United States – Origin Marking Requirement (WT/DS597)

Opening Statement of Hong Kong, China

at the Second Substantive Meeting with the Parties

9 February 2022

I. INTRODUCTION

1. Madame Chair, distinguished members of the Panel, Hong Kong, China welcomes this opportunity to present its views at the outset of this second substantive meeting, and thanks the Panel and the Secretariat staff again for their efforts in preparing for this second substantive meeting with the parties.

2. While it is always preferable to conduct substantive meetings in person, Hong Kong, China appreciates the Panel's decision to conduct this second substantive meeting on a virtual basis due to the ongoing situation with the Covid-19 pandemic.

3. In this opening statement, Hong Kong, China will focus on the key issues in this legal dispute as helpfully highlighted in the parties' answers to the Panel's questions following the first substantive meeting, together with their second written submissions.

4. In particular, Hong Kong, China will first explain to the Panel that the interpretation of Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") suggested by the United States throughout these proceedings is

legally baseless, and that the United States has failed to discharge its burden of proof in its purported invocation of the said exception.

5. Following that, Hong Kong, China will proceed to demonstrate that the United States has made no credible response on the merits to the claims advanced by Hong Kong, China under the Agreement on Rules of Origin (the "ARO"), the Agreement on Technical Barriers to Trade (the "TBT Agreement") and the GATT 1994. In fact, the parties' submissions have made it all the more apparent that the measures at issue in this dispute are *prima facie* inconsistent with the identified provisions of the said covered agreements and are not otherwise justifiable.

II. THE UNITED STATES' INTERPRETATION OF ARTICLE XXI(B) OF THE GATT 1994 IS FUNDAMENTALLY FLAWED AND THE UNITED STATES HAS FAILED TO DISCHARGE ITS BURDEN OF PROOF UNDER ARTICLE XXI(B) OF THE GATT 1994

6. First, the United States' entire defence in this dispute remains, as it has been from the outset, that the revised origin marking requirement is justified under Article XXI(b) of the GATT 1994. The United States has repeatedly argued that "the sole finding that the Panel may make in its report … is to note its understanding of Article XXI and that the United States has invoked Article XXI".[1]

7. Hong Kong, China respectfully submits that there are two fundamental flaws with the contention made by the United States. The first is that Article XXI(b) of the GATT 1994 does not apply to either the ARO or TBT Agreement. The United States' position on this issue, which is that Article XXI(b) applies to all Annex 1A agreements,

[1] United States' second written submission, para. 214.

including the ARO and TBT Agreement, is entirely baseless, as evidenced, *inter alia*, by the fact that not a single third party has supported the United States on this question. With respect, Hong Kong, China has sufficiently elaborated how the United States' position is erroneous as a matter of treaty interpretation and will not repeat those points in this statement. Hong Kong, China maintains the view that Article XXI(b) of the GATT 1994 is only relevant to this dispute insofar as it pertains, potentially, to Hong Kong, China's claims under Articles I and IX of the GATT 1994.

8. The second problem with the United States' attempted invocation of Article XXI(b) is that it is based on an entirely self-judging interpretation of that exception that two prior panels,[2] as well as every third party in this dispute, have clearly and correctly rejected. Properly interpreted, a Member's invocation of Article XXI(b) must begin with a *prima facie* demonstration that one or more of the subparagraphs of that provision is objectively applicable to the measures for which justification is sought. The United States has not even attempted to discharge that burden of proof by presenting evidence and legal argument in support of the objective applicability of any one of the Article XXI(b) subparagraphs. Nor has the United States attempted to demonstrate in accordance with the requirement of the chapeau of Article XXI(b) that the measures bear a plausible relationship to any essential security interests of the United States, such that the invocation of Article XXI(b) would have been made in good faith. The reason why the United States has not attempted to demonstrate any such relationship is obvious, as there is simply no conceivable argument that requiring

[2] *See* Panel Report, *Russia – Traffic in Transit*; Panel Report, *Saudi Arabia – IPRs*.

the origin of Hong Kong, China goods to be mislabelled bears any relationship whatsoever to any essential security interests of the United States.

