong, China in

[2] Panel Report, *Thailand - Cigarettes (Philippines)*, paras 7.589 et seq.
[3] Panel Report, *EC–Salmon (Norway)*, para.7.237.
[4] The application of rules of origin is not limited to the determination of origin. Examples of application also include verification, certification etc.
[5] See also Canada's third-party submission, para. 6; and third-party statement, paras. 4 to 7.

paragraphs 26 et al. of its first written submission and by Canada in paragraphs 7 to 8 of its third-party submission?

b. *For purposes of clarifying the meaning of "country of origin" in Article 1.1 of the ARO, is it the Panel's task to clarify the meaning of "country" pursuant to Article 3.2 of the DSU? If not, why not?*

c. *Do the disciplines set out in Articles 1 and 2 of the ARO limit the manner in which Members must recognize the territorial boundaries of other Members when conferring origin to products manufactured or processed in any given country?*

d. *If, as submitted by Canada, the determination of "what constitutes a 'country' for country of origin marking purposes" is not governed by the disciplines of the ARO, is it governed by any other disciplines under the covered agreements? In this context, please comment, in particular, on disciplines governing origin marking and those covering equal treatment among Members (e.g. Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994)?*

6. The European Union will reply to questions under points (a) to (d) together.

7. The European Union agrees with Canada that while the ARO disciplines Members in respect of the content of the rules of origin[6], the ARO does not restrain the sovereign right of a WTO Member to grant or refuse recognition to a state or entity or impose the recognition of the territorial boundaries of other Members.

8. States conduct their relations with other states or entities on the basis of particular understandings of the legal status of those other states or entities. Under international law it is generally accepted to be a prerogative of any state to be able to extend recognition to a new entity and conversely to withdraw recognition if circumstances change. This not to say that there are no circumstances at all in which a panel might find itself considering the territorial boundaries of a WTO Member, whether a State or a customs territory, in one context or another, based on the standard of review in Article 11 of the DSU (objective assessment); or that the fact that both parties are WTO Members might be in all circumstances irrelevant to such consideration. Merely that it is clearly not the task of the WTO to resolve certain public international law disputes of a territorial or boundary nature that are clearly a matter for another jurisdiction. Nothing in the WTO Agreement suggests that the Members intended it to displace the existing arrangements in public international law on this matter, and in any event the WTO is seriously ill-equipped to engage in such matters. If that proposition resolves itself into the

[6] Article 2 ARO.

observations that the Agreement on Rules of Origin does not generally control such questions; and that Article XXI of the GATT 1994 remains available in any event to cover such cases in a relatively straightforward and uncontroversial manner – that should be sufficient for the purposes of the adjudication that the Panel needs to make in this particular case.[7]

9. Article 3.2 DSU provides that panels and the Appellate Body are 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.

10. The European Union agrees with Canada that the definition of "country" in the Explanatory Notes to the WTO Agreement is of limited relevance. While it confirms that the term "country" is understood to include separate customs territories, it does not set out a conclusive definition of what constitutes a "country", or how a Member must arrive at that determination, but rather uses the term "includes" to signify that the term is to be understood to encompass separate customs territories.

11. The fact that the ARO is silent on the territorial scope of a "country" is the result of a choice of the negotiators. A provision clarifying that the term "country" means "the land [...] over which a country exercises sovereignty" was proposed during the ARO negotiation rounds, as well as it was suggested to include the concept of "products or activities in territories not subject to the jurisdiction of a single country".[8] These proposals were not accepted.

12. In sum, if the problem is conceptually reduced to its three constituent elements – "that originates there", anything that develops the concept of "originates" is an origin rule controlled by the Agreement on Rules of Origin; and anything that applies such origin rule(s) to a particular product or products is an application of such origin rule(s), that is, a determination of

[7] More concretely, the EU could envisage a situation in which there is a boundary dispute between States A and B, where there is an area that both claim. State C sides with State A, so refuses to recognise goods from the area as originating in State B. State B sues State C in the WTO under the GATT; State C invokes XXI ("it considers"); State C wins. State D sides with State B, so refuses to recognise goods from the area as originating in State A. State A sues State D in the WTO under the GATT; State D invokes Article XXI ("it considers"); State D wins. These outcomes are not mutually exclusive, but could co-exist, reflecting the different security interests of the relevant States. Thus, not only would the WTO not (of course) have the pretension to resolve the underlying territorial dispute in public international law (which would be a matter for another jurisdiction); but also, in the context of the trade disputes, it could accommodate the different legitimate security interests of the different States involved.

[8] World Trade Organization, Committee on Rules of Origin, WCO Doc. 39.166 < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123736,46209,802,30154,8287,21837,25777&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.

origin. However, anything that delimits what "there" is, does not in principle fall within the scope of the Agreement on Rules of Origin.

13. Furthermore, a *reason* given for a particular delimitation of "there" is not, without more, sufficient to bring that matter within the scope of the Agreement on Rules of Origin. The second sentence of Article 2(c) contains a specific and limited obligation: "they" (that is, rules of origin) must not require the fulfilment of a certain *condition* not related to manufacturing or processing as a prerequisite for the origin determination (a condition is an "if – then" structure that may either be met or not met in particular instances). A reason for the enactment of a piece of legislation is not to be conflated with a condition as part of a legal provision and the legal test governing its application.[9] If the measure at issue would contain a rule stating, for example, that if the product is dumped it is to be considered as originating in China, whereas if not dumped it is to be considered as originating in Hong Kong, China, that would be a condition and a violation of the second sentence of Article 2(c); but a reason is not a condition. This conclusion does not change merely because the measure delimits "there" for one specific purpose (origin marking) but not others – that alone does not bring the measure within the scope of the Agreement on Rules of Origin where otherwise it would not control. That situation might or might not be relevant for the Panel's assessment under Article XXI GATT, but that is a different question.

Question 4

To all third parties: With reference to paragraph 30 of Hong Kong, China's first written submission, under what circumstances would a country-of-origin determination be wrong or incorrect pursuant to the ARO?

14. Noncompliance with any of the criteria set out in Article 2 of the ARO would lead to a country of origin determination that would be incompatible with the ARO.

15. If for example a good was wholly obtained in Member A, and assume for the pure sake of simplicity that the scope of the territory and sovereignty of this Member are undisputed, yet following a determination of origin this good would be considered as originating from Member B, that would a priori not appear to be in compliance with the ARO. Conversely, and as explained above, the exercise of the prerogative of a state to extend recognition to a new entity

[9] See: Appellate Body Report, *EC and certain Member States – Large Civil Aircraft*, paras 1050 - 1051 for the discussion of the concept of a subsidy *contingent* upon export which is not to be conflated with the reasons for which a subsidy may be granted.

or to withdraw recognition if circumstances change, and as a consequence decide that a particular territory will not be considered as part of Member A, is not a matter governed by the rules of origin and is not subject to the disciplines of ARO even if it has an impact on the ultimate determination of origin. The most decisive in this connection, however, would not be the question of recognition, but rather the question of objective satisfaction of the conditions of statehood or of the legitimately drawn boundaries. None of this appears relevant in this dispute, given that the US has not enacted any measure whereby Hong Kong is no longer a WTO Member separate from China.

Question 5

To all third parties: Canada argues that the [ARO] provisions at issue in this dispute "do not discipline or dictate what the actual country of origin of a good must be".[10] Please comment.

16. The ARO lays down certain conditions which the rules of origin that are used to determine the country of origin of goods must comply with; they do not define in full how origin must be determined. The ARO for example prohibits the application of rules of origin in a manner that is discriminatory, unduly burdensome or distortive to international trade,[11] and welcomes rules of origin that are transparent, objective and coherent, ideally based on a positive standard.[12] These rules do not inhibit WTO Members from using a wide discretion when adopting their rules and criteria for origin determination.[13] There is for the time being no agreement on a harmonized set of rules of origin that all WTO Members would have to apply.

17. The determination of origin of a particular good is a case-by-case assessment whereby the proof of origin as submitted is analyzed in the light of the applicable rules of origin. The disciplines under the ARO are relevant not only in respect of the substance of the rules of origin, but also their application[14] in practice.

18. As explained above, the ARO does not interfere with the prerogative of WTO Members to recognize a new entity or to withdraw recognition, as that

[10] Canada's third-party submission, para. 6.
[11] Articles 2(b-d); WTO Panel, United States —Rules of Origin for Textiles and Apparel Product, paras 6.23-24. Agreement on Rules of Origin, articles 1.2; and Annex II .3
[12] Agreement on Rules of Origin, articles 1.2; 9, and Annex II .3
[13] Panel, United States —Rules of Origin f or Textiles and Apparel Product, paras 6.23-24
[14] See recitals 3 and 7 to the ARO, Heading of Part II to the ARO, Article 2(b)-(e).

particular decision is separate and distinct from the determination of origin under the ARO.

Question 6

To all third parties: Does the requirement to indicate a particular country as a country of origin for the purpose of an origin mark necessarily involve a prior determination that that country is the country of origin as stated by Hong Kong, China in paragraphs 24 and 30 of its first written submission, or can that indication be made independently of such a determination? If so, on what basis?

19. That indication can indeed be made *differently than*, rather than "independently of such a determination". Concretely, based on a rule of origin that determines specific goods to be originating in country A, an origin marking requirement can theoretically require that goods originating in A be *marked as* originating in B. While this surely would not make much sense, the question here is whether this would generate a breach of the ARO, and it would not.

20. The actual application of a requirement to mark the origin of a product would most usefully rely on rules of origin that are applied to determine the origin of that product. The absence of any kind of rules of origin and the absence of a determination of origin, would render origin marking requirements senseless or would change their nature into marking/labeling requirements which no longer designate the origin of goods but something else.

Question 7

To all third parties: Do you agree with Hong Kong, China's statement in paragraph 43 of its first written submission that "Article 2(d) requires importing Members to apply the same rules of origin to goods imported from any Member."[15] If not, why not?

21. Article 2(d) ARO requires that the rules of origin "shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the goods concerned".

22. Non-discrimination is not necessarily the same as equal treatment. It is well established that the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner. The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory", and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of

[15] Emphasis original.

discrimination can accommodate both drawing distinctions *per se*, and drawing distinctions on an improper basis. Hypothetically, a differential treatment may thus be possible, provided it addresses dissimilar situations. Where the situations are similar, however, Hong Kong would be correct that non-discrimination requires equal treatment.

