***United States – Origin Marking Requirement (WT/DS597)***

Closing Statement of Hong Kong, China

at the Second Substantive Meeting with the Parties

11 February 2022

1. Madame Chair, distinguished members of the Panel, members of the Secretariat staff, Hong Kong, China thanks you for your attentiveness during the course of this second substantive meeting and for your efforts in making this meeting a productive one.

2. In this closing statement, Hong Kong, China will address some of the main points of discussion over the past two days and offer our perspective on where those matters now stand in the light of the parties' statements and interventions. I will focus in particular on two issues: (i) the United States' contention under Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement") that the revised origin marking requirement, as a technical regulation, does not accord less favourable treatment to goods of Hong Kong, China origin because the regulation is allegedly based on an "origin-neutral" regulatory objective; and (ii) I will

discuss the United States' purported invocation of Article XXI(b) of the GATT 1994. We focus on these two issues because they have been the principal issues of discussion over the past two days. This focus should not be understood, however, to place less emphasis on other legal and evidentiary arguments that Hong Kong, China has placed before the Panel, for which purpose we rest on our prior submissions and interventions.

***The United States' Allegedly "Origin-Neutral" Regulatory Objectives***

3. In relation to Hong Kong, China's claim under Article 2.1 of the TBT Agreement, it is undisputed that the challenged measures distinguish between like products based on origin. Pursuant to U.S. regulations, all goods imported into the United States must be marked with the full English name of the country of "manufacture, production, or growth", *except* for goods from Hong Kong, China, which must instead be marked as goods from the People's Republic of China, a different customs territory and a different WTO Member. The United States has repeatedly asserted that Hong Kong, China has not demonstrated that this differential treatment is detrimental, but where Hong Kong, China is specifically denied treatment accorded to other Members on the face of the challenged measures, the detrimental impact is incontrovertible.

4. The measures are therefore in clear violation of Article 2.1 of the TBT Agreement. Hong Kong, China believes that it is useful, at this

juncture, to recall that Article 2.1 is not a complicated provision. It states in relevant part that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products … originating in any other country." The United States agrees with Hong Kong, China that the entire purpose of this provision is to preclude origin-based discrimination in respect of technical regulations. Yet the United States insists that the challenged technical regulations are not discriminatory, despite targeting only products from Hong Kong, China, because of the alleged "origin-neutral" concerns underpinning the regulation.

5. When Hong Kong, China attempted to explore the implications of the United States' proposed "origin-neutral" framework in the question and answer session yesterday, the United States repeatedly responded by emphasizing the alleged self-judging nature of its essential security interests. To be clear, however, the parties agree that the United States' views regarding the self-judging nature of its essential security interests are only relevant in the context of Hong Kong, China's claim under Article 2.1 if the Panel agrees with the United States that Article XXI(b) of the GATT 1994 is applicable to the TBT Agreement. Hong Kong, China's view, shared by all of the third parties, is that the U.S. position on the

applicability of Article XXI(b) to the TBT Agreement is baseless. In the context of Hong Kong, China's claim under Article 2.1, the repeated U.S. references to its "self-judging essential security interests" are therefore a non-sequitur.

6. Where this leaves the United States is with its theory that measures that are *de jure* discriminatory are not in violation of Article 2.1 if a Member can identify an origin-neutral concern operating somewhere in the background. This framework is nonsensical on its face. If a Member's technical regulation discriminates against the products from another Member based on the origin of those products, asserting that the technical regulation is motivated by a regulatory concern that also applies to the products of *other Members* only serves to highlight the existence of the discrimination. This is what Hong Kong, China sought to demonstrate yesterday with its flavoured cigarettes hypothetical.

7. Note that in Hong Kong, China's hypothetical, however, a measure targeting only flavoured cigarettes from Indonesia would at least be *related* to an origin-neutral concern about flavoured cigarettes. This is in sharp contrast to the facts of the current dispute, where the U.S. "origin-neutral" framework is made all the more specious because of the U.S. view that it does not need to demonstrate *any* relationship between the challenged technical regulation and its alleged origin-neutral concerns.