9. As explained by Hong Kong, China in our prior submissions, Article XXI(b) is an affirmative defence, and the burden of proof for the invocation of Article XXI(b) rests squarely with the United States. The United States has had ample opportunity in these proceedings to attempt to discharge its burden in making a *prima facie* defence under Article XXI(b). However, it has chosen not to do so, not even on an *arguendo* basis. Instead, what the United States has done so far is nothing more than effectively invite the Panel to formulate a case for the United States under Article XXI(b) based on "publicly available information" which has not even been specifically identified. Such an approach is not compatible with the allocation of the burden of proof and with the function of the Panel under Article 11 of the Dispute Settlement Understanding. Hong Kong, China therefore respectfully submits that the Panel should firmly refuse the United States' invitation to the Panel to make out a justification for its GATT-inconsistent measures. Moreover, given the late stage of these proceedings, it may raise serious questions of due process for the United States to now attempt to discharge its burden of proof either in connection with this second substantive meeting or in its final submissions to the Panel. The United States is fully aware that its interpretation of Article XXI(b) has been rejected by two prior panels,[3] and that its interpretation of this provision finds little or no support among other Members. The United States therefore

[3] *See* Panel Report, *Russia – Traffic in Transit*; Panel Report, *Saudi Arabia – IPRs*.

made a conscious decision about how to approach Article XXI(b) in this dispute, and the Panel must hold the United States to the consequences of that decision.

10. Having disposed of the United States' attempt to justify the revised origin marking requirement under Article XXI(b) of the GATT 1994, Hong Kong, China will now turn to the United States' responses to Hong Kong, China's claims on the merits under the ARO, the TBT Agreement, and the GATT 1994, respectively.

III. HONG KONG, CHINA'S CLAIMS UNDER THE ARO

11. We have come this far in the panel proceedings, and yet the United States has still not answered the most elementary question relating to Hong Kong, China's claims under the ARO, which is: What does the United States consider the origin of the goods affected by the revised origin marking requirement to be, and on what basis did the United States reach that determination?

12. There are only two possible answers to this question. Either the United States considers that the goods are of Hong Kong, China origin, in which case it needs to explain why it is treating those goods as originating from the customs territory of the People's Republic of China, a different WTO Member, or it considers that the affected goods have an origin of the People's Republic of China, in which case it needs to explain the basis on which it reached that determination of origin.

A. The revised origin marking requirement is based on an ARO-inconsistent determination by the United States that the goods concerned have an origin of the People's Republic of China

13. For the reasons that Hong Kong, China has explained in our prior submissions, the evidence on the record demonstrates that the revised origin marking requirement is based on a determination by the United States that the goods covered by the revised origin marking requirement have an origin of the People's Republic of China.

14. Under U.S. law, a mark of origin must indicate "the country of origin" of the product.[4] It is not disputed that, in U.S. practice, a mark of origin of "China" indicates an origin of the People's Republic of China, not Hong Kong, China.[5] The revised origin marking requirement therefore reflects a determination by the United States that goods manufactured or processed in Hong Kong, China originate in the People's Republic of China, a different WTO Member.

15. The fact that the revised origin marking requirement is based on a determination that the affected goods have an origin of the People's Republic of China is confirmed by the U.S. Customs and Border Protection's ("USCBP") rejection of any mark of origin that includes the words "Hong Kong".[6] USCBP rejected the proposed marks of origin not because the words "Hong Kong" do not accurately indicate an origin of Hong Kong, China, but rather because the words "Hong Kong" would not accurately indicate what the United States has determined to be the "*actual* country of origin", namely the

[4] Hong Kong, China's second written submission, para. 32.

[5] Hong Kong, China's second written submission, para. 46.

[6] *See* Hong Kong, China's second written submission, paras. 41-44.

People's Republic of China. Had this been a matter of the *terminology* used to indicate an origin of Hong Kong, China, as the United States at times implies, USCBP should readily have accepted any or all of the proposed marks of origin,[7] each one of which accurately indicates the "full English name" of the separate customs territory of Hong Kong, China, as required by USCBP's origin marking regulations.

