BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

FIRST WRITTEN SUBMISSION OF HONG KONG, CHINA

28 May 2021

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TABLE OF SHORT FORMS

SHORT FORM	OFFICIAL NAME
ARO	Agreement on Rules of Origin
August 11 Federal Register notice	85 Fed. Reg. 48551 (11 August 2020)
CompTIA	Computing Technology Industry Association
Executive Order 13936	The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020)
GATT 1994	General Agreement on Tariffs and Trade 1994
MFN	Most-Favoured-Nation
TBT Agreement	Agreement on Technical Barriers to Trade
TID	Trade and Industry Department of Hong Kong, China
USCBP	U.S. Customs and Border Protection
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF REPORTS

SHORT TITLE	FULL REPORT TITLE AND CITATION
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Australia – Tobacco Plain Packaging (Dominican Republic)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS441/R, Add.1 and Suppl.1, adopted 29 June 2020, as upheld by Appellate Body Report WT/DS441/AB/R, DSR 2018:VIII, p. 3925
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Chile – Price Band	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Ecuador, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, p. 1085
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
EC – Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p. 3915

SHORT TITLE	FULL REPORT TITLE AND CITATION
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018 [appealed by the European Union 21 September 2018 – the Division suspended its work on 10 December 2019]
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Hot Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Textiles Rules of Origin	Panel Report, *United States – Rules of Origin for Textiles and Apparel Products*, WT/DS243/R and Corr.1, adopted 23 July 2003, DSR 2003:VI, p. 2309
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

I. Introduction and Summary

1. This is a legal dispute concerning country of origin marking requirements arising principally under the Agreement on Rules of Origin ("ARO") and the Agreement on Technical Barriers to Trade ("TBT Agreement").

2. The measures at issue in this dispute involve a determination by the United States that goods indisputably manufactured or processed within the customs territory of Hong Kong, China originate within the People's Republic of China, a different World Trade Organization ("WTO") Member, and require these goods to be marked to indicate this origin.

3. Hong Kong, China is an inalienable part of the People's Republic of China and is also an original Member of the WTO by virtue of Article XI of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"). Under the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (which came into effect on 1 July 1997), Hong Kong, China is a separate customs territory, and may, using the name "Hong Kong, China", participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade.[1] By virtue of the first explanatory note to the WTO Agreement, the term "country" as used in the WTO covered agreements, including for the purpose of determining the country of origin of a good, is understood to include Hong Kong, China, as a separate customs territory Member of the WTO.

4. For these reasons, in the context of the WTO covered agreements, the People's Republic of China is not the correct country of origin for goods that originate in the customs territory of Hong Kong, China. The correct country of origin of these goods is Hong Kong, China when the disciplines on country of origin determinations prescribed by the ARO are properly applied. The measures at issue therefore require goods of Hong Kong, China origin to be marked with an incorrect country of origin when imported into the United States.

5. The United States has reached this erroneous determination for political reasons unrelated to a proper determination of the country of origin of the goods. This approach improperly and unlawfully interjects political considerations into what is meant to be a purely technical exercise to determine a product's country of origin. This approach, if accepted, would undermine the critical role that accurate country of origin determinations play within the rules-based multilateral trading system. While the United States, like any other Member, is free to take political considerations into account in deciding how to conduct its relations with other Members, those considerations should play no role in determining the country of origin of goods under the WTO covered agreements. As the rules of the ARO make clear, that

[1] See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990), Decree of the President of the People's Republic of China No. 26, Article 116 [redacted].

determination must be made exclusively on the basis of where a good was manufactured or processed.

6. In addition to contravening the rules established to determine the country of origin of a good, the measures at issue unlawfully discriminate against goods of Hong Kong, China origin in violation of both the ARO and the TBT Agreement. In respect of imports from other Members, the United States bases its country of origin determinations on considerations relating to where a good was manufactured or produced, or where it was last substantially transformed. In respect of imports from Hong Kong, China, the United States applies an additional condition – whether Hong Kong, China is "sufficiently autonomous" from the People's Republic of China, as assessed by the United States – that the United States does not apply to imports from other Members. This discriminatory and arbitrary treatment results in the United States not applying the same country of origin rules to imports from Hong Kong, China, and detrimentally modifies the conditions of competition for goods of Hong Kong, China origin as compared to the treatment accorded to like products originating in the customs territory of other Members.

7. Members and their enterprises have an interest in ensuring that the origin of their goods is correctly and uniformly determined in accordance with the rules established for this purpose, including for the purpose of any origin marking requirement that an importing Member may impose. It is a good's country of origin that determines the treatment of that good within international commerce, as well as the international legal rights that attach to that good as the good of a WTO Member. As the preamble to the ARO recognizes, "clear and predictable rules of origin and their application facilitate the flow of international trade" and should not themselves "create unnecessary obstacles to trade".[2] Where, as in this case, a Member requires a good to be marked with an origin other than its correct country of origin, it impedes the flow of international trade contrary to the objectives of the ARO and the WTO covered agreements more broadly. As Hong Kong, China will detail, for example, the requirement to mark goods originating in Hong Kong, China as originating in the People's Republic of China has increased the cost and complexity of exportation for Hong Kong enterprises by forcing them to segregate their products based on the country of destination, and has denied Hong Kong, China the benefits associated with Hong Kong brand products.

8. This first written submission of Hong Kong, China is organized as follows:

- **Part II** provides background on the U.S. origin marking requirement and the requirement, as of 10 November 2020, to mark imported goods manufactured or produced in Hong Kong, China as goods having an origin of the People's Republic of China.