8. The alleged origin-neutral concerns that the United States has identified in this case are its global concerns about democratic norms and fundamental freedoms. The measure that Hong Kong, China is challenging is a technical regulation that precludes Hong Kong, China goods from being marked with the name "Hong Kong, China". Hong Kong, China cannot conceive of any relationship between this technical regulation and the United States' professed global concerns about democratic norms and fundamental freedoms, and the United States appears determined not to explain what this relationship might be. But what the United States is asking the Panel to accept is quite clear – namely, that its origin-neutral concerns about democratic norms and fundamental freedoms could be used to demonstrate that *any* origin-based discrimination is in fact "origin-neutral" and not inconsistent with Article 2.1. This is true even if the measures are discriminatory on their face, as is the case here, and even if the measures have no relationship to the United States' professed "global concerns", as is also the case here. Hong Kong, China trusts that it is evident to the Panel at the end of this second meeting that accepting the U.S. "origin-neutral" theory would obliterate the straightforward prohibition on origin-based discrimination contained in Article 2.1 of the TBT Agreement.

### *The United States' Failed Invocation of Article XXI(b) of the GATT 1994*

9. Over the past two days, the United States has repeatedly made clear that it has no intention of seeking to demonstrate, even on an *arguendo* basis, that the challenged measures are justified under Article XXI(b) of the GATT 1994 as this exception has been interpreted by two prior panels and in the manner that Hong Kong, China and every third party in this dispute have advocated. The United States persists in its erroneous position that Article XXI(b) is "self-judging" in its entirety, a position that Hong Kong, China has firmly refuted in its prior submissions to the Panel.

10. To the limited extent that the United States has made general assertions in seeking to justify the challenged measures under Article XXI(b), those assertions are clearly insufficient on their face to discharge the United States' burden of proof as the Member invoking this exception. The United States has not demonstrated the objective applicability of any of the subparagraphs of Article XXI(b), and it has not articulated any "essential security interests" as this term is properly understood or made any effort to demonstrate that the action for which it seeks justification could in any plausible way protect those "essential security interests" whatever they might be.

11. Beginning with the subparagraphs of Article XXI(b), i.e. the types of GATT-inconsistent "actions" for which a responding Member may seek justification, Hong Kong, China does not consider that the United States has even attempted to demonstrate the objective applicability of any of these subparagraphs. While the United States has made vague references to Article XXI(b)(iii) and may have implied that the challenged measures constitute an "action … taken in time of … [an] other emergency in international relations", the United States has made no effort to identify that any such "emergency in international relations" exists, as that term is properly understood.

12. As we discussed yesterday, and just now, the phrase "emergency in international relations" has a particular meaning. Properly interpreted in its context, an "emergency in international relations" must implicate defence or military interests, or maintenance of law and public order interests, within the territory of the invoking Member, even if the events in question are taking place outside the invoking Member's territory. The United States has made no attempt to demonstrate that any such situation objectively exists, let alone that this situation, whatever it might be, has the required temporal and subject matter nexus to the GATT-inconsistent action that it seeks to justify. The U.S. position on this issue – and I think this became clear just now – is inextricably bound up with its position that

the subparagraphs of Article XXI(b) are also entirely "self-judging", a position that Hong Kong, China has shown to be fundamentally flawed as a matter of treaty interpretation.

13. Even if the United States had demonstrated the objective applicability of Article XXI(b)(iii), which it has not, the same basic problem would arise were the United States to attempt to demonstrate that it has invoked this exception in good faith. As the panel in *Russia – Traffic in Transit* correctly held, the obligation of good faith requires the "invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".[1] While sticking to its position that what constitutes an "essential security interest" is exclusively for the invoking Member to determine, the United States nevertheless suggests that any situation in the world that may implicate the United States' alleged global concern of "fundamental freedoms, human rights, and democratic norms" necessarily implicates the "essential security interests" of the United States.

14. Once again, this position is divorced from a proper understanding of what the term "essential security interests" means. As we discussed just a moment ago, the panel in *Russia – Traffic in Transit* correctly held that the

[1] Panel Report, *Russia – Traffic in Transit*, para. 7.134.

term "essential security interests" "may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[2] This interpretation follows, *inter alia*, from the ordinary meaning of the term "essential", which the United States itself acknowledges as referring to a security interest "in the absolute or highest sense"[3], and from the fact that each of the subparagraphs of Article XXI(b) plainly concerns defence and military interests, or maintenance of law and public order interests, within the territory of the invoking Member. Other than repeating its unfounded position that "essential security interests" are whatever the invoking Member says they are, the United States has not offered an alternative and reasonable interpretation of this term, let alone one that has any basis in customary principles of treaty interpretation.