16. The United States has not addressed any of this evidence. The evidence therefore stands unrebutted. The only conclusion supported by evidence on the record is that the revised origin marking requirement is based on a determination by the United States that the affected goods originate in the People's Republic of China. This determination of origin is necessarily inconsistent with Article 2(c) of the ARO, because it is a determination of origin based on considerations unrelated to manufacturing or processing, and with Article 2(d) of the ARO, because it is based on the *de jure* discriminatory application of the United States' rules of origin.

B. The United States' "terminology" argument is no defence to its revised origin marking requirement which is inconsistent with Articles 2(c) and 2(d) of the ARO

17. As Hong Kong, China has further explained, the revised origin marking requirement is inconsistent with Articles 2(c) and 2(d) of the ARO even if one were to accept the United States' apparent suggestion that the measures concern the *terminology* used to indicate an origin of *Hong Kong, China*. This is because the United States is

[7] Hong Kong, China's second written submission, paras. 39-44[redacted]

mistaken as a matter of law in the context of the WTO-covered agreements that nothing in the ARO prevents a Member from treating goods originating in one country as having the origin of a different country (in this case, requiring goods that indisputably originate in Country A to be marked as having an origin of Country B).[8] The U.S. position, if accepted, would render the entire ARO a nullity. Properly interpreted, and for the reasons that Hong Kong, China explained in our second written submission,[9] the ARO requires Members to treat the origin of goods in accordance with their country of origin *as determined on the basis of ARO-compliant rules of origin*.

18. Both Canada and the European Union appear to recognize that compliance with the ARO requires Members to *treat* the origin of goods for all non-preferential purposes in accordance with their country of origin as determined on the basis of ARO-compliant rules of origin. Canada, for its part, forthrightly acknowledges that it would be inconsistent with the ARO to require goods that have an origin of Country A when ARO-compliant rules of origin are applied to be marked as having an origin of Country B.[10] The European Union, while less coherent, appears to also acknowledge that a required mark of origin "must reflect origin in accordance with" an ARO-compliant determination of origin.[11] These positions recognize that for the ARO to have any practical meaning and effect, a determination of origin made in accordance with ARO-compliant rules of origin must govern the *actual treatment* of the origin of goods in

[8] Hong Kong, China's second written submission, paras. 46-48.

[9] Hong Kong, China's second written submission, paras. 53-64.

[10] Canada's response to Panel question No. 6, para. 17.

[11] European Union's response to Panel question No. 1, para. 1.

practice. Any other interpretation of the ARO would render it a meaningless agreement.

19. The United States' apparent acknowledgement that the goods covered by the revised origin marking requirement originate in Hong Kong, China when ARO-compliant rules are applied is tantamount to a concession that the United States is acting inconsistently with the ARO. The United States appears to acknowledge that the goods subject to the revised origin marking requirement are goods of Hong Kong, China origin when the United States' "normal rules of origin" – that is, the United States ARO-compliant rules of origin – are applied.[12] The United States nevertheless requires these goods to be marked as having the origin of a different WTO Member, the People's Republic of China. This treatment of origin is based on considerations unrelated to manufacturing or processing, in violation of Article 2(c) of the ARO, and is the result of discrimination in the application of rules of origin, in violation of Article 2(d) of the ARO.

20. As a result, regardless of whether one views the measures of the United States as based on a determination that the affected goods have an origin of the People's Republic of China (the view supported by the unrebutted evidence) or, alternatively, as measures that treat goods that are of Hong Kong, China origin as having an origin of the People's Republic of China, which is a different WTO Member, the revised origin marking requirement is inconsistent with Articles 2(c) and 2(d) of the ARO.

[12] United States' second written submission, para. 165.