- **Part III** explains that the United States' determination that imported goods manufactured or produced in Hong Kong, China have an origin of the People's Republic of China is inconsistent with Article 2(c) and Article 2(d) of the ARO. It is inconsistent with Article 2(c) because it unlawfully conditions the

[2] Agreement on Rules of Origin, Preamble, Third and Fourth Recitals.

conferral of a particular country of origin upon conditions unrelated to manufacturing or processing. It is inconsistent with Article 2(d) because the United States does not apply the same rules of origin to goods imported from the customs territory of Hong Kong, China that the United States applies to goods imported from other Members.

- **Part IV** explains that the U.S. origin marking requirement is a technical regulation that the United States applies to goods imported from Hong Kong, China in a manner that accords less favourable treatment to those goods as compared to the regulatory treatment accorded to like products originating in other Members (and non-Members). This technical regulation is therefore inconsistent with Article 2.1 of the TBT Agreement.

- **Part V** explains that the U.S. origin marking requirement as applied to goods imported from Hong Kong, China violates Article IX:1 and Article I:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") for the same essential reasons that the requirement accords less favourable treatment to goods of Hong Kong, China origin under Article 2(d) of the ARO and Article 2.1 of the TBT Agreement. Because the ARO and the TBT Agreement are the agreements that deal most specifically, and in detail, with the subject matter of this dispute, namely the rules for determining country of origin as they apply to origin marking requirements, the Panel should begin its assessment with Hong Kong, China's claims under those two agreements and should exercise judicial economy in respect of the claims under the GATT 1994 in the event that the Panel finds the measures at issue inconsistent with either or both of those agreements.

- **Part VI** concludes with the request for findings and recommendations.

II. Background on the Revised Origin Marking Requirement

A. U.S. Country of Origin Marking Requirement

9. Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304, requires goods imported into the United States to be marked with their country of origin. Section 304(a) provides:

> (a) MARKING OF ARTICLES. Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. …[3]

10. U.S. Customs and Border Protection ("USCBP") is responsible for implementing section 304 of the Tariff Act of 1930. Part 134 of USCBP's

[3] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a) [redacted]

regulations, 19 C.F.R. Part 134, prescribes detailed rules concerning compliance with the origin marking requirement.[4]

11. Through its regulations, USCBP has defined the term "country of origin" for the purpose of section 304 as "the country of manufacture, production, or growth of any article of foreign origin entering the United States".[5] The definition additionally provides that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin'".[6] Thus, the "country of origin" for the purpose of the origin marking requirement is the country in which the imported article was manufactured, produced, or grown, or the country in which the article underwent a substantial transformation.

12. For the purpose of the origin marking requirement, USCBP has consistently treated Hong Kong, China as a "country of origin".[7] Such treatment of Hong Kong, China by USCBP for customs and origin marking purposes is consistent with the fact that Hong Kong, China is a separate customs territory and as such falls within the scope of "country" for the purposes of the WTO covered agreements and is thus a distinct country of origin from which goods may originate under the rules prescribed by the ARO (and for all purposes under the WTO covered agreements for which a determination of origin is required).

13. With regard to the specific words used on an imported article to indicate its country of origin, USCBP's regulations provide that "the markings required by this part shall include the full English name of the country of origin, unless another marking to indicate the English name of the country of origin is specifically authorized by the Commissioner of Customs".[8] Abbreviations which "unmistakably indicate the name of a country" are acceptable, as are alternative spellings "which clearly indicate the English name of the country of origin".[9]

14. Under section 304 of the Tariff Act of 1930 and USCBP's regulations, imported articles not marked as required by law are subject to additional duties of 10 percent, assessed on top of other duties that may apply.[10]

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[4] 19 C.F.R. Part 134

[5] 19 C.F.R. § 134.1(b)

[6] 19 C.F.R. § 134.1(b)

[7] See 19 C.F.R. § 134.1(a) See also, e.g. USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Childrens' Computer Games (26 January 1990) USCBP Ruling Letter HQ 560337 Re: Country of origin marking for products of Hong Kong imported on or after July 1, 1997 (27 June 1997)

[8] 19 C.F.R. § 134.45(a)(1)

[9] 19 C.F.R § 134.45(b)

[10] See 19 U.S.C. § 1304(i) 19 C.F.R. § 134.2

B. The Requirement to Mark Goods Manufactured or Produced in Hong Kong, China with an Origin of "China"

15. Prior to the imposition of the measures at issue in the present dispute, the United States had consistently determined that goods manufactured or produced in Hong Kong, China are goods of "Hong Kong" origin and therefore required such goods to be marked in this manner.[11] This was true both before[12] and after[13] the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China on 1 July 1997. USCBP had previously rejected any use of the word "China" in the required mark of origin (including "Hong Kong, China") on the grounds that Hong Kong and China are two separate customs territories and thus two distinct countries of origin.[14] In U.S. practice, "China" designates an origin of the People's Republic of China.[15]

16. On 11 August 2020, USCBP published a Federal Register notice indicating that, after 25 September 2020, imported goods manufactured or produced in Hong Kong must be marked to indicate that their origin is "China".[16] By subsequent notice, USCBP extended the date for compliance with this requirement to 10 November 2020.[17] As Hong Kong, China will discuss in more detail in Part III.B.2 below, USCBP has rejected any use of the words "Hong Kong" in the required mark of origin after 9 November 2020 (including "Hong Kong, China"). Thus, the United States now requires a mark of origin ("China") that it previously rejected in the case of goods manufactured or produced in Hong Kong, China, while rejecting the use of a mark of origin ("Hong Kong") that it previously required as the exclusive mark of origin for such goods.