1.2. Agreement on Technical Barriers to Trade (TBT Agreement)

Question 8

To all third parties: What elements does a complainant need to demonstrate with respect to a marking requirement for it to constitute a technical regulation in the sense of Annex 1.1 to the TBT Agreement?

23. A marking requirement must meet three criteria to fall within the definition of "technical regulation" in the TBT Agreement: (i) it must apply to an identifiable product or group of products; (ii) it must lay down one or more characteristics of the product or their related processes and production methods, including the applicable administrative provisions; and (iii) compliance with the product characteristics or their related processes and production methods, including the applicable administrative provisions, must be mandatory. The document may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. The burden of proof to establish that these criteria have been met is on the complainant.

Question 9

To all third parties: With regard to Article 2.1 of the TBT Agreement, does a finding of detrimental impact, in this case, depend on whether requiring the name "China" on the origin mark for goods produced in Hong Kong, China is contrary to WTO rules? In your response, please comment on Canada's submission in paragraph 12 of its third-party statement that there may not be differential treatment here.

24. The WTO Appellate Body has interpreted the phrase "no less favourable treatment" in Article 2.1 TBT to indicate a two-step analytical approach. First, the question is whether the measure results in a detrimental impact on the conditions of competition for the complainant's product compared to the like product in the importing Member or like product of other Members. If the answer to the first question is "yes," the second step requires to check whether that detrimental impact stems exclusively from a legitimate regulatory distinction in the sense that the measure is "even-handed."

25. The European Union submits that a finding of detrimental impact cannot depend on whether the technical regulation at issue is contrary to "WTO rules"

or not. Firstly, it is unclear which WTO rules exactly Canada has in mind for the case at hand (presumably ARO). Secondly, it is well established that a measure may be compatible with one of the covered agreements, while violating the TBT.

Thus, the answer to this question is that the detrimental nature of the requirement in question depends on the requirement itself and can flow from any implication which this requirement has. The fact alone of being subject to a requirement that otherwise would not apply, can already be detrimental. Concretely, the 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.

Question 10

To all third parties: If essential security interests were taken into account in the assessment of a claim under Article 2.1 of the TBT Agreement:

> *a) what burden of proof would each party carry in respect of such an examination? In your response, please comment on Canada's argument in paragraph 14 of its third-party statement that Hong Kong, China has not met its burden of proof.*

26. With respect to the burden of proof when dealing with claims under Article 2.1 of the TBT Agreement, in *US – Tuna II (Mexico)* the Appellate Body observed that:

> In the context of Article 2.1 of the *TBT Agreement*, the complainant must prove its claim by showing that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.[16]

27. The Appellate Body further observed that the responding Member will be best situated to adduce the arguments and evidence needed to explain why,

[16] Appellate Body Report, *US – Tuna II (Mexico)*, para. 216 (footnotes omitted); see also Appellate Body Report, *US – COOL*, para. 272 ("If, for example, the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1").

contrary to the complainant's assertions, the technical regulation is even-handed and thus why the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, since it has promulgated the technical regulation containing the regulatory distinctions that result in the detrimental impact. It is, however, clear that the burden of proof cannot shift to the responding party if the complaining party failed to make a prima facie case altogether as to whether the measure is less favourable, for example, by showing that the measure is not even-handed.[17] This is true regardless of whether essential security interests or other considerations are taken into account in the assessment of a claim under Article 2.1 of the TBT Agreement.

28. The European Union further refers to its Third Party Submission and recalls that the identification of a legitimate policy objective is just one step in the analysis required under Article 2.1 of the TBT Agreement. The 7th Recital does not provide for a "self-judging" exception to the disciplines of the TBT Agreement. Indeed, the disciplines of Article 2.1 remain as such unchanged and are properly within the jurisdiction of a panel before which a claim of inconsistency with those disciplines is brought.

29. Throughout this process it is important to bear in mind that the concept of "burden of proof" relates to evidence adduced to substantiate facts, which are events that occurred in the past. Considerations about the future (such as the expected operation of a measure) or about hypotheticals or counterfactuals are not about facts or evidence in this sense (even if the proving of past facts might be germane, indirectly, to such considerations). Such matters are better viewed through the lens of a burden of persuasion, rather than a burden of proof. Furthermore, in the context of a necessity test, both parties are likely to find themselves engaging with the question of whether the measure is the least trade restrictive available (particularly in terms of its expected operation), there being no alternative that would be less trade restrictive but that would make an equivalent contribution to the legitimate policy objective. In this context, a more helpful perspective may be the general rule, also current in public international law, that the party affirming the positive of a particular proposition (whether a fact or a supposition) may reasonably be expected to provide appropriate support for such affirmation.

[17] Appellate Body Report, US- Tuna II (Mexico), para. 217; Appellate Body Report, US-COOL, para. 272.

b) what would be the relevance of the sixth and seventh recitals of the preamble of the TBT Agreement for determining the contours of such an examination;

30. The European Union refers to paras 47-56 of its Third Party Submission.

d) how would such an examination compare to the necessity test carried out in respect of "national security requirements" in Article 2.2 of the TBT Agreement. In this context, what is the relevance, if any, of this term, as used in Article 2.2, to the assessment of a claim under Article 2.1?

31. The necessity test in Article 2.2 of the TBT contains an open, illustrative list characterized as "legitimate objectives". Article 2.2 TBT includes and explicit reference to "national security requirements".

32. Recital 7 of the preamble to the TBT Agreement refers to "essential security interests". In the view of the European Union recital 7 is useful context in interpreting "national security requirements" under Article 2.2 TBT.

33. The necessity test under Article 2.2 is the same with respect to all legitimate objectives. There are no textual differences that would justify a different standard of review.

34. Article 2.1 TBT does not contain a necessity test. The nature of the analysis to be conducted under Article 2.2 is different from that to be conducted under Article 2.1 TBT. Indeed, it is under Article 2.2 of the TBT Agreement that a Panel must consider whether any contribution to a legitimate objective is 'more trade restrictive' than necessary. That balancing exercise, is not expressed in Article 2.1 TBT. This shows that the inquiry into legitimacy is different under Article 2.1 TBT than under Article 2.2 TBT. In a *de facto* claim under Article 2.1 no facts are *per se* excluded from the analysis, the only question being whether the adjudicator finds them relevant to the question of whether or not there is *de facto* discrimination. If an adjudicator finds that there is an alternative measure that is less trade restrictive but equally contributes to the objective, this *may* imply that the regulatory distinctions do not flow exclusively from the stated objective, but in truth reflect an unstated intent to be protectionist. By contrast, in Article 2.2, such considerations are not merely facts to be weighed in a basket together with other facts, but part of the legal test of necessity, such that, if there is a less trade restrictive alternative, the violation is established. Thus, Article 2.2 is best seen as a more specific provision on the question of necessity, implying that, if this is a live issue, a panel might prefer to start its analysis with Article 2.2, with the

possibility of judicially economising under Article 2.1 should that be appropriate.

35. The examples of legitimate objectives which are explicitly listed under Article 2.2. TBT are relevant in determining what can be considered as a legitimate objective under the TBT Agreement, including notably under Article 2.1 TBT.

Question 11

To all third parties: Does the legitimate regulatory distinction test as developed by the Appellate Body (e.g. US – Tuna II (Mexico) (Article 21.5 – Mexico II), para. 6.9) apply in the case of an origin-based distinction?

36. No, by no means. If a distinction is made only on grounds of origin the case is a so-called *de jure* case, the only question being whether the terms of the measure, as written, contain the distinction on grounds of origin. It is only if some other type of distinction is made, other than on grounds of origin, that the case is a so-called *de facto* case, where it becomes relevant to consider whether the measure has a detrimental impact on the conditions of competition between like products, and also to consider the regulatory purpose (through the lens of whether the distinction flows exclusively from the stated legitimate policy objective and is therefore even-handed). This distinction between origin-neutral and non-origin-neutral technical regulations was made in the cases in which Article 2.1 was for the first time clarified in this respect.

37. However, those cases related to policy objectives that are akin to Article XX GATT objectives. When policy objectives are akin to Article XXI objectives, a slightly different perspective is warranted because essential security interests are often pursued through origin-based measures. As indicated in our responses to previous questions, this case is about a measure that has, for a specific reason (insufficient autonomy), delimited what "there" is for a particular purpose (marking).

1.3. GATT 1994

Question 12

To all third parties: What constitutes "less favourable" treatment in Article IX of the GATT 1994, and how does it compare to "less favourable" treatment under Article 2.1 of the TBT Agreement?

38. Article IX of the GATT 1994 requires members to 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. Whether or not a breach of the less favourable treatment obligation under Article IX:1 can be established, can thus depend on the outcome of the assessment as to whether the marking requirement at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis like products imported from any other country.

39. Both Article IX GATT 1994 and Article 2.1 of the TBT Agreement contain a "no less favourable treatment" obligation, which is a manifestation of the broader WTO rules against discrimination, the essence of which is to ensure that imported products are treated equally favourably irrespective of their origin.[18] While Article IX GATT only prohibits discrimination between imported products (MFN), Article 2.1 TBT also imposes a national treatment obligation. As with the non-discrimination rules under Article 2.1 of the TBT Agreement, Article IX:1 GATT 1994 encompasses both *de jure* and *de facto* discrimination.

40. However, Article 2.1 of the TBT Agreement does not purport to prevent Members from adopting regulatory distinctions as such, even where the effects of a regulatory distinction may be commercially inconvenient to another Member. In this respect, the specific context of the TBT Agreement must be taken into account. Under the TBT Agreement, the notion of a "legitimate regulatory distinction" is integral to the overall assessment and must be considered before any determination as to whether or not a measure violates Article 2.1 of the TBT Agreement is reached. As the Appellate Body held in *EC – Seal Products*, the specific context of the TBT Agreement means that Article 2.1 TBT does not operate to prohibit *a priori* a restriction on international trade.

    In contrast, Article IX is part of the GATT 1994, as Article III:4 is. These two provisions are thus the closer comparison. This also because Article XX applies to both, as does Article XXI.