IV. HONG KONG, CHINA'S CLAIMS UNDER THE TBT AGREEMENT

A. Hong Kong, China's claim has always been that the United States' revised origin marking requirement is a *de jure* origin-based discriminatory measure in violation of Article 2.1 of the TBT Agreement

21. If I may now turn to the TBT Agreement, in relation to Hong Kong, China's claim under Article 2.1 of the TBT Agreement, the United States focuses its second written submission on its assertion that Hong Kong, China has "walk[ed] away from its own theory of the case" simply because Hong Kong, China has stated that the challenged measures are *de jure* discriminatory.[13] The United States obfuscates the issue by implying that the provision of evidence by Hong Kong, China on the detrimental impact of the origin-based distinction in the revised origin marking requirement is not compatible with a *de jure* discrimination claim under Article 2.1 of the TBT Agreement. The United States erroneously asserts that if Hong Kong, China believes that the measures are *de jure* discriminatory, this means that Hong Kong, China has "abandoned" its argument that the disputed measures accord less favourable treatment because the "inability of Hong Kong enterprises to mark their goods as goods of Hong Kong or Hong Kong, China origin detrimentally modifies the condition of competition in the U.S. market for these goods vis-à-vis the treatment accorded to like product originating in other Members."[14]

22. With respect, Hong Kong, China finds these remarks by the United States to be confusing, and they do not accurately reflect our position. Hong Kong, China has neither "walked away from" nor "abandoned" its arguments under the TBT Agreement.

[13] United States' second written submission, para. 177.

[14] United States' second written submission, paras. 176 and 181.

It is well established that a party asserting that a technical regulation is inconsistent with Article 2.1, whether as a *de jure* discriminatory or *de facto* discriminatory measure, must demonstrate that: (i) the imported products in question are like the products of national origin or the products of other origins; and (ii) the treatment accorded to products imported from the complaining Member is less favourable than that accorded to like products of national origin or like products originating in other Members (and non-Members).[15]

23. In relation to the measures at issue in this dispute, Hong Kong, China made clear in our first written submission that the challenged measures are *de jure* discriminatory because they "drew a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members)",[16] and that this origin-based distinction detrimentally modifies the conditions of competition in the U.S. market for goods from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).[17]

24. On the face of the challenged measures, Hong Kong, China is specifically denied treatment accorded to other Members – namely, the ability to mark goods with the full English name of their country of origin. According to the United States' position, goods originating in Hong Kong, China must instead be marked as goods from

[15] *See, e.g.* Appellate Body Report, *US – Tuna II (Mexico)*, para. 202.

[16] Hong Kong, China's first written submission, para. 57.

[17] Hong Kong, China's first written submission, para. 60.

the People's Republic of China, which is a different WTO Member. As the European Union explained in its answers to panel questions, "[c]oncretely, 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."[18]

25. Hong Kong, China has *also* demonstrated as a matter of fact in each of our written submissions that the inability of Hong Kong enterprises to mark their goods as goods of Hong Kong or Hong Kong, China origin detrimentally modifies the conditions of competition in the U.S. market for these goods vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).[19]

26. [redacted] Hong Kong, China has also demonstrated that the requirement to mark goods exported from Hong Kong, China as having an origin of "China" when destined for the United States has increased the cost and complexity of exportation for Hong Kong enterprises.[21] Finally, Hong Kong, China has explained that the inaccurate marking of the customs origin of a good is liable to

[18] European Union's response to Panel question no. 9, para. 25.

[19] Hong Kong, China's first written submission, paras. 61-63; Hong Kong, China's second written submission, paras. 95-99.

[redacted]

[21] Hong Kong, China's second written submission, para. 98.

cause confusion and potential error in the regulatory treatment of that good, and in fact has already had those effects as a result of the revised origin marking requirement.[22]

27. Rather than engaging with Hong Kong, China's argument that the revised origin marking requirement detrimentally modifies the conditions of competition in the U.S. market for goods from Hong Kong, China – an argument which has now been detailed at length in two separate written submissions – the United States simply and erroneously asserts that Hong Kong, China has abandoned this argument entirely.[23]

28. To be clear, Hong Kong, China's argument has been from the very beginning, and remains, that the measures at issue are *de jure* discriminatory. Hong Kong, China believes that the detrimental impact of the origin-based distinction in the revised origin marking requirement is evident on the face of such *de jure* discriminatory measures. Further, Hong Kong, China has also provided evidence of this detrimental impact in fact to facilitate the Panel's objective assessment in the present dispute.