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[11] In this submission, when discussing the U.S. origin marking requirements, Hong Kong, China uses the phrase "manufactured or produced" as that is the phrase found in the U.S. definition of country of origin for purposes of section 304 of the Tariff Act of 1930. See 19 C.F.R. § 134.1(b) [redacted] (referring to the "country of manufacture [and] production"). When discussing Article 2(c) of the ARO, Hong Kong, China refers to "manufacturing or processing" as that is the phrase used in that provision. Hong Kong, China understands the meaning of the terms "manufactured or produced" to be materially the same as the terms "manufactured or processed".

[12] See, e.g. USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Childrens' Computer Games (26 January 1990) [redacted] 62 Fed. Reg. 30927 (5 June 1997) [redacted]

[13] USCBP Ruling Letter N306315 Re: The Country of Origin Marking of Body Spray Mists (2 October 2019) [redacted] USCBP Ruling Letter N308366 Re: The country of origin and marking of an electric table top score board from Hong Kong (8 January 2020) [redacted]

[14] See USCBP Ruling Letter HQ 731701 Re: Country of Origin Marking of Childrens' Computer Games (26 January 1990) [redacted]

[15] See, e.g. USCBP Ruling Letter N309640 Re: The tariff classification, country of origin, and marking of "MG Essence WHIP DREAM Facial Foam Cleanser," "MG Essence WHIP DREAM Facial Foam Maker," and "MG Essence Clear Pouch" from China (25 February 2020) [redacted]

[16] 85 Fed. Reg. 48551 (11 August 2020) ("August 11 Federal Register notice") [redacted]

[17] See USCBP, CSMS #43729326 – GUIDANCE: Additional 45-day Compliance Period for Executive Order 13936 – Hong Kong Normalization (21 August 2020) [redacted]

17. USCBP has explained that the requirement to mark goods manufactured or produced in Hong Kong as having an origin of "China" does not affect the United States' determination of the country of origin for other purposes, including for purposes of duty assessment.[18] As a result, the United States now maintains two conflicting country of origin determinations in respect of the identical goods manufactured or produced in the customs territory of Hong Kong, China – the People's Republic of China when determining the country of origin for origin marking purposes, and Hong Kong, China when determining the country of origin for duty and other customs purposes.

18. USCBP issued the August 11 Federal Register notice under the authority of Executive Order 13936, issued by former U.S. President Donald J. Trump on 14 July 2020.[19] Under section 201(a) of the United States-Hong Kong Policy Act of 1992, the laws of the United States apply to Hong Kong, China in the same manner that those laws applied to Hong Kong prior to the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China on 1 July 1997.[20] Under section 202(a) of that Act, the U.S. President can suspend the application of section 201(a) if the President "determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China".[21] Executive Order 13936 contains a finding that Hong Kong, China is not "sufficiently autonomous" in the view of the United States and suspends the application of section 201(a) to a number of U.S. laws, including the origin marking requirement set forth in section 304 of the Tariff Act of 1930.

19. The August 11 Federal Register notice makes clear that the suspension of section 201(a) of the United States-Hong Kong Policy Act of 1992 as it applies to section 304 of the Tariff Act of 1930 is what required USCBP to determine that the country of origin of goods manufactured or produced in Hong Kong, China is the People's Republic of China for the purpose of the origin marking requirement. As that notice summarizes:

> in light of the President's Executive Order … suspending the application of section 201(a) of the United States-Hong Kong Policy Act of 1992 to the marking statute, section 304 of the Tariff Act of 1930, with respect to imported goods produced in Hong Kong, such goods may no longer

[18] See USCBP, Frequently Asked Questions – Guidance on Marking of Goods of Hong Kong – Executive Order 13936 (last modified 6 October 2020) ("The change in marking requirements does not affect country of origin determinations for purposes of assessing ordinary duties under Chapters 1-97 of the HTSUS or temporary or additional duties under Chapter 99 of the HTSUS. Therefore, goods that are products of Hong Kong should continue to report International Organization for Standardization (ISO) country code "HK" as the country of origin when required.") [redacted]

[19] See The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020) ("Executive Order 13936") [redacted]

[20] See United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 201(a) [redacted]

[21] United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 202(a) [redacted]

be marked to indicate "Hong Kong" as their origin, but must be marked to indicate "China."[22]

20. Section 304 of the Tariff Act of 1930, Part 134 of the USCBP's regulations, the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice interacted with each other as described above to create the present circumstance in which the United States: (i) concludes, for the purpose of its origin marking requirement, that the People's Republic of China is the country of origin of goods manufactured or produced in the customs territory of Hong Kong, China; and (ii) requires goods imported from the customs territory of Hong Kong, China to be marked with this country of origin determination. Hong Kong, China will refer to this conclusion and requirement as, collectively, "the revised origin marking requirement".

21. The revised origin marking requirement involves a country of origin determination by the United States, governed by the ARO. That country of origin determination is based on a criterion – "sufficient autonomy", as determined by the United States – that is unrelated to considerations of manufacturing or processing and that the United States does not apply to determine the origin of imports from other Members.