15. The problem for the United States is that not every foreign policy or political concern, no matter how sincerely held, necessarily implicates a Member's essential security interests as this term is properly understood. Even if one were to take at face value the United States' asserted interest in promoting "fundamental freedoms, human rights, and democratic norms"

[2] Panel Report, *Russia – Traffic in Transit*, para. 7.130.

[3] U.S. Second Written Submission, para. 135.

around the world, the United States has failed to demonstrate how the alleged situation with regard to "fundamental freedoms, human rights, and democratic norms" in other parts of the world relates to the protection of the United States' territory and its population from external threats, or the maintenance of law and public order internally. Article XXI of the GATT 1994 is entitled "*Security* Exceptions", not "Foreign Policy" or "Political" exceptions. The United States itself has stated in these proceedings on more than one occasion, that "support for democratization is a fundamental principle of *overall U.S. foreign policy*". Irrespective of the veracity of this position, such purported foreign policy interest could not possibly be described as an "essential security interest" under Article XXI.

16. Finally, and where the wheels ultimately come off the bus for the United States' attempted invocation of Article XXI(b), the United States has completely failed to demonstrate that there is any nexus whatsoever between the GATT-inconsistent action for which it seeks justification and *any* "essential security interests" of the United States, *even accepting* for this purpose that the promotion of "fundamental freedoms, human rights, and democratic norms" in other parts of the world *is* such an "interest". Let us not lose sight of the fact that the measures at issue in this dispute relate exclusively to a *country of origin labelling requirement*. The United States has not even attempted to explain how the discriminatory treatment of

Hong Kong, China goods in respect of this origin labelling requirement – in particular, the refusal to allow these goods to be marked with the full English name of the customs territory in which they were manufactured or produced, the treatment that the United States accords to the goods of all other Members – has anything to do with protecting any "essential security interests" of the United States, whatever those "interests" might be. There is no plausible connection between requiring the origin of goods to be mislabelled and the protection of any "essential security interests" of the United States. More importantly, the United States has not offered any explanation of what this connection might be – in fact, in its closing statement just now, I believe the United States has made clear that it has no intention of demonstrating this connection. This is presumably because there is none.

17. Please allow me to be clear – in Hong Kong, China's view, the Panel should never have to reach the question of whether the United States has met its burden of proof under Article XXI(b) of the GATT 1994. Hong Kong, China has demonstrated that the revised origin marking requirement is inconsistent with the ARO and TBT Agreement, and has further demonstrated that the United States' assertion that Article XXI(b) is available as a defence to violations of these two agreements is completely unfounded. The Panel should therefore find that the revised origin marking

requirement is inconsistent with the identified provisions of the ARO and TBT Agreement and not otherwise justifiable, in which case the Panel may properly exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994 (including the United States' attempted invocation of Article XXI(b)). Hong Kong, China, has focused on the United States' attempted invocation of Article XXI(b) in this closing statement not only because it is pertinent in the event that the Panel reaches Hong Kong, China's claims under the GATT 1994 (to which the United States has no credible response on the merits), but also because the United States' assertions concerning its purported "essential security interests" have pervaded the discussion over the past two days, including in respect of Hong Kong, China's claims under the TBT Agreement. Article XXI(b) of the GATT 1994 is plainly the foundation of the United States' defence in this dispute, and the United States has failed to discharge its burden of proof as the party invoking this exception.

18. In conclusion, the matter before the Panel is a legal dispute narrowly focused on whether the United States' discriminatory treatment of Hong Kong, China goods in respect of the United States' country of origin labelling requirement is consistent with the identified provisions of the covered agreements. For the reasons that Hong Kong, China has explained, it is not consistent with those provisions. Let me deviate from

the prepared statement for a moment. The United States suggests that Hong Kong, China's goal is to have this Panel and the WTO pass judgment in some way on the United States' determination with respect to Hong Kong, China's autonomy. That is not Hong Kong, China's goal in this dispute. As I just said, this is a narrow legal dispute, relating to discrimination in the application of a country of origin labelling requirement. It is not about the veracity of the United States' views concerning the relationship between Hong Kong, China and the People's Republic of China. While the United States has attempted to justify these violations under Article XXI(b) of the GATT 1994 – effectively conceding those violations – that exception does not apply to the ARO and TBT Agreement and, in any event, the United States has failed to discharge its burden of proof under that exception for the reasons that I have just explained.

19. Once again, on behalf of Hong Kong, China I thank the Panel and the Secretariat for their efforts in connection with this second substantive meeting. We look forward to answering your advance questions in writing, along with any other questions that the Panel may have, and to submitting our comments on the United States' answers.