B. "Legitimate regulatory distinction" and United States' alleged security interests are irrelevant to the Panel's analysis under Article 2.1 of the TBT Agreement

29. In answers to Panel questions, Canada suggested that Hong Kong, China's demonstration of a "detrimental impact" might not be sufficient to demonstrate "less favourable treatment" under Article 2.1 of the TBT Agreement, because Hong Kong, China has not advanced arguments regarding whether the detrimental impact in

[22] Hong Kong, China's second written submission, para. 98.

[23] United States' second written submission, paras. 177 and 181.

question is based on a "legitimate regulatory distinction".[24] As Hong Kong, China will further elaborate in the question-and-answer session, the "legitimate regulatory distinction" test is applicable only in cases of alleged *de facto* discrimination.[25] Where there is origin-based discrimination *evident on the face of the challenged measures*, as is the case in relation to the revised origin marking requirement, there is no need for the Panel to engage in additional analysis to determine whether there is less favorable treatment resulting from "discrimination against the group of imported products".[26] Moreover, Canada's argument is moot for purposes of this dispute, because the United States has not ever suggested that the detrimental impact in question is based on a "legitimate regulatory distinction".

30. The United States' argument is that any detrimental impact is not discriminatory because it is "rationally related" to the alleged "origin-neutral" concerns of the United States about "freedoms" and "democratic norms" – concerns which the United States emphasizes are not "applicable to only Hong Kong, China".[27]

31. Yet, as Hong Kong, China has already explained in our second written submission, the United States' argument regarding its alleged "origin-neutral" concerns only serves to reinforce the fact that the measures reflect origin-based discrimination,

[24] *See* Canada's response to Panel question No. 10(a), para. 32.

[25] *See* Appellate Body Report, *US – COOL (Article 21.5)*, para. 5.95.

[26] *See*, *e.g.*, Appellate Body Report, *US – Clove Cigarettes*, paras. 182, 215.

[27] United States' response to Panel question No. 14, para. 60.

given that the revised origin marking requirement applies *explicitly and exclusively* to all products originating in the customs territory of Hong Kong, China.[28]

32. Finally, even if the origin-based discrimination on the face of the challenged measures were not the end of the analysis, Hong Kong, China respectfully reiterates that it believes that the Panel would necessarily need to conclude that the U.S. alleged essential security interests are irrelevant to the Panel's analysis under Article 2.1 of the TBT Agreement.[29]

33. First, it is clear that in no event would it be possible for a panel to take into account a Member's essential security interests if the Member does not articulate what those interests *are*, and Hong Kong, China again re-emphasizes that the burden would be entirely on the responding Member to *articulate* its essential security interests in the first instance. Second, in order for the United States' alleged essential security interests to be even potentially relevant to the Panel's analysis, there would need to be *at least* a rational relationship between the United States' alleged security interests (whatever they might be) and the contested measures. The United States has made no attempt to argue that there is *any* relationship between the United States' essential security interests and the labelling (or rather, mislabelling) of the origin of products imported from the customs territory of Hong Kong, China. The United States' essential security interests are therefore irrelevant to the Panel's analysis under Article 2.1 of the TBT

[28] Hong Kong, China's second written submission, para. 103.

[29] Hong Kong, China's second written submission, paras. 113-114.

Agreement, which obviates the need for the Panel to determine exactly *how* it might take those interests into account even if they *were* relevant.[30]

V. HONG KONG, CHINA'S CLAIMS UNDER THE GATT 1994

34. Turning now to Hong Kong, China's claims under the GATT 1994, it is apparent from the United States' second written submission that it has no meaningful response to Hong Kong, China's claims under Article IX:1 and Article I:1. The United States' attempt to rebut these claims is based on an obvious mischaracterization of the relevant legal standard under these provisions.

A. The United States' revised origin marking requirement accords less favourable treatment to products originating in Hong Kong, China in violation of Article IX:1 of the GATT 1994

35. Article IX:1 of the GATT 1994 requires each Member 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 [Members (and non-Members)]." As Hong Kong, China explained most recently in our second written submission, there are two steps to evaluating a claim under this provision: (i) identifying the baseline "treatment with regard to marking requirements" that the United States accord to the like products of any Members (and non-Members); and then (ii) evaluating whether the "treatment with regard to marking requirements" accorded to the goods of Hong Kong, China is "less favourable" than the baseline treatment.[31]

[30] Hong Kong, China's second written submission, paras. 112-114.