22. The U.S. origin marking requirement, as applied to goods imported from Hong Kong, China under the revised origin marking requirement, is also a technical regulation for the purpose of the TBT Agreement. In respect of this technical regulation, the United States does not accord the same treatment to goods imported from the customs territory of Hong Kong, China that it accords to like products originating in other Members (and non-Members).

III. THE REVISED ORIGIN MARKING REQUIREMENT IS INCONSISTENT WITH THE ARO

A. Introduction

23. Article 1.1 of the ARO defines "rules of origin" as "those laws, regulations and administrative determinations of general application applied by any Member to *determine the country of origin* of goods".[23] Article 1.2 elaborates upon this

[22] 85 Fed. Reg. 48551 (11 August 2020) [redacted]. Hong Kong, China observes that there is no evidence that USCBP's prior practice of requiring goods of Hong Kong, China origin to be marked as goods of "Hong Kong" was a result of section 201(a) of the United States-Hong Kong Policy Act of 1992. The 1997 Federal Register notice in which USCBP indicated that goods of Hong Kong origin should continue to be marked as goods of "Hong Kong" makes no reference to section 201 of the United States-Hong Kong Policy Act of 1992. See 62 Fed. Reg. 30927 (5 June 1997) [redacted]. Nevertheless, Executive Order 13936 and the August 11 Federal Register notice make clear that it was the suspension of section 201(a) of the United States-Hong Kong Policy Act of 1992 as it applies to section 304 of the Tariff Act of 1930 that required USCBP to determine that the country of origin of goods manufactured or produced in Hong Kong, China is "China" for the purpose of the origin marking requirement.

[23] Emphasis added.

definition by stating that "rules of origin" include all rules of origin used in, *inter alia*, "origin marking requirements under Article IX of GATT 1994".

24. It follows from these definitional elements that: (i) origin marking requirements involve laws, regulations and administrative determinations of general application applied by a Member to determine the country of origin of goods; and (ii) the requirement to mark a good with a particular country of origin is a "determination concerning the country of origin" of that good, i.e. that the origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the good. Any such determination must be made in accordance with the requirements of the ARO.

25. Part II of the ARO establishes "disciplines to govern the application of rules of origin". These disciplines are divided between "disciplines during the transition period", governed by Article 2, and "disciplines after the transition period", governed by Article 3. The "transition period" refers to the period prior to the completion of the work programme on harmonizing rules of origin, described in Part IV of the ARO. The work programme on harmonizing rules of origin has not yet been completed. As a result, the "disciplines during the transition period" as set forth in Article 2 of the ARO remain in effect.

26. The first explanatory note to the WTO Agreement explains that "[t]he terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO." The ARO is one of the Multilateral Agreements on Trade in Goods contained in Annex 1A to the WTO Agreement. Thus, where the ARO uses the term "country", including in the phrase "country of origin", that term includes Hong Kong, China as a separate customs territory Member of the WTO. Under the ARO, Hong Kong, China is a "country of origin" from which goods may originate, and whose goods benefit from the disciplines on country of origin determinations as specified in that agreement.

B. The Revised Origin Marking Requirement Is Inconsistent with Article 2(c) of the ARO

1. Background on Article 2(c)

27. Article 2(c) of the ARO provides in relevant part that:

> rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.

28. The panel in *US – Textiles Rules of Origin* considered that "the ordinary meaning of the second clause [of the second sentence] is clear. It requires Members to ensure that the conditions their rules of origin impose as a prerequisite for the conferral of origin not include a condition which is unrelated to manufacturing or

processing."[24] The panel further considered that the "conditions" to which this clause refers "are those that must be fulfilled for a qualifying good to be accorded the origin of a particular country."[25] Thus, a measure is inconsistent with the second clause of the second sentence of Article 2(c) if it imposes a condition unrelated to manufacturing or processing as a prerequisite for the conferral of a particular country of origin upon an imported good, including for origin marking purposes.

29. The ordinary meaning of the term "manufacturing" as it appears in Article 2(c) is to "[b]ring (material) into a form suitable for use"; "[m]ake or fabricate from material; produce by physical labour or machinery".[26] The ordinary meaning of the term "processing" as it appears in Article 2(c) is "[s]ubject to or treat by a process", where the term "process" is understood to refer to "a systemic series of actions or operations directed to some end".[27] Thus, a measure is inconsistent with the second sentence of Article 2(c) if it imposes as a prerequisite for the determination of the country of origin of a product a condition unrelated to where the product was made or where the product underwent a particular process to prepare it for sale as a product of that type.

30. It is apparent from the definitional provisions of the ARO that an origin marking requirement requires a country of origin determination, and that the specific country of origin mark required by an importing Member indicates that Member's determination concerning the country of origin of the good so marked. Under Article 2(c), a Member may not condition the conferral of a particular country of origin as indicated in a mark of origin upon conditions unrelated to manufacturing or processing. It follows that any required mark of origin must *correctly* indicate the country of origin of a good when conditions relating exclusively to manufacturing or processing are taken into account. For example, if a good was manufactured or processed in Guinea-Bissau, it would be inconsistent with Article 2(c) for an importing Member to condition the conferral of Guinea-Bissau origin upon any other consideration and to require the good to be marked instead as a product of "Guinea", which is a different Member (and a different country) and thus a different country from which goods may originate.

31. As discussed below, it is self-evident that the revised origin marking requirement imposes a condition "not related to manufacturing or processing" as a prerequisite for the determination that an imported good is of Hong Kong, China origin. The conditions that the United States imposes for this purpose under the United States-Hong Kong Policy Act of 1992 are political conditions subjectively determined by the United States, not conditions related to manufacturing or processing.