[18] As noted by the Appellate Body *US-Tuna II (Mexico)* notwithstanding the differences, "important parallels exist between the non-discrimination provisions contained in Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. In particular, the inquiry under these provisions hinges on the question of whether the measure at issue modifies the conditions of competition in the responding Member's market to the detriment of products imported from the complaining Member vis-à-vis like domestic products or like products imported from any other country." (Appellate Body Report, *US-Tuna II (Mexico) – Article 21.5 DSU*, para. 7.278.)

Question 13

To all third parties: Hong Kong, China describes as less favourable treatment, under Article IX of GATT 1994, treatment where "goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin".[19] In this regard, please comment on the following:

a) Under what circumstances would a country indication on an origin mark be wrong or incorrect. In particular, does an origin mark, in order to be consistent with Article IX, have to indicate the "actual" country of origin?

41. As noted above, in reply to Question 12, Article IX:1 of the GATT 1994 contains an MFN obligation with regard to **origin marking requirements**. Beyond 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**. Contrary to what Hong Kong, China implies in its FWS, Article IX of the GATT 1994 and the ARO do not have the same scope.[20]

42. Article IX:1 of the GATT 1994 would not necessarily be breached, even if a country indication on an origin mark is "wrong" or "incorrect" from the perspective of the complaining Member, provided it was based on **origin marking requirements** which do not treat less favorably products imported from the complaining Member vis-à-vis the like products imported from any other country.

b) On what basis does a Member determine what the "actual" country of origin is?

43. Members determine the country of origin by applying their rules of origin for origin marking.

44. The term "actual" in relation to country of origin is not a treaty term; it cannot be found in the GATT 1994 (nor ARO or TBT Agreement). The European Union understands it as designating what the complainant considers as the "correct" country of origin.

45. As noted in reply to Questions 1 and 3, it is also necessary to distinguish the exercise of a sovereign right of Members to recognize or not a particular state or entity and/or their territorial boundaries from the act of determining origin by applying specific rules of origin for the purpose of origin marking requirements.

[19] Hong Kong, China's first written submission, para. 72.
[20] Ibid, para. 68.

c) What is the relevance of the 1958 GATT Decision referred to by Hong Kong, China in paragraph 74 of its first written submission?

46. The European Union agrees in principle with the conclusion of the panel in *Australia – Plain Packaging (Dominican Republic)* that the 1958 GATT Decision can be considered as guidance within the meaning of Article XVI:1 of the WTO Agreement that bears upon the interpretation of Article IX of the GATT 1994. It is not clear, however, that the 1958 GATT Decision supports the arguments and conclusion reached by Hong Kong, China specifically concerning the interpretation of Article IX:1 GATT 1994.

47. Hong Kong seems to rely on the 1958 GATT Decision (i) to argue that Members should accept as a satisfactory marking the indication of the name of the country of origin in the English language introduced by the words "made in"; and (ii) to take issue with the fact that its producers are effectively forced to mark the same products differently for the US market from the marking imposed for other Members' markets and thus also segregate the products depending on their destination.

48. Article IX:1 GATT 1994 imposes no discipline on the rules that the Members rely upon to determine origin for the purpose of origin marking. Furthermore, the absence of a harmonised set of rules of origin for the purposes of marks of origin inevitably leads to discrepancies in the determinations of origin between WTO Members for certain goods or categories of goods. The recommendation that Members should accept as a satisfactory marking the indication of the name of the country of origin in the English language introduced by the words "made in" only marginally alleviates this systemic deficiency by recommending a harmonised manner of **presenting** an origin mark. Hong Kong, China's reliance on the 1958 GATT Declaration to interpret Article IX:1 of the GATT 1994 thus appears misplaced.

d) On what basis should a Member determine what the correct "full English name" of a country is?

49. The European Union would consider the official names of WTO Members to be a candidate for identifying their correct full English names, but not necessarily determinative and the sole correct country designation, because countries may also have other full English names that are objectively correct.

Question 14

To all third parties: For purposes of demonstrating, under Article I:1 of the GATT 1994, that an advantage is not being accorded to it immediately and unconditionally, does Hong Kong, China need to show that the name "China" on the origin mark applied to goods produced in Hong Kong, China is contrary to WTO rules?

50. In the view of the European Union in conducting the analysis under Article I:1 of the GATT 1994, the question is not whether the name "China" on the origin mark applied to goods produced in Hong Kong, China can be considered as contrary to rules contained in other provisions, but rather whether what Hong Kong, China describes as an advantage that is granted to other Members, but denied to it, namely the ability to mark the goods the same way regardless of the destination of the product or the same way as other countries' producers may mark their products (namely with the name of the country of production) is indeed an advantage within the meaning of Article I:1 GATT 1994. (And it is.)

51. Hong Kong, China also refers to the ability to mark a product with the "correct" country of origin as an advantage that is denied to it. In this respect, the general rules on allocation of the burden of proof would seem to apply, namely that the party who asserts a claim of violation is responsible for providing proof thereof. If the essence of the alleged advantage is that it is "incorrect", failing which it would not be an advantage at all, it is for claimant to show it. Thus what Hong Kong, China needs to show is that goods originating in Hong Kong, China may not be marked as "Made in Hong Kong" whereas like products originating in other countries may be marked as "Made in" those countries.

2. APPLICABILITY OF ARTICLE XXI(B) TO THE CLAIMS UNDER THE ANNEX 1A AGREEMENTS AT ISSUE IN THIS DISPUTE

Question 15

To all third parties: What is the subject of, and what are the specific steps in, the interpretive exercise that the Panel needs to undertake to decide whether Article XXI(b) applies to the claims under the ARO and the TBT Agreement at issue in this dispute?

52. Article 3.2 of the DSU provides that the covered agreements have to be interpreted according to the customary rules of interpretation of public international law. It is generally accepted that Articles 31 and following of the Vienna Convention on the Law of Treaties reflect those customary rules.

53. In determining whether Article XXI(b) of the GATT 1994 applies to claims under the ARO and the TBT Agreement, the Panel should therefore look at

"the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The subject of this interpretative exercise are the treaty provisions relevant here, namely and in particular Article XXI(b) of the GATT 1994, and the terms of the ARO and the TBT Agreement.

54. With regard to the terms of Article XXI(b) of the GATT 1994, the European Union notes that this provision is specifically limited to claims under "this agreement" – that is: under the GATT 1994. Neither the ARO nor the TBT Agreement contain terms incorporating Article XXI(b) of the GATT 1994 into these two agreements. The European Union therefore concludes that Article XXI(b) of the GATT 1994 is not available to claims under the ARO and the TBT Agreement.[21]

Question 16

To all third parties: Should the Panel, in your view, in its analysis on the availability, or not, of Article XXI(b) to the claims at issue in this dispute follow the analytical approach applied by the Appellate Body, in for example China – Rare Earths (paragraphs 5.61-5.62 and 5.74), and by previous panels referred to by some third parties (European Union[22], Singapore[23] and Switzerland[24])? If not, do you consider this approach legally incorrect? In your response, please indicate whether there are any relevant differences between Article XX and Article XXI of the GATT 1994 for applying such an analytical approach, in determining the applicability of Article XXI of the GATT 1994 to non-GATT provisions.

55. The European Union agrees with the Appellate Body's approach as outlined notably in *China – Rare Earths*. The European Union does not consider that there are relevant distinctions between the interpretative approach appropriate to the interpretation of Articles XX and XXI of the GATT 1994. In particular, both of these provisions have to be interpreted following the customary rules of interpretation of public international law (see reply to question 15 above).

56. The European Union refers in this respect to Exhibit 5 to its third party submission, in paras. 171 – 174, where its position in this respect is described in more detail.

[21] See the European Union's third party submission, paras. 24 and 47 (and the reference contained therein to Exhibit EU-5, paras. 171 – 174).
[22] European Union's third-party submission, paras. 24 and 47 (referring to Exhibit EU-5, paras. 171-174).
[23] Singapore's third-party statement, para. 4.
[24] Switzerland's third-party submission, paras. 59-60.

Question 17

To all third parties: In its first written submission, the United States argues that "[j]ust as the origin marking requirement is subject to an exception to the claims under Articles I:1 and IX:1 of the GATT 1994, so too the [requirement] is subject to an exception to the same substantive claims under the" ARO (paragraph 295), and "under the TBT Agreement" (paragraph 320). Please comment on where this consideration would be relevant in the interpretive analysis on the applicability of Article XXI to the claims at issue in this dispute.

57. The European Union considers that the applicability of the defence contained in Article XXI of the GATT 1994 to the different WTO agreements has to be determined separately for each agreement. The terms of Article XXI of the GATT 1994 themselves limit the applicability of the defence contained therein to claims under the GATT 1994.

Question 18

To all third parties: At paragraph 275 of its first written submission, the United States argues that the interpretation that Article XXI of the GATT 1994 applies throughout Annex 1A is fully consistent with the general interpretative note to Annex 1A, noting that none of the Annex 1A Agreements contains a provision stating that Article XXI is inapplicable to the obligations under those agreements. In this regard, what meaning, if any, should be attributed to silence in a particular agreement as to whether an exception from another agreement applies? Can it be inferred from such silence that the application of such an exception is permitted or prohibited?

58. The European Union notes that each time another Annex 1A agreement incorporates the general and security exceptions it does so by express reference, under a "bridge" provision (e.g. Article 3 of TRIMs Agreement expressly provides that "[a]ll exceptions under GATT 1994 shall apply").

59. It cannot be inferred from simple silence that the application of an exception is permitted or prohibited. However, silence in certain agreements is relevant in conjunction with the express reference in others. If certain agreements contain an express reference, *a contrario* it can be inferred that silence means the lack of availability of the security exceptions absent a "bridge" provision.

60. Finally, the European Union notes that several Annex 1A agreements have their own balancing between trade interests and other values, e.g. Article 2.2 of the TBT Agreement. With regard to the proper interpretation of Article 2.1 of the TBT Agreement in this respect, the European Union respectfully refers to its written third party submission, at paras. 47 and following.

Question 19

To all third parties: Would the supposed unavailability of an exception in respect of the claims under the ARO or the TBT Agreement, which is available to Hong Kong, China's claims under the GATT 1994, result in a conflict subject to the General Interpretative Note to Annex 1A?