[31] Hong Kong, China's second written submission, para. 117.

36. The essence of the United States' response to Hong Kong, China's claim under Article IX:1 is that Article IX:1 does not prescribe any rules about how a Member determines the country of origin for origin marking purposes, or what terminology it permits or requires to indicate the country of origin.[32] This response shows a lack of accurate appreciation of the nature of Article IX:1. Article IX:1 is an *anti-discrimination* provision, not a provision that prescribes specific substantive rules governing how Members implement origin marking requirements. The issue under Article IX:1 is whether the United States discriminates against goods of Hong Kong, China origin in respect of the origin marking requirements, *relative to the treatment that it accords to goods of other Members under its own municipal law and practice.*

37. In its discussion of Article IX:1 in its second written submission, the United States appears to acknowledge that the goods subject to the revised origin marking requirement are goods of Hong Kong, China origin under the United States' normal rules of origin.[33] The baseline treatment that the United States accords to the goods of other Members (and non-Members) is to require, and therefore permit, those goods to be marked with the "full English name" of their country of origin as determined under U.S. law. If the United States were to accord the same treatment to goods of Hong Kong, China origin, it would permit those goods to be marked as having an origin of "Hong Kong, China" or otherwise indicate their Hong Kong origin in the required mark of origin. As Hong Kong, China has described, the United States has expressly denied this treatment to goods of Hong Kong, China origin. Hong Kong, China has further

[32] *See, e.g.*, United States' second written submission, paras. 194-195.

[33] United States' second written submission, para. 194.

explained and documented in our prior submissions how this discriminatory treatment constitutes *less favourable* treatment in respect of the origin marking requirements – points to which the United States has not responded at all. Clearly, it is an advantage for exporters to be able to mark their products with their actual country of origin, an advantage that the United States denies to the goods of Hong Kong, China origin.

B. The United States' revised origin marking requirement accords less favourable treatment to products originating in Hong Kong, China in violation of Article I:1 of the GATT 1994

38. The United States engages in the same tactic with respect to Hong Kong, China's claim under Article I:1 of the GATT 1994. The question under Article I:1 is not, as the United States suggests, whether this provision prescribes specific substantive rules about how Members implement origin marking requirements.[34] The question is whether the United States accords *less favourable treatment* in respect of this particular "rule or formality in connection with importation" *relative to the treatment that the United States accords to goods of other Members under its own municipal law.* For the same reasons that the revised origin marking requirement provides less favourable treatment to goods of Hong Kong, China origin under Article IX:1, the measures also provide less favourable treatment to goods of Hong Kong, China origin under Article I:1 of the GATT 1994.

39. To summarize, the United States has no credible response to Hong Kong, China's claims under the GATT 1994, just as it has no credible response to Hong Kong, China's claims under the ARO and TBT Agreement. While a claim under the GATT

[34] United States' second written submission, paras. 199-200.

1994 is, in principle, potentially subject to Article XXI(b), Hong Kong, China has explained that the United States' interpretation of Article XXI(b) is flawed and that it has not even made any attempt to discharge its burden of establishing a *prima facie* case that one or more of the subparagraphs of Article XXI(b) is objectively applicable to the action for which justification is sought.

40. As such, while Hong Kong, China believes that the Panel should exercise judicial economy in respect of Hong Kong, China's claims under the GATT 1994 in the event that the Panel finds the revised origin marking requirement inconsistent with either or both of the ARO and the TBT Agreement, Hong Kong, China respectfully submits that the Panel should find that the revised origin marking requirement is inconsistent with Articles IX:1 and I:1 of the GATT 1994, and not otherwise justified, if it were to proceed to examine these claims.

41. Hong Kong, China thanks the Panel for its attention to this opening statement and looks forward to answering the Panel's questions. Thank you.