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[24] Panel Report, *US – Textiles Rules of Origin*, para. 6.208.

[25] Panel Report, *US – Textiles Rules of Origin*, para. 6.218.

[26] NEW SHORTER OXFORD ENGLISH DICTIONARY, 4TH EDN, L. BROWN (ED.) (CLARENDON PRESS, 1993) (excerpts)

[27] NEW SHORTER OXFORD ENGLISH DICTIONARY, 4TH EDN, L. BROWN (ED.) (CLARENDON PRESS, 1993) (excerpts)

32. However, as context for interpreting Article 2(c), and in particular for determining what does or does not constitute a condition related to "manufacturing or processing", it is useful to take into account the context provided by Article 3(b) of the ARO. Article 3(b) provides that, after the transition period governed by Article 2, the harmonized rules agreed by Members will ensure that:

> the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out[.]

This context indicates that considerations of "manufacturing or processing", as referenced in Article 2(c), are considerations that relate generally to where a good was wholly obtained or produced, or where the good underwent its last substantial transformation. This context is consistent with the ordinary meaning of the terms "manufacturing" and "processing" as they appear in Article 2(c), discussed above. As with other parallels between Article 2 and Article 3, Article 2(c) can be seen as a more general expression of the standard set forth in Article 3(b), but one that nevertheless requires importing Members to determine the country of origin of a product exclusively by reference to where a product was made or where the product underwent a particular method or treatment to prepare it for sale.

33. Other than in the case of the revised origin marking requirement at issue in this dispute, U.S. law follows the "related to manufacturing or processing" condition prescribed by Article 2(c) when determining the country of origin of a good. As discussed in Part II.A above, the United States defines the country of origin for origin marking purposes as "the country of manufacture, production, or growth of any article of foreign origin entering the United States."[28] The definition additionally provides that "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin'".[29] These are conditions that relate exclusively to where a product was manufactured or processed, as required by Article 2(c).

34. Indeed, it is evident that the United States has consistently considered Hong Kong, China to be the *correct* country of origin when considerations relating exclusively to manufacturing or processing are taken into account. This is evidenced by the fact that, prior to the August 11 Federal Register notice, the United States consistently required the designation of "Hong Kong" as the country of origin for goods that were manufactured or produced in Hong Kong or that underwent a substantial transformation in Hong Kong. As discussed in Part II.B above, the United States reached this determination of origin both before and after the resumption of the exercise of sovereignty by the People's Republic of China in 1997. The United States' acknowledgement of the correct country of origin is further evidenced by the fact that the United States *continues* to treat goods manufactured or produced in Hong Kong, China, or articles substantially transformed there, as goods of Hong Kong, China origin for customs, tariffs, and other related purposes. As these

[28] 19 C.F.R. § 134.1(b)

[29] 19 C.F.R. § 134.1(b)

practices reflect, Hong Kong, China is the correct country of origin for goods manufactured or processed in the customs territory of Hong Kong, China when the requirements of Article 2(c) are fulfilled.

2. The "sufficient autonomy" condition that the United States has applied to determine the origin of goods imported from Hong Kong, China is inconsistent with Article 2(c)

35. As detailed in Part II.B above, the United States conditions the separate application of its laws to the customs territory of Hong Kong, China upon a requirement that Hong Kong, China remains "sufficiently autonomous" from the People's Republic of China. Section 202(b) of the United States-Hong Kong Policy Act of 1992 provides that in making a determination as to whether Hong Kong, China remains "sufficiently autonomous", the U.S. President "should consider the terms, obligations, and expectations expressed in the Joint Declaration with respect to Hong Kong."[30] Further indication of the types of considerations that the United States takes into account is provided at 22 U.S.C. § 5725, which details the factors that the U.S. Secretary of State is required to examine in the annual report required by that provision "regarding the autonomy of Hong Kong".[31] None of these considerations relates to the location of the manufacturing or processing of a good.

36. It is these political considerations, and not conditions related to manufacturing or processing, that led the United States to determine that goods manufactured or produced in the customs territory of Hong Kong, China originate within the People's Republic of China for origin marking purposes. As detailed in Part II.B above, Executive Order 13936 relied upon section 202 of the United States-Hong Kong Policy Act of 1992 to suspend the ordinary operation of the origin marking requirement to goods produced in Hong Kong. Specifically, the Executive Order states:

> Pursuant to section 202 of the United States-Hong Kong Policy Act of 1992 (22 U.S.C. 5722), I hereby suspend the application of section 201(a) of the United States-Hong Kong Policy Act of 1992, as amended (22 U.S.C. 5721(a)), to the following statutes:
>
> …
>
> (f) section 1304 of title 19, United States Code [the origin marking requirement].[32]

[30] United States-Hong Kong Policy Act of 1992 (5 October 1992), Section 202(b)

[31] 22 U.S.C. § 5725, Secretary of State report regarding the autonomy of Hong Kong (27 November 2019)

[32] The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43414 (17 July 2020), Sec. 2

37. The suspension of the ordinary operation of 19 U.S.C. § 1304 is what allowed USCBP, in turn, to publish the August 11 Federal Register notice. As that notice summarizes:

> in light of the President's Executive Order … suspending the application of section 201(a) of the United States-Hong Kong Policy Act of 1992 to the marking statute, section 304 of the Tariff Act of 1930, with respect to imported goods produced in Hong Kong, *such goods may no longer be marked to indicate "Hong Kong" as their origin*, *but must be marked to indicate "China."*[33]