61. As recalled e.g. by the panel in *EC – Export Subsidies on Sugar (Thailand)*[25] and the panel in *Indonesia – Autos*[26], there is a presumption in international law against conflicts when treaties have the same membership. This principle has been recognized by the WTO jurisprudence when dealing with internal conflicts within the WTO Agreement. The WTO jurisprudence has maintained the general principle that there is a conflict when two provisions are mutually exclusive, that is when only one provision "applies" because it is not possible for a single measure to be consistent with both provisions.

62. The European Union notes that the panel in *Thailand - Cigarettes (Philippines), Article 21.5* dealt with a similar situation where the applicability of Article XX to the CVD agreement was at issue. The panel observed:

> We do not consider that it follows from the fact that Article XX is applicable to the obligations contained in Article VII of the GATT 1994 that there would be a legal conflict or absurd result if Article XX were not applicable to the obligations in the CVA. In our view, it does not follow that the applicability of Article XX exceptions to the general obligations regarding customs valuation contained in Article VII of the GATT 1994 mandates that those same exceptions must also be applicable to the system of customs valuation comprising detailed methodologies found in the CVA. Indeed, the CVA contains specific and technical rules that elaborate how the customs value of imports may be determined, which are additional to, and different from, those found in Article VII of the GATT 1994.

63. The same would be true with respect to the ARO in relation to Article XXI of the GATT. The fact that an exception is not available under e.g. the ARO, but is available for a similar obligation under the GATT 1994 would not appear to be a conflict within the meaning of the General Interpretative Note to Annex 1A. In this kind of scenario we are not dealing with an impossibility for a single measure to comply with two different (conflicting obligations). Instead, we are dealing with similar obligations under different agreements, but not all agreements provide the possibility for the defendant to justify a breach.

[25] Panel Report, *EC – Export Subsidies on Sugar (Thailand)*, para. 7.155.
[26] Panel Report, *Indonesia- Autos*, fn. 649.

Question 20

To all third parties: Could you direct the Panel to relevant documents from the Uruguay Round negotiations that would support your view on the meaning of the inclusion or exclusion of a provision in an Annex 1A Agreement specifying that the GATT 1994 exceptions apply to its provisions?

64. The European Union did not identify any documents from the Uruguay Round negotiations which would be relevant for the issue raised by the Panel.

Question 21

To all third parties: In paragraphs 288, 308 and 309 of its first written submission, the United States considers that the references to Articles XXII and XXIII of the GATT 1994 and to the DSU in Articles 7 and 8 of the ARO and Article 14 of the TBT Agreement, respectively, support its view that Article XXI of the GATT 1994 would be applicable to the ARO and the TBT Agreement. Please comment on this argument.

65. The references to Articles XXII and XXIII of the GATT 1994 and to the DSU in Articles 7 and 8 of the ARO and Article 14 of the TBT Agreement are of a totally different nature. These are the "consultation and dispute settlement provisions" of these two multilateral agreements on trade in goods in the meaning of Article 1.1 DSU. Like in most but not all such provisions within the WTO Agreement the negotiators chose the incorporation of/reference to Articles XXII, XXIII as avenue to craft such provisions. Thus they simply mean that dispute settlement procedures should take place on the basis of those provisions and Article 1.1 DSU. These references cannot be seen as a "bridge" provision linking the security exceptions in the GATT 1994 (which are not among the articles to which reference is made) to the ARO and TBT Agreements. If anything, they show that the incorporation of/reference to GATT provisions was known to the negotiators and that they did not do this in most but not all cases (cf. TRIMs) for the substantive exception provisions.

Question 22

To all third parties: Please elaborate on how with respect to the TBT Agreement, the reference to "essential security interest(s)" in the seventh recital of the preamble and Article 10.8.3, the references to "national security requirements" in Articles 2.2 and 5.4 and the references to "national security" in Articles 2.10 and 5.7 inform the assessment of the applicability of Article XXI(b) of the GATT 1994 to that agreement. In your response, please elaborate on any differences between these concepts and the relevance of such differences, if any, for the assessment of the applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement.

66. As explained in greater detail in our third party submission, the European Union is of the view that Article XXI(b) GATT 1994 is not available to justify a

breach under the TBT Agreement.[27] Transposing into the TBT Agreement the attenuated necessity test of GATT XXI appears to be inconsistent and incompatible with the intention of TBT drafters.

67. It is clear from the wording of Article XXI that its provisions only apply to "this Agreement", i.e. to the GATT 1994. Had the drafters of the TBT Agreement envisaged that Article XXI would apply to that agreement, they could have included an explicit cross-reference to Article XXI of GATT 1994. For example, Article 3 of TRIMs Agreement expressly provides that "[a]ll exceptions under GATT 1994 shall apply", and Article 24.7 of the Trade Facilitation Agreement (TFA) provides that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement".[28] They chose not do so.

68. Beyond express textual references, even when one conducts a broader analysis of the relationship between provisions of different covered agreements,[29] there would appear to be no basis to extend Article XXI of the GATT 1994 to the scope of the TBT Agreement. For example, the TBT Agreement does not contain a provision comparable to paragraph 5.1 of China's Accession Protocol, which states that "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade."[30] In line with the approach in *China - Raw Materials*,[31] *China- Rare Earths*,[32] and *Thailand — Cigarettes (Philippines) (Article 21.5)*[33] it should be held that the lack of specific language suggesting otherwise means that the GATT general and security exceptions are not available in the context of the TBT Agreement.

69. This view is supported by the position of Appellate Body on Article XX GATT 1994 and should apply *mutatis mutandi*s in respect of Article XXI GATT 1994 as well.[34]

[27] See Third Party Submission of the European Union, paras 47-56. However, as explained in our written submission, recital 7 of the preamble to the TBT informs the reading of what can constitute a legitimate policy objective for the purpose of assessing compliance with Article 2.1 of the TBT Agreement.
[28] The TFA entered into force on 22 February 2017.
[29] Appellate Body Reports, *China – Rare Earths*, para. 5.55. According to the Appellate Body, that relationship must be "ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments."
[30] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233, concerning the Protocol on the Accession of the People's Republic of China, WT/L/432, p. 4.
[31] Appellate Body Reports, *China - Raw Materials*, paras. 293 and 306.
[32] Appellate Body Reports, *China – Rare Earths*, paras. 5.73 - 5.74.
[33] Panel Report, *Thailand — Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.757.
[34] Appellate Body Report, *China – Rare Earths*, para. 5.56.

70. As the Panel notes in its question, the TBT Agreement contains several references to "national security". In the TBT Agreement, unlike in the GATT 1994 (TRIPS and GATS), references to the "necessity" of measures pursuing national security objectives are not qualified by terms like "which it considers". The drafters could have reproduced the qualified necessity test where it appears in the TBT Agreement, but – safe for one exception, which will be addressed below – they did not and in so doing they put TBT measures pursuing national security objectives on equal footing with TBT measures pursuing any other legitimate regulatory objectives (e.g. those pursuing health or environmental protection etc.; see e.g. Articles 2.2, 2.10, 5.4, 5.7 TBT). It is also worth noting that the term "necessary" in the 7th recital of the TBT Preamble is unqualified, as is the case with the term "necessary" in the 6th recital.

71. The references to national security in the TBT Agreement are not limited to a list of specific "situations" (see in contrast Article XXI(a), (b), (c)) paras. (a), (b) and (c) of GATT 1994.

72. There is, however, one exception: Article 10.8.3 of the TBT Agreement states that "[n]othing in this Agreement shall be construed as requiring: […] Members to furnish any information, the disclosure of which they consider contrary to their essential security interests." In the view of the European Union, this exception merely confirms the reading that for all other purposes and obligations, there is no special regime under the TBT Agreement for disciplining measures pursuing national security-related objectives differently from any other types of TBT measures. It is also worth noting that Article 10.8.3 of the TBT Agreement closely reproduces the text of Article XXI(a) of the GATT 1994, which seems to confirm that the negotiators probably contemplated having the full exception from the GATT XXI as a textual option (as was the case in the context of GATS and TRIPS), but in the end decided to include in the TBT Agreement only a small part of it, while omitting the other parts.

Question 23

To all third parties: Please comment on the relevance of the Tokyo Round negotiating documents referred to in paragraphs 312 to 315 of the United States' first written submission in assessing the applicability of Article XXI(b) to the TBT Agreement.

73. As noted in reply to Question 22 the negotiating history of the TBT Agreement confirms that the negotiators considered incorporating Article XXI of the GATT, but decided against doing so and opted instead to treat TBT measures

pursuing national security objectives on equal footing with TBT measures pursuing any other legitimate regulatory objectives.

74. Tokyo Round negotiating documents referred to by the US in its first written submission confirm this premise, as does the text of the Tokyo Round Standards Code.[35]

Question 24

To all third parties: Please comment on the relevance of the Tokyo Round Agreement on Technical Barriers to Trade being open to accession by non-GATT contracting parties in assessing whether Article XXI(b) of the GATT 1994 applies to the TBT Agreement.

75. Under international law the relationship between third parties and treaties is defined by a general formula "*pacta tertiis nec nocent nec prosunt*". A treaty does not create rights and obligations for a third state without its consent. 'For states non-parties to the treaty, the treaty is "*res inter alios acta*".

76. The GATT was a treaty between third parties for non-contracting parties. As a result, in the absence of incorporation by explicit reference or incorporation of the text (which did not occur at the time of the Tokyo Agreement), the exceptions under the GATT were not available with respect to the Tokyo Round Agreement on Technical Barriers to Trade. That intention by the negotiators to keep the GATT and TBT regimes separate was maintained in subsequent negotiations and is reflected in the text as it stands today.

Question 25

To all third parties: Please clarify what is the meaning of the phrase added at the end of the sixth recital of the TBT Agreement during the Uruguay Round (i.e. "and are otherwise in accordance with the provisions of this Agreement"), and whether the absence of any such language in the seventh recital has any bearing on determining the applicability of Article XXI(b) to the TBT Agreement?

77. The Appellate Body looked at the phrase "and are otherwise in accordance with the provisions of this Agreement" in the context of the *US- COOL* dispute and noted:

[35] Document LT/TR/A/5. The approach of treating "national security" the same way as any other legitimate objective, was already reflected in the 1979 Tokyo Round Standards Code (see e.g. Articles 2.2, 2.6 and 7.4, recital 7). The standards code also contained in its Article 10.5.3 a transparency exception identical to that of Article 10.8.3 TBT, which reproduces part of Article XXI GATT 1994, while creating a different regime specific to the TBT Agreement for the remainder.

> […] we do not agree with the arguments of Canada and Mexico that the qualification "subject to the requirement that they ... are otherwise in accordance with the provisions of this Agreement" in the sixth preambular recital of the TBT Agreement subordinates the principle expressed in that recital – that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate" – to the provisions of the TBT Agreement. Rather, this principle functions as interpretive context to the provisions of the TBT Agreement, including Article 2.2. In the context of Article 2.2, we understand the qualification "subject to the requirement that they ... are otherwise in accordance with the provisions of this Agreement" to mean that, while a Member may pursue a legitimate objective "at the levels it considers appropriate", it may not do so in a manner that is "more trade-restrictive than necessary". In our view, the obligation to ensure that technical regulations are not more trade restrictive than necessary under Article 2.2 can be interpreted and applied in a manner that does not conflict with the principle enunciated in the sixth preambular recital of the TBT Agreement.[36]

78. The European Union considers that the absence of this phrase in the seventh recital has no bearing on determining the applicability of Article XXI(b) to the TBT Agreement.

Question 26

To all third parties: Please comment on the argument by the European Union in paragraph 50 of its third-party submission regarding the difference between an operative article of an agreement and a recital of the preamble. What is the relevance, if any, of this argument for the question of applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement?

79. As the question refers to an argument raised by the European Union in its third-party submission, the European Union does not consider it necessary to comment further.

Question 27

To all third parties: Please comment on the argument by the European Union in paragraph 51 of its third-party submission regarding the textual differences between Article XXI and the seventh recital of the TBT Agreement. What is the relevance, if any, of this argument for the question of applicability of Article XXI(b) of the GATT 1994 to the TBT Agreement?

80. As the question refers to an argument raised by the European Union in its third-party submission, the European Union does not consider it necessary to comment further.

[36] Appellate Body Report, US – COOL, para. 5.226 (footnotes omitted).

Question 28

To all third parties: Please comment on the relevance of the practice of Members to notify to the TBT Committee certain measures as taken for "national security", as well as raising Specific Trade Concerns on this type of measures, in determining the applicability of Article XXI(b) to the TBT Agreement.[37]

81. Notification of a certain measure is not dispositive of its legal characterization and applicability of a certain agreement. Members may well be inclined to notify certain measures out of caution.

82. This being said, the European Union notes that the TBT Agreement has its own balancing system of trade and other values in Article 2.2, which includes essential national security interests.

Question 29

To all third parties: Article XXI of the GATT 1994 covers three distinct situations described in each of its paragraphs (a), (b), and (c). Please comment on whether there are any relevant distinctions to be made when considering the applicability of each of these situations to Annex 1A specific agreements (e.g. incorporation of language similar to Article XXI(a) in Article 10.8.3 in the TBT Agreement).

83. As noted above in reply to Question 22, the fact that the TBT Agreement negotiators decided to incorporate part of Article XXI GATT 1994, confirms that they were aware of the possibility of including the whole provision (through reference or otherwise), but decided not to. If Article XXI was in any event available to justify a violation under the TBT Agreement, as argued by the US, Article 10.8.3 of the TBT Agreement would be redundant.

Question 30

To all third parties: In paragraphs 280 to 288 and 297 to 309 of its first written submission, the United States refers to specific provisions of the ARO and the TBT Agreement that, in its view, link each agreement to the GATT 1994. What is the link that must be demonstrated to show that Article XXI is applicable to the ARO and the TBT Agreement? Specifically, is it a link between:

a. the ARO or the TBT Agreement as a whole, on the one hand, and the GATT 1994 as a whole, on the other hand;

b. the ARO or the TBT Agreement as a whole, on the one hand, and Article XXI of the GATT 1994, on the other; or

c. the specific obligations invoked by Hong Kong, China in this dispute, on the one hand and Article XXI of the GATT 1994, on the other?

84. The European Union will reply to questions under points (a) to (c) together.

[37] See "The WTO Agreement Series: Technical Barriers to Trade" (third edition), https://www.wto.org/english/res_e/booksp_e/tbt3rd_e.pdf, pp. 161-164.

85. The European Union considers that in accordance with Article 3.2 of the DSU, the Panel is required to make a holistic assessment of the matter to ascertain whether Article XXI is available as defense for a violation of the obligations at issue. It is not clear that the "categories of link" identified by the Panel in this question can be of particular assistance. While the existence of a link between the specific obligations invoked by Hong Kong, China in this dispute, on the one hand and Article XXI of the GATT 1994, on the other, would be a very strong element in support of the conclusion that the Article XXI exception applies, the other two types of link would require a very careful analysis of the texts in accordance with the customary rules of treaty interpretation before any conclusion can be drawn.

86. The conditions for applicability of GATT 1994 exceptions outside the GATT 1994 have been clarified through case law. While the focus so far was mainly on Article XX GATT 1994, the reasoning also applies – *mutatis mutandis* – to the assessment of applicability of Article XXI.

87. In *China – Publications and Audiovisual Products*, in the context of assessing a claim brought under Paragraph 5.1 of China's Accession Protocol, the Appellate Body found that China could invoke Article XX(a) of the GATT 1994 to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Accession Working Party Report. In reaching this finding, the Appellate Body relied on the language contained in the introductory clause of Paragraph 5.1, which states "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". In this case the specific link was between the obligation invoked by the complainant and the WTO Agreement.

88. Conversely, in *China – Raw Materials* and *China – Rare Earths* it confirmed that lack of specific language in Paragraph 11.3 of China's Accession Protocol meant that China cannot have recourse to Article XX of the GATT 1994 to justify export duties that are inconsistent with Paragraph 11.3.

89. The panel in *Thailand — Cigarettes (Philippines) (Article 21.5)* recalled that:

> "The text of Article XX establishes that the provision applies to "this Agreement", i.e. to the GATT 1994. Insofar as another covered agreement specifically cross - references Article XX and incorporates these general exceptions by reference, the Article XX exceptions will apply to that other agreement. For example, Article 3 of the TRIMs Agreement explicitly provides that "[a]ll exceptions under GATT 1994 shall apply", which plainly includes Article XX of the GATT 1994. Similarly, Article 24.7 of the TFA, which entered into force on 22 February 2017, states that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement". These are clear examples of incorporation by reference.[38]

90. The European Union notes, as did the Appellate Body, that significance should be attached to the fact that a covered agreement expressly refers to certain GATT 1994 provisions, but not the exceptions. When this is the case, the argument that the provision should be considered as incorporated implicitly is not particularly persuasive. Similarly, as explained above in reply to questions 22 and 29, it is significant that the TBT negotiators incorporated the text of Article XXI(a), but not the rest of the provision.

Question 31

To all third parties: Please comment on the scenario described in paragraph 278 of the United States' first written submission, where UN mandated action, pursuant to Article XXI(c) of the GATT 1994, might affect obligations set out in an Annex 1A specific agreement. In your response, please address the following questions:

a. What would be examples of actions taken by a Member "in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security" that would be inconsistent with the ARO?

91. The European Union notes that such a hypothetical scenario is not subject to the present proceedings and that the US did not offer any concrete example from past UN practice. One possible situation of inconsistency with the ARO may be if a UN mandated action (adopted after the end of the transition period of the ARO) were not to give effect to the principle of last substantial transformation and treats as goods originating in the sanctioned Member goods that were merely packaged on its territory. But even this is unlikely; the UN mandated action would rather target directly the goods in question, rather than choosing the detour of an origin rule that departs from the ARO.

b. In interpretive terms, what is the relevance of this scenario to the applicability of Article XXI to such agreements?

92. This hypothetical scenario is not relevant to the present proceedings.

[38] Panel Report, *Thailand — Cigarettes (Philippines) (Article 21.5)*, para. 743.

3. NATURE OF ARTICLE XXI(B) OF THE GATT 1994

Question 32

To all third parties: In light of the principle of effet utile, is it possible for a provision of the WTO covered agreements to remain effective if it is not subject to review by a dispute settlement panel?

93. The object and purpose of any provision, the more so for an affirmative exception to the disciplines of the agreement as a whole, could be significantly undermined if its invocation were non-reviewable.

94. In addition, a non-reviewable exception will render ineffective the rest of the provisions of the agreement, that is all its obligations to which that exception applies.

Question 33

To all third parties: In paragraph 50 of its first written submission, the United States argues that "a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests. In this way, 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)." Please comment.

95. The European Union fails to understand how Article XXI(a) can exempt the United States from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Any discretion accorded under it is not unlimited.

96. The European Union acknowledges that information relating to essential security interests is of a highly sensitive nature, but the party invoking the exception is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if the United States was justified in not providing certain information pursuant to Article XXI(a), that would not discharge the United States from its burden of proof in relation to Article XXI(b).

97. In this dispute, in order to make out a coherent case under Article XXI(b), the United States should explain the "action" that it considers necessary to protect its essential security interests, the "essential security interests" that it claims to be at issue, the nature of any alleged "emergency in international relations", as well as any plausible connection between the "action" and the

"essential security interests", including how the United States took into account the interests of third parties.

Question 34

To all third parties: In paragraph 51 of its first written submission, the United States argues that "a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b). While it may not be that such a conflict would arise in every instance, the Panel must avoid any interpretation of one provision that could undermine or even invalidate the effectiveness of another." Please comment.

98. As explained in its third party submission and in reply to Question 33, the European Union disagrees with the US position that Article XXI(a) and Article XXI(b) are non-justiciable provisions. The conflict the US refers to does not arise if the provisions are correctly interpreted.

Question 35

To all third parties: In paragraph 52 of its first written submission, the United States argues that "the phrase 'which it considers necessary' is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase 'which it considers' in Article XXI(b), and not reduce these words to inutility." Please comment.

99. As explained in greater detail in the third party submission, the European Union does not propose an interpretation which would reduce the phrase "which it considers" under Article XXI(a) and XXI(b) to inutility.

100. The European Union refers to its detailed explanations on these matters in its written submission. The use of the words "which it considers" qualifying "necessary" in Article XXI(b) means that the Member adopting the measure at issue enjoys a certain degree of discretion.