The August 11 Federal Register notice concludes by informing the public that "goods produced in Hong Kong … must be marked to indicate that their origin is 'China' for purposes of 19 U.S.C. 1304 [the origin marking requirement]".[34]

38. Nothing in the August 11 Federal Register notice, or elsewhere in the relevant measures, relates to the manufacturing or processing of goods within the customs territory of Hong Kong, China. The fact that Executive Order 13936 needed to suspend the *ordinary* application of the origin marking requirement in order to permit USCBP to issue the August 11 Federal Register notice confirms that, but for the special provision of U.S. law that applies only to goods manufactured or produced in Hong Kong, China, U.S. law would continue to: (i) determine that goods manufactured or produced in Hong Kong, China are goods of Hong Kong, China origin, which is their correct country of origin when the requirements of Article 2(c) are fulfilled; and (ii) require these goods to be marked to indicate their correct country of origin (i.e. "Hong Kong" or "Hong Kong, China").

39. These considerations further demonstrate that the "sufficient autonomy" condition is a rule of origin, i.e. it is a law or regulation of general application applied by the United States to determine the country of origin of certain goods. The "sufficient autonomy" condition set forth in the United States-Hong Kong Policy Act of 1992, while applying only to goods imported from Hong Kong, China, is of "general application" because it affects an unidentified number of economic operators and is not addressed to a specific company or transaction.[35] This condition "is applied … to determine the country of origin of goods" because it was the finding of an alleged absence of "sufficient autonomy" that required USCBP to determine, for origin marking purposes, that the country of origin of goods imported from Hong Kong, China is the People's Republic of China. The requirement of "sufficient autonomy" is a "condition not related to manufacturing or processing" that the United States has imposed as a prerequisite for "a qualifying good to be accorded the origin of a particular country", namely as a prerequisite for according the origin of

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[33] 85 Fed. Reg. 48551 (11 August 2020) [redacted] (emphasis added).

[34] 85 Fed. Reg. 48552 (11 August 2020) [redacted]

[35] Appellate Body Report, *EC – Poultry*, para. 113. See also Appellate Body Report, *US – Underwear*, p. 21; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.773; Panel Report, *EC – Selected Customs Matters*, para. 7.116.

Hong Kong, China to goods manufactured or processed in the customs territory of Hong Kong, China.

40. For these reasons, the United States has "require[d] the fulfilment of a certain condition not related to manufacturing or processing", i.e. the possession of what the United States considers to be "sufficient autonomy" from the People's Republic of China, as a prerequisite for a determination that Hong Kong, China is the country of origin of goods manufactured or processed within the customs territory of Hong Kong, China. This imposition of a condition unrelated to manufacturing or processing as a prerequisite for a determination of the country of origin is inconsistent with Article 2(c) of the ARO. For the same reason, the requirement to mark goods manufactured or processed in Hong Kong, China as goods of "China" origin is inconsistent with Article 2(c) because it incorrectly indicates the country of origin of these articles when considerations relating exclusively to manufacturing or processing are taken into account.

C. The Revised Origin Marking Requirement Is Inconsistent with Article 2(d) of the ARO

1. Background on Article 2(d)

41. Article 2(d) of the ARO provides, in relevant part, that "the rules of origin that [Members] apply to imports … shall not discriminate between other Members".

42. The ordinary meaning of the term "discriminate", as it pertains here, is to "make a distinction".[37] Thus, under Article 2(d), Members may not make distinctions

[37] NEW SHORTER OXFORD ENGLISH DICTIONARY, 4TH EDN, L. BROWN (ED.) (CLARENDON PRESS, 1993) (excerpts)

in how they apply their rules of origin as among different Members. The panel in *US – Textiles Rules of Origin* considered that:

> [T]he principal objective of the second clause of Article 2(d) is to ensure that, for a given good, the strictness of the requirements that must be satisfied for that good to be accorded the origin of a particular Member is the same, regardless of the provenance of the good in question (*i.e.*, Member from which the good is imported, affiliation of the manufacturers of the good, etc.).[38]

43. Hong Kong, China agrees with this interpretation: Article 2(d) requires importing Members to apply the same rules of origin to goods imported from any Member. Members may not draw distinctions, invidious or otherwise, in the rules of origin that they apply to goods imported from any Member, including separate customs territory Members.

2. The United States does not apply the "sufficient autonomy" condition to imports from other Members

44. Under U.S. law, the United States applies a condition to goods imported from the customs territory of Hong Kong, China – the condition of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – to determine the country of origin of goods imported from that customs territory. The United States does not apply this same condition to goods imported from other Members. Separate and apart from the fact that the "sufficient autonomy" rule is unrelated to considerations of manufacturing and processing and is therefore inconsistent with Article 2(c) of the ARO, as discussed in Part III.B above, the United States' application of this additional condition to goods of Hong Kong, China origin is discriminatory under Article 2(d).

45. Under section 201(a) of the United States-Hong Kong Policy Act of 1992, "the laws of the United States shall continue to apply with respect to Hong Kong, on and after July 1, 1997, in the same manner as the laws of the United States were applied with respect to Hong Kong before such date unless otherwise expressly provided by law or by Executive order under section 202." As described in Part II.B above, prior to 1 July 1997, the United States required goods imported from Hong Kong to be marked as goods of "Hong Kong" origin, consistent with the United States' obligations under, *inter alia*, Article 2(c) of the ARO. The United States continued to require this marking of goods imported from the customs territory of Hong Kong, China after the resumption of the exercise of sovereignty by the People's Republic of China on 1 July 1997, also in a manner consistent with the United States' WTO obligations.