101. This discretion is translated into the fact that it is not required to make a comparison of the action with a less trade restrictive alternative capable of achieving equivalent results. In other words, if the only argument that a complainant has is that there was allegedly an alternative measure available that would have been less trade restrictive but make at least an equivalent contribution to the objective, then the complainant will not prevail, provided that the respondent satisfies the panel, with evidence, that "it considers" the measure to be "necessary".

102. However, this in no way negates the very text of Article XXI(b), which uses the words "for the protection of". Therefore, if the evidence objectively demonstrates that the measure is not "for" a security objective, because it is in fact for some other objective, then the respondent will fail. If there is no

relationship between the measure and the alleged security objective, then the measure cannot be, comparatively, the best available option on any view, including that of the respondent.

Question 36

To all third parties: Please comment on the relevance of the textual differences between Articles XX and XXI(b) of the GATT 1994 to an interpretation of the phrase "relating to" in Article XXI(b)(i) and (ii) as entailing "an objective relationship between the ends and the means, subject to objective determination", as stated by the panel in Russia – Traffic in Transit in paragraph 7.69 of its report.

103. The first two subparagraphs of Article XXI(b) both start with the terms "relating to", which in this context means "about". In the view of the European Union there is no "relate to" test in these provisions. All sub-paragraphs of Article XXI(b) are subject to the attenuated necessity test ("which it considers necessary"). In addition, the connection between the measure at issue and the essential security interests is reflected in the use of the word "for", which gives it an objective dimension.

104. A panel can and should objectively ascertain whether a specific action concerns in fact "fissionable materials" or "arms" etc. (rather than non-qualifying products) and whether it is genuinely "related to" those materials. Pigs, or cows, for instance, cannot be considered fissionable materials only because the respondent "considers" so.

Question 37

To all third parties: Please comment on the relevance of the DSU provisions referred to in paragraphs 59 to 64 of the United States' first written submission, specifically Articles 3.7, 22.3(c), 26.1, and 26.2 of the DSU, as context in interpreting Article XXI(b) of the GATT 1994.

105. To begin with, the DSU articles referred to by the US are not the relevant DSU articles for the purpose of determining whether a panel does or does not have jurisdiction in a case where the respondent invokes one of the exceptions in Article XXI(b) of the GATT 1994.

106. Article 3.7 of the DSU refers to Members' own "judgment". The Appellate Body has explained that Members are expected to be "largely self-regulating" in its application. Nevertheless, even that provision is not "self-judging". Thus, in *Peru – Agricultural Products*, the Appellate Body found:[39]

[39] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18 – 5.19.

> [A]lthough the language of the first sentence of Article 3.7 of the DSU states that 'a Member shall exercise its judgement', the considerable deference accorded to a Member's exercise of its judgement in bringing a dispute is not entirely unbounded. For example, in order to ascertain whether a Member has relinquished, by virtue of a mutually agreed solution in a particular dispute, its right to have recourse to WTO dispute settlement in respect of that dispute, greater scrutiny by a panel or the Appellate Body may be necessary.

107. In that dispute, the Appellate Body went on to conduct an objective assessment of whether the complainant "could be considered as having acted contrary to its good faith obligations under Articles 3.7 and 3.10 of the DSU when it initiated these proceedings."[40]

108. Therefore, while that provision does entail a considerable amount of discretion, it is certainly not "self-judging", or "not permitting a panel to look behind a Member's decision" and it leaves intact the possibility of a panel to conduct an objective assessment of whether a Member infringed it and whether it acted in line with good faith, unlike the interpretation of Article XXI of the GATT 1994 proposed by the US.

109. Article 22.3 of the DSU is also not "self-judging" in the way in which the US claims Article XXI(b) of the GATT 1994 to be, even though that provision also uses the term "considers", followed by a requirement (comparable to the subparagraphs of Article XXI(b)) to take into account certain factors.

110. To recall, the arbitrators interpreted Articles 22.3(b) and 22.3(c) of DSU, which both start with the phrase "if that party considers", in the following manner:[41]

> It follows from the choice of the words "if that party considers" in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words "in considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures" in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question 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 within the same sector under the same agreements, or only

[40] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.28.
[41] Decision of the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC),* para. 52.

under another agreement provided that the circumstances were serious enough.

111. Article XXI of the GATT 1994 has also several qualifying elements, such as "for the protection of" and the categories of goods and circumstances which are exhaustibly mentioned in subparagraphs (i) to (iii). It is definitely not an open-ended, self-judging provision.

112. Finally, an analysis of Articles 26.1 and 26.2 of the DSU does not help the US position either. The fact that "a party considers and a panel or the Appellate Body determines" does not mean that, *a contrario*, in Article XXI(b) of the GATT 1994 only a party considers. All those provisions contain is just a reference to the procedural steps for such a complaint, in the procedural context of the DSU. There was no need for similar specifications in a substantive part of the GATT 1994.

113. In light of the above, an analysis of the mentioned provisions of the DSU does not support the US views.

114. To the contrary, an analysis of the relevant provisions in the DSU supports the European Union's position, based on the very text of Article XXI of the GATT 1995, that there are objective elements in that article subject to review by a panel. The European Union refers to paragraphs 38 – 45 of Exhibit 5 to its third party submission, explaining why Article XXI is not an exception to the rules on jurisdiction laid down in the DSU.

Question 38

To all third parties: Which aspects of the object and purpose of the GATT 1994, the WTO Agreement, and the covered agreements inform an interpretation of Article XXI(b) of the GATT 1994? In your response, please indicate whether such aspects support the view that Article XXI(b) is self-judging or the view that it is at least partly subject to an objective review by a panel.

115. The object and purpose of the WTO Agreement in general and of the GATT 1994 in particular is "to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade".[42]

116. The self-judging reading of Article XXI(b) by the US is contrary to that object and purpose.

[42] Third recital of the Preamble of the WTO Agreement. See Appellate Body Report, *EC – Computer Equipment*, para. 82.

117. It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.[43]

Question 39

To all third parties: With respect to the 1949 GATT Council Decision in United States - Export Measures referenced by the United States in its first written submission[44]:

a. *Does this decision constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention, as argued by the United States?*

b. *To what extent does this decision express an agreement between Members on the interpretation of the GATT 1994 or the application of its provisions?*

c. *If this decision does constitute a "subsequent agreement", to what extent does this decision establish the self-judging nature of Article XXI?*

118. The European Union will reply to questions under points (a) to (c) together.

119. The European Union has addressed the US argument that a 1949 decision by the GATT Contracting Parties on Czechoslovakia's complaint that the 1949 decision constitutes a "subsequent agreement" of the Contracting Parties within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), to the effect that Article XXI of the GATT 1994 is self-judging, in some detail in its Third Party Submission made before the panel in *Russia – Traffic in Transit*, which it annexed to its third party submission before this Panel and respectfully refers to paragraphs 58 – 78 of Exhibit EU-5.

120. In sum, the European Union does not agree that the 1949 decision is a subsequent agreement between the parties regarding the interpretation of the GATT or the application of its provisions. The US claim that the decision shows that Article XXI is "self-judging" is untenable. If anything, the decision demonstrates the opposite.

[43] See Panel Report, *Russia – Traffic in Transit*, para. 7.79.

[44] United States' first written submission, paras. 68-78.

Question 40

To all third parties: With respect to the GATT/ITO negotiating history discussed by the United States in its first written submission, please comment on the following:

a. whether the GATT/ITO negotiating history would constitute "the preparatory work of the treaty" and/or "the circumstances of the conclusion" of the GATT 1994, as part of WTO Agreement; and

b. whether it would be appropriate for the Panel to seek recourse to the GATT/ITO negotiating history in the light of Article 32 of the Vienna Convention.

121. The European Union will reply to questions under points (a) and (b) together.

122. The European Union respectfully refers to paragraphs 82 *et seq* of Exhibit EU-5 and the Report in *Russia – Traffic in Transit*, which addressed this very issue and where the panel concluded that the negotiating history of Article XXI supports the view that that provision is not "self-judging" in the sense now advocated by the United States.[45]

Question 41

To all third parties: Can it be discerned from the GATT/ITO negotiating history whether the negotiating parties considered the draft security exception to be self-judging?

123. See reply to Question 40.

Question 42

To all third parties: With respect to the internal documents of the US delegation discussed in paragraphs 7.89 to 7.91 of the panel report in Russia – Traffic in Transit, please comment on the following:

a. whether the internal documents constitute "supplementary means of interpretation" in the meaning of Article 32 of the Vienna Convention, for example, as the "preparatory works of the treaty" or "circumstances of the conclusion" of the treaty;

124. In the European Union's view, these documents would constitute the circumstances of the conclusion of the GATT 1947,[46] or other supplementary

[45] Panel Report, *Russia – Traffic in Transit*, sections 7.5.1 – 7.5.3.

[46] Thus, the documents of the US delegation permit "the examination of the historical background against which the treaty was negotiated" (Appellate Body Report, *EC – Computer Equipment*, paras. 86 and 92). In *EC – Chicken Cuts*, the Appellate Body explained that "[a]n "event, act or instrument" may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a "circumstance of the conclusion" when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision." Importantly, the Appellate Body added that "not only "multilateral" sources, but also "unilateral" acts, instruments, or statements of individual negotiating parties may be useful in

means of interpretation, keeping in mind that the list of supplementary means of interpretation in Article 32 of the VCL is not exhaustive.[47]

b. whether, as argued by the European Union in paragraph 106 of Exhibit EU-5, a panel has discretion to rely on publicly available facts and evidence, especially to confirm or support a conclusion on the interpretation of Article XXI(b) of the GATT 1994 that could be reached independently of those facts and evidence; and

c. whether it is possible to draw any firm conclusions from the internal documents about the self-judging nature of Article XXI.

125. It should firstly be noted that the panel in *Russia – Traffic in Transit* relied on the internal documents only to confirm and support its conclusion on the interpretation of Article XXI(b) of the GATT 1994 that could be reached independently of those facts and evidence. The European Union considers that the analysis of the panel in *Russia – Traffic in Transit* was correct. The position of the US delegation, which neatly aligns with the wording of what was to become Article XXI as well as with the subsequent statements by the United States and other contracting parties, supports the view that neither Article XXI in general, nor Article XXI(b) in particular, are "self-judging" or "non-justiciable" as now claimed by the United States.

Question 43

To all third parties: Please comment on: (a) the relevance of the statements of GATT contracting parties referenced by the United States[48] under the Vienna Convention, and (b) whether these statements reflect a consensus position that invocations of Article XXI(b) of the GATT 1994 are not meant to be subject to review by a dispute settlement panel.

126. The European Union respectfully refers to paragraphs 116 *et seq* of Exhibit EU-5, where it explain in greater detail that these statements do not reflect a consensus position.

ascertaining "the reality of the situation which the parties wished to regulate by means of the treaty" and, ultimately, for discerning the common intentions of the parties." Appellate Body Report, *EC – Chicken Cuts*, para. 289.

[47] Appellate Body Report, *EC – Chicken Cuts*, para. 283 and fn 531 ("We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they include the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.")

[48] United States' first written submission, paras. 191-210.

Question 44

To all third parties: With respect to the 1982 decision adopted by the GATT CONTRACTING PARTIES concerning invocations of Article XXI:

a. *Does this decision constitute a "subsequent agreement" in the meaning of Article 31(3)(a) of the Vienna Convention?*

b. *If this decision does constitute a "subsequent agreement", to what extent does this decision establish the self-judging nature of Article XXI?*

c. *To what extent does this decision express an agreement between Members on the interpretation of the GATT 1994 or the application of its provisions?*

d. *If this decision does not constitute a "subsequent agreement", should the Panel give it any legal weight under any other provision (such as Article 1(b) of the GATT 1994 or Article XVI:1 of the WTO Agreement)?*

127. The European Union will reply to the questions under points (a) to (d) together.

128. The 1982 Decision sets forth guidelines that should apply until a formal interpretation of Article XXI was made. Hence, the decision should not be understood as guiding how to interpret Article XXI since it states itself that an interpretation has not been made.

129. The central feature of this Decision is the procedural requirement to notify measures taken under Article XXI.

130. Nevertheless, the Decision does touch upon the question of standard of review insofar as it expressly confirms that "when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement." The "full rights under the [GATT]" includes also the right to challenge a measure on the basis of what is now Article XXIII:1(a) of the GATT 1994, i.e. in a "violation" complaint.

131. Thus, the 1982 Decision confirms the European Union's view that Article XXI does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of the GATT 1994, and that unilateral invocations do not prevent panels from objectively reviewing whether the conditions in Article XXI are met.

Question 45

To all third parties: Please comment on the relevance of the textual differences in the three linguistic versions of Article XXI(b) of the GATT 1994 for purposes of interpreting the provision. In your responses, please discuss, inter alia, that the Spanish-language version of Article XXI(b) of the GATT 1994: (a) places the word "relativas" (relating) in the introductory clause to Article XXI(b) as opposed to at the beginning of subparagraphs (i) and (ii); (b) places a comma before the word "relativas"; (c) uses the phrase "a las aplicadas" (to those applied/taken) at the beginning of subparagraph (iii); and (d) uses a colon at the end of the introductory clause, like the French text.

132. The textual differences in the three linguistic versions of Article XXI(b) cannot be construed by any means so as to provide any support to the US' interpretation of that provision.

133. (a) Indeed, with regard to the use of "relativas", its placing in the introductory clause confirms that the measures (action in English) refers to those limited situations in subparagraphs (i) to (iii).

134. (b) The fact that in the Spanish version the chapeau has a comma before the word "relativas" suggests a grammatical, logical, and legal separation between the clause "las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad", and the adjective "relativas" which introduces and is connected to each of the three enumerated subparagraphs.

135. This separation is fully in line with the European Union's reading of the provision: the term "it considers/estime" only qualifies the term "necessary/necesarias", and certainly not the subparagraphs. Thus, the comma in the Spanish version provides further support for what is, in the European Union's view, the best and most coherent reading of all three linguistic versions.

136. The separation is, however, clearly at odds with the US' reading that the term "it considers/estime" qualifies the provision as a whole, including the three sub-paragraphs.

137. (c) The use of "applicadas" in Article XXI(b)(iii) confirms that it refers to the measures (medidas = action) and not to "it considers necessary".

138. (d) With regard to the use of a colon at the end of the chapeau of Article XXI(b) in the French and Spanish versions, and no colon at the end of the English version, this simply indicates an enumeration. What is enumerated are the three enumerated subparagraphs following the *chapeau*. These subparagraphs are limitative qualifying clauses, i.e. they qualify and limit the

exercise of the discretion (such as exists) which is accorded to Members under the *chapeau* to these three circumstances.[49] The enumeration suggests simply that there is a closed list of circumstances, and the colon suggests that those circumstances will be listed after the colon.

139. The European Union fails to see the legal significance of the absence of a colon in the English text. Even if a colon was there, the provision would read exactly in the same way.

140. In that respect, the European Union would point out that there is no colon at the end of the *chapeau* of Article XXI ("Nothing in this Agreement shall be construed") in the English and French versions, but there is one in the Spanish version. The European Union fails to see the legal significance of this.

141. The European Union also recalls the analysis of the ordinary meaning of the provision in the *Russia – Traffic in Transit* report.[50]

142. In light of the detailed textual analysis provided above, it is clear that Article XXI is not self-judging.

Question 46

To all third parties: At paragraphs 47 and 48 of Exhibit EU-5, the European Union states that footnote 2 to the KORUS FTA comes close to expressing the idea of non-justiciability, providing that, where a party invokes Article 23.2 of that FTA, "the tribunal or panel hearing the matter shall find that the exception applies". The European Union notes that the WTO covered agreements contain no such text. What meaning do you attribute to the absence of such a provision in the GATT 1994 or elsewhere in the covered agreements as to whether the security exception of Article XXI(b) is self-judging?

143. The European Union refers to its submissions. Indeed, if the GATT drafters envisaged a self-judging provision, they might have considered that kind of language. The fact that the US used such language in an FTA it concluded strongly suggests that the US itself is perfectly aware that such additional language is required.

Question 47

To all third parties: In paragraph 123 of its first written submission, the United States notes that the Treaty of Rome and the Agreement on the European Economic Area reflect significant deviations from the text of Article XXI of the GATT 1994, including by omitting the "which it considers necessary" language, by expressly providing for the review of measures taken by a government for essential security purposes, and by using

[49] Panel Report, *Russia – Traffic in Transit*, para. 7.65.

[50] Panel Report, *Russia – Traffic in Transit*, paras. 7.65 – 7.68 and 7.82.

language that goes beyond that contained in subparagraph (iii). What meaning do you attribute to these differences in language in the above-mentioned treaties as to whether the security exception of Article XXI(b) is self-judging?

144. At the outset, the European Union recalls that the GATT 1994 and the other covered agreements must be interpreted according to the customary rules of interpretation of public international law. The European Union does not consider that the Treaty of Rome or the Agreement on the European Economic Area, to which the United States makes reference in its argument, fall within the texts to which regard must be had according to Articles 31 and 32 of the Vienna Convention of the Law of Treaties when interpreting a given international agreement. The European Union considers therefore that those two agreements and their wording can be illustrative with regard to drafting techniques and drafting options of treaties. They cannot, however, be regarded as of direct relevance to the interpretation of the covered agreements.

145. In any event, the European Union considers further that the US' position on the Treaty of Rome and the Agreement on the European Economic Area is convincing:

146. Article 346(1) of the Treaty on the Functioning of the European Union (TFEU) contains the "it considers" language, which was however never considered an impediment in judicial review of EU Member States' measures, as numerous Court judgments show.[51]

147. The Court of Justice of the European Union (CJEU) has held that the text of Article 346(1)(b) of TFEU does not preclude the matter being examined by the Court. In interpreting that provision, the Court has found that the language in Article 346(1)(b) TFEU ("it considers necessary") does not mean that that provision can be construed "as conferring on Member States a power to depart from the provisions of the Treaty simply in reliance on those interests". Rather, a Member State must "show that such derogation is necessary in order to protect its essential security interests".[52]

[51] Article 346(1)(b) of TFEU provides that:
The provisions of the Treaties shall not preclude the application of the following rules:
[…] any Member State may take such measures as *it considers necessary for the protection of the essential interests of its security* which are connected with the production of or trade in arms, munitions and war material […] (emphasis added).

[52] CJEU, Judgment of 4 September 2014, *Schiebel Aircraft GmbH*, EU:C:2014:2139, para. 34 and the case-law cited.

148. The CJEU has followed a similar approach when interpreting Article 346(1)(a) of the TFEU:

> As regards, more particularly, Article 296 EC, it must be observed that, although that Article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, that Article cannot however be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests. […]
>
> Consequently it is for the Member State which seeks to take advantage of Article 296 EC to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests. […]
>
> Furthermore, the level of specificity to be attained in the declarations which Member States must periodically complete and send to the Commission is not such as to lead to damage to the interests of those States in respect of either security or confidentiality. […]
>
> In the light of the foregoing, the Kingdom of Denmark has not shown that the conditions necessary for the application of Article 296 EC are satisfied.[53]

149. Article 348 TFEU does not mean what the US would like it to mean. To recall, Article 348 provides that:

> If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.
>
> By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347. The Court of Justice shall give its ruling in camera.

150. All that the first paragraph of Article 348 TFEU does is to specify that the Commission and Member States shall cooperate in finding solutions compatible with the internal market, while the second paragraph provides a derogation from the stages of bringing an infringement action against a Member State, making the procedure easier and not more difficult (more deferential). Neither the first not the second paragraph can be construed as meaning that the reference in Article 346 TFEU to "measures as it [a Member State] considers necessary", "by itself, was not necessarily subject to review".[54] In other words, absent Article 348 TFEU, the standard infringement

[53] CJEU, Judgment of the Grand Chamber of 15 December 2009, *European Commission v Kingdom of Denmark*, Case C-461/05, EU:C:2009:783, paras. 53 – 60.
[54] US' FWS, para. 127.

procedures in Articles 258 and 259 TFEU would apply, and "it considers" would not be a legal impediment in that respect.

151. The US then refers to measures taken "in the event of war [or] serious international tension constituting a threat of war" and claims that "this language is significantly different from the reference in Article XXI(b)(iii) of the GATT 1994 to "in time of war or other emergency in international relations.""[55] This is not correct. The text of Article 347 TFEU reflects in this respect the very text of Article XXI(b)(iii), which refers in its Spanish version to "grave tensión internacional" and in its French version to "grave tension internationale". Thus, a reference to "serious international tension" is nothing else than a mere translation into English of the Spanish and French versions of the text.