46. Executive Order 13936 suspended the application of section 201(a) of the United States-Hong Kong Policy Act of 1992 to certain statutes, including the origin marking requirement set forth in section 304 of the Tariff Act of 1930, based on then

[38] Panel Report, *US – Textiles Rules of Origin*, para. 6.248 (emphasis added). Hong Kong, China understands the panel's use of the term "strictness" in this quote to refer generally to the conditions that must be satisfied for a good to be accorded the origin of a particular Member.

President Trump's determination that Hong Kong, China is "no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China (PRC or China) under [those statutes]".[39] As explained by USCBP in the August 11 Federal Register notice, it was the suspension of the application of section 201(a) of the United States-Hong Kong Policy Act of 1992 to section 304 of the Tariff Act of 1930 that required the USCBP to determine that "imported goods produced in Hong Kong … may no longer be marked to indicate 'Hong Kong' as their origin, but must be marked to indicate 'China'".[40]

47. It was therefore the "sufficient autonomy" condition contained in section 202(a) of the United States-Hong Kong Policy Act of 1992, as implemented through Executive Order 13936, that provided the legal basis for the USCBP to determine in its August 11 Federal Register notice that the country of origin for goods imported from the customs territory of Hong Kong, China is the People's Republic of China. While the "sufficient autonomy" condition and the suspension of section 201(a) under Executive Order 13936 affected a variety of U.S. statutes, one application of that condition was to determine the country of origin of certain goods for the purposes of the U.S. origin marking requirement. The United States-Hong Kong Policy Act of 1992 (to the extent it is relevant to the August 11 Federal Register notice), Executive Order 13936 (to the extent it is relevant to the August 11 Federal Register notice), and the August 11 Federal Register notice itself are therefore "laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods" as defined in Article 1.1. of the ARO, i.e. they are "rules of origin" that the United States "appl[ies] to imports" within the meaning of Article 2(d) of the ARO.

48. The United States does not apply the "sufficient autonomy" condition to goods of other Members for the purpose of determining their country of origin. The United States therefore "discriminate[s] between other Members" in respect of the rules of origin that the United States applies to imports, in contravention of Article 2(d).

IV. THE REVISED ORIGIN MARKING REQUIREMENT IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

49. Separate and apart from their inconsistency with the ARO, the measures at issue are also inconsistent with the TBT Agreement. The U.S. origin marking requirement, as applied to goods imported from Hong Kong, China under the revised origin marking requirement, is a technical regulation in respect of which the United States has accorded goods imported from Hong Kong, China less favourable treatment than that accorded to like products originating in other Members (and non-Members), in violation of Article 2.1 of the TBT Agreement.

[39] The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (17 July 2020)

[40] 85 Fed. Reg. 48551 (11 August 2020)

A. The Revised Origin Marking Requirement Is a Technical Regulation

50. The U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a "technical regulation" within the meaning of Annex 1, paragraph 1, of the TBT Agreement. That paragraph defines the term "technical regulation" as:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

51. It is well established that the second sentence of this definition is independent from the first, i.e. that a "technical regulation" may "deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method" even if they do not "lay[] down product characteristics or their related processes and production methods" within the meaning of the first sentence.[41]

52. The requirement to mark an imported product with its country of origin is a "marking … requirement" that "appl[ies] to a product". The U.S. origin marking requirement as set forth in section 304 of the Tariff Act of 1930 and Part 134 of USCBP's regulations, as well as rulings and notices relating thereto, is therefore a "technical regulation" that falls within the scope of the TBT Agreement.

53. As Hong Kong, China will detail in this Part, the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice also form part of the United States' origin marking requirement as they apply to goods imported from the customs territory of Hong Kong, China. The origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is inconsistent with Article 2.1 of the TBT Agreement.

B. The Revised Origin Marking Requirement Accords Less Favourable Treatment to Products of Hong Kong, China Origin

54. Article 2.1 of the TBT Agreement provides 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.

55. In addition to establishing that the measures in question constitute a "technical regulation" as discussed in Part IV.A above, a party asserting a claim under

[41] See e.g. Appellate Body Report, *EC – Seal Products*, para. 5.14; Panel Report, *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 7.147.

Article 2.1 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).[42]

56. With regard to the requirement of likeness, it is well established that "when origin is the sole criterion distinguishing the products", it is "sufficient for a complainant to demonstrate that there can or will be domestic and imported products that are 'like'".[43] The Appellate Body has observed that "measures allowing the application of a presumption of 'likeness' will typically be measures involving a *de jure* distinction between products of different origin."[44]

57. The measures at issue draw a *de jure* distinction between goods imported from Hong Kong, China and goods originating in other Members (and non-Members). As discussed in Part II.A above, section 304 of the Tariff Act of 1930 requires goods imported into the territory of the United States to be "marked … in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."[45] For the purpose of this marking requirement, the "country of origin" of an article is "the country of manufacture, production, or growth of any article of foreign origin entering the United States," or the country in which "work or material added to an article … effect[ed] a substantial transformation" of that article.[46] An article imported into the United States must be marked with "the full English name of the country of origin", so determined.[47]