Question 48

To all third parties: Does the qualification of a particular element of Article XXI(b) by the phrase "which it considers" make that element partially self-judging or entirely self-judging?

152. As the European Union explained in in greater detail its written submission, "it considers" qualifies only the necessity test (i.e. it is not required to demonstrate a less trade restrictive alternative capable of achieving the same level of protection) and cannot be understood to refer to the entirety of Article XXI(b) of the GATT 1994 (neither to the rest of the chapeau of Article XXI(b) nor to the types of goods/ circumstances referred to in subparagraphs (i) to (iii)).

Question 49

To all third parties: In paragraph 46 of its first written submission, the United States argues that the subparagraphs of Article XXI(b) "guide a Member's exercise of its rights under this provision…". Please comment. In your response, please indicate whether there are any examples of such "guidance" in other provisions of the WTO covered agreements.

153. The subparagraphs (i) to (iii) of Article XXI(b) are exhaustive of the types of circumstances covered by the provision. Thus, the respective text is not mere "guidance", but a limited list of goods and circumstances.

154. Similarly, the exceptions in Article XX of the GATT 1994 form a limited list, and not an indicative list, providing "guidance".

[55] US' FWS, para. 128.

155. To the contrary, Article 2.2 of the TBT Agreement has an open list of values, and those expressly mentioned are non-exhaustive examples.

Question 50

To all third parties: In paragraph 18 of its third-party statement, Canada argues that, to the extent that the panel in Russia – Traffic in Transit meant to suggest (in paragraph 7.135 of its report) that an emergency in international relations must occur within the invoking Member or its immediate surroundings", this interpretation "fails to adequately recognize the myriad of ways in which emergencies in international relations may manifest in modern life".

a. *Do you read the panel as having imposed a territorial limitation on what may constitute an "emergency in international relations" for purposes of Article XXI(b)(iii) of the GATT 1994?*

b. *To what extent must the emergency in international relations take place within or near the territorial limits of the invoking Member?*

156. The European Union will reply to questions under points (a) and (b) together.

157. The European Union does not consider that the emergency in international relations always and necessarily needs to take place within or near the territorial limits of the invoking Member and does not understand the panel in *Russia – Traffic in transit* to be suggesting in paragraph 7.135 of its report that there should be a territorial limitation on what may constitute and "emergency in international relations" within the meaning of Article XXI(b)(iii). The panel observed that if the armed conflict, or a situation of breakdown of law and public order is within the Member or in its immediate vicinity articulating the essential security interests arising from the emergency in international relations will be more straightforward than in cases where the emergency in international relations is further removed from the territory of the Member invoking Article XXI(b)(iii).

Question 51

To all third parties: Could the situations described by Canada in paragraph 18 of its third-party statement constitute or contribute to an emergency in international relations in the sense of Article XXI(b)(iii) of the GATT 1994?

158. 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). The interposition of "other"

between "war" and "emergency" suggests that the war is one particular example of emergency.

159. The European Union agrees with the panel in *Russia- Traffic in Transit*, which correctly found that:

> An emergency in international relations would, therefore, appear to refer 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. 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. […] economic differences […] are not sufficient, of themselves, to constitute an emergency in international relations.[56]

160. The European Union could imagine that there may be situations other than a threat of war that may amount to 'other emergencies in international relations'. That may be the case, for example, of a massive cyber-attack from abroad, paralysing a whole country and its vital structures. To qualify under this exception, such situations should not be of a purely domestic nature, but involve an international dimension, a conflict between two or more different countries.

Question 52

To all third parties: In paragraph 7.74 of the panel report in Russia – Traffic in Transit, the panel considered that the interests that would arise from the enumerated subparagraphs of Article XXI(b) are all defence and military interests, as well as maintenance of law and public order interests. Please comment on whether these interests could arise from a reading of the text of Article XXI(b), specifically subparagraphs (i) and (ii); and whether other types of interests could be implicated by the phrase "other emergency in international relations" in subparagraph (iii). Do subparagraphs (i) to (iii) of Article XXI(b) inform each other as to the overall subject matter and scope of applicability of the provision?

161. As confirmed by the panel in *Russia - Traffic in Transit*:

> 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. [57]

162. The first two subparagraphs of Article XXI(b) concern fairly specific objects ("fissionable materials" and "traffic in arms"). In addition, they both start with

[56] Panel Report, *Russia – Traffic in Transit*, paras. 7.75-7.76.

[57] Panel Report, *Russia – Traffic in Transit*, para. 7.71.

the terms "relating to", which in this context means "about".[58] There is nothing that prevents a panel from ascertaining whether a specific action concerns in fact "fissionable materials" or "arms" etc. (rather than non-qualifying products) and whether it is genuinely "related to" those materials.

163. The third subparagraph, which was at issue in *Russia - Traffic in Transit*, refers 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 previous two and is not defined by reference to particular types of products, but instead by reference to the occurrence of certain events.

164. 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.[59] 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.[60] Its scope extends not only to declared war, but to any armed conflict.

165. 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). The interposition of "other" between "war" and "emergency" suggests that war is one particular example of emergency.

Question 53

To all third parties: In paragraph 7.75 of the panel report in Russia – Traffic in Transit that political or economic conflicts "will not be 'emergencies in international relations' within the meaning of subparagraph (iii) unless they give rise to defence and military interests, or maintenance of law and public order interests". Please comment on this statement.

[58] There is no "relate to" test in these provisions; all sub-paragraphs are subject to the attenuated necessity test ("which it considers necessary").
[59] Panel Report, *Russia – Traffic in Transit*, paras. 7.71 and 7.82.
[60] See the UN General Assembly Resolution 3314 (XXIX) (Definition of Aggression), 14 December 1974.

166. The European Union agrees with the panel in *Russia – Traffic in Transit* that the cumulative reading of the three subparagraphs suggests that purely economic (divergences of) interests would not fall within the scope of Article XXI(b)[61]. The same is true for political conflicts unless they fall within the "Security Exceptions" of Article XXI, including those that give rise to defence and military interests, or maintenance of law and public order interests, and that reach a sufficiently high threshold of a tension or crisis qualifying as emergency in international relations.

Question 54

To all third parties: In paragraph 7.71 of the panel report in Russia – Traffic in Transit, the panel considered that an "emergency in international relations" is an objective fact amenable to objective determination. Does such an objective determination exclude any deference to a Member's appreciation of the situation?

167. Such an objective determination does not exclude any deference to a Member's appreciation of the situation. The European Union can imagine, for instance, that if the relations between two Members are traditionally less friendly, then an escalation of the situation may be perceived sooner as having the gravity and urgency of another emergency in international relations.

168. This being said, even in such a situation a panel should check whether from the perspective of the invoking Member, in light of the relevant circumstances, giving rise to i.e. defence or military interests, there is a sufficient basis to qualify such a situation as an "other emergency in international relations" within the meaning of Article XXI(b)(iii). Such a panel check is necessary in order to avoid a possible abuse of rights.

Question 55

To all third parties: In paragraph 105 et al of its first written submission, the United States argues that the GATT/ITO drafting history "makes clear that non-violation nullification or impairment claims, rather than breach claims, are the means of recourse for parties affected by essential security measures".

a. In your view, does the GATT/ITO negotiating history distinguish between violation claims and non-violation claims in respect of Article XXI?

169. Negotiating drafts did not appear to distinguish between violation and non-violation claims. This is relevant because it disproves the US' argument that

[61] Panel Report, *Russia – Traffic in Transit*, paras. 7.75 and 7.133.

the negotiators considered that Article XXI, or its predecessor, would only be subject to so-called non-violation claims. The European Union refers to paras 95-101 of Exhibit EU-5.[62]

b. What bearing does the issue of the availability of a non-violation nullification or impairment claim in relation to Article XXI have on whether the security exception in Article XXI(b) of the GATT 1994 is self-judging?

170. Non-violation complaints may be available even in cases where the measure at issue is objectively within the scope of the security exception, i.e. justified under it. This does not have any bearing on whether Article XXI(b) is self-judging or not, as violation complaints are also available and a panel should make an objective assessment of the matter before it, including of the applicability and conformity with Article XXI(b).

c. Could a Member who has taken action pursuant to Article XXI(b) of the GATT 1994 be held accountable for that action, for instance, through a non-violation nullification and impairment claim? In your response, please elaborate on what remedies would be available for the affected Member in that situation.

171. The European Union refers to the response to the previous sub-question and to Article 26 of the DSU.

Question 59

To all third parties: Please comment on the United States' argument in paragraph 57 of its first written submission that, given the textual differences between Articles XX and XXI, it would "make no sense" for a panel examining an Article XXI defense to first determine the applicability of the subparagraphs. Please also comment on Switzerland's argument in paragraph 30 of its third-party submission that, given the similar structures of these provisions, the Panel would assess whether the circumstance in the subparagraph is established before examining whether the measure satisfies the conditions of the introductory clause.

172. Article XXI, like Article XX, is in the nature of an affirmative defence. The titles of both articles refer to "exceptions".[63]

173. The fact that Article XXI is in the nature of an affirmative defence has several legal consequences, concerning (i) the order of analysis, (ii) the burden of proof and (iii) the mechanics of the justification.

[62] The relevant documents in the present proceedings are Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (5 March 1947) (Exhibit US-23); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (24 July 1947), pp. 26 – 27 (Exhibit US-30); United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (9 January 1948) p. 2 (Exhibit US-39).

[63] The Appellate Body has used the expression "affirmative defence" in connection with exceptions, notably Article XX. Appellate Body Report, *EC – Hormones*, para. 104.

174. In practice, like under Article XX, a panel's analysis works in two stages: first, the complainant has to make a *prima facie* case of a possible violation, and only then the respondent has the burden of proving that the respective action is justified by recourse to one of the available exceptions.[64]

175. Finally, it is the WTO-inconsistent aspect of the measure (and not the measure as a whole) that must be justified under an affirmative defence. Logically, for a panel to identify the WTO-inconsistent aspects of a measure, it needs first to examine the claims of violation.[65]

[64] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

[65] Appellate Body Report, *US – Gasoline*, pp. 13-14.