58. As discussed in Part II.B above, the United States applies an additional requirement in the case of goods imported from the customs territory of Hong Kong, China – the requirement of "sufficient autonomy" from the People's Republic of China, as assessed by the United States – that the United States does not apply to goods originating in other Members (and non-Members). The United States has applied that condition to determine that goods imported from the customs territory of Hong Kong, China have an origin of the People's Republic of China, and consequently requires goods imported from Hong Kong, China to be marked as goods of "China". The United States has expressly rejected marking goods imported from Hong Kong, China as goods of "Hong Kong, China" origin, which is the full English name of the customs territory in which the goods originate. This difference in the regulatory treatment of goods imported from Hong Kong, China is a consequence of written instruments (the United States-Hong Kong Policy Act of 1992, Executive Order 13936, and the August 11 Federal Register notice) that apply exclusively to imported goods produced in the customs territory of

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

[43] Panel Report, *US – Poultry (China)*, paras. 7.424-7.429.

[44] Appellate Body, *Argentina – Financial Services*, para. 6.36.

[45] Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a)

[46] 19 C.F.R. § 134.1(b)

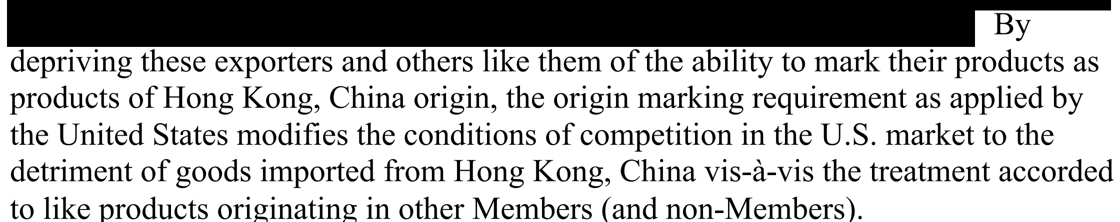
[47] 19 C.F.R. § 134.45(a)(1)

Hong Kong, China. Because this *de jure* difference in regulatory treatment is based on the origin of the goods rather than any characteristic(s) of the goods themselves, the presumption of likeness is established.

59. Turning to the issue of less favourable treatment, a technical regulation accords less favourable treatment to a Member when it modifies the conditions of competition in the market of the regulating Member to the detriment of the group of products imported from this Member vis-à-vis the group of like domestic products or the group of like products imported from other Members (and non-Members).[48] In this connection, Hong Kong, China is focussing on the respects in which the revised origin marking requirement modifies the conditions of competition in the U.S. market to the detriment of products imported from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members) (i.e. the denial of Most-Favoured-Nation ("MFN") treatment).

60. 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). There are several reasons why it is advantageous for an exporter to be able to mark its products with the name of their actual country of origin. The United States extends this treatment to goods originating in other Members (and non-Members) but denies this treatment to goods imported from Hong Kong, China.

61. First, there is often considerable brand and reputational value to be derived from marking a product as one having the origin of a particular Member, i.e. as a product that was manufactured or processed in the customs territory of that Member. Exporters of goods to the United States other than exporters of goods of Hong Kong, China origin have the option of marking the goods with the correct English name of their actual country of origin (in fact, they are *required* to mark their products in this way under the U.S. origin marking requirement), while exporters of goods to the United States from Hong Kong, China are expressly denied this option.



By depriving these exporters and others like them of the ability to mark their products as products of Hong Kong, China origin, the origin marking requirement as applied by the United States modifies the conditions of competition in the U.S. market to the detriment of goods imported from Hong Kong, China vis-à-vis the treatment accorded to like products originating in other Members (and non-Members).

62. Second, 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. Whether by virtue of conflicting regulatory requirements in other Members or because of an enterprise's commercial interest in marking its products with their true country of origin, Hong Kong exporters, as well as importers of goods into the United States, must now

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[48] See e.g. Appellate Body Report, *US – Clove Cigarettes*, para. 180.

segregate and mark the identical product differently depending upon whether the product is destined for the United States or for some other market.[49] Exporters of like products from other Members do not face the additional costs and complexity of segregation, as they are permitted to mark their products with the full English name of the actual country of origin.[50]

63. Finally, there is an inherent advantage for exporters in being able to mark their products with the actual country of origin of the product, as opposed to the origin of a different Member (in this case, the People's Republic of China). Throughout the WTO covered agreements, and by virtue of the first explanatory note to the WTO Agreement, it is the origin of a good from within the customs territory of a WTO Member that affects the treatment of that product within international commerce, as well as the international legal rights that attach to that product as the good of a WTO Member. WTO Members and their enterprises therefore have an interest in ensuring that their goods are accurately marked with the *customs* origin of the good. By the same token, they have an interest in ensuring that their goods are not marked as having the origin of a *different* WTO Member, which is what the United States now requires in respect of goods imported from Hong Kong, China. The inaccurate marking of the customs origin of a good is liable to cause confusion and potential error in the regulatory treatment of that good,

[49] In comments submitted to the United States Trade Representative in connection with this dispute, the Computing Technology Industry Association ("CompTIA") explained that the requirement to mark goods originating in Hong Kong, China as goods of "China" origin creates "an unreasonable and punitive burden for US companies". CompTIA, Comments re: WTO Dispute Settlement Proceeding Regarding United States-Origin Marking Requirement (Hong Kong, China), Ref. Docket Number USTR-2021-0001, Dispute Number DS597, 86 FR 13960 (12 April 2021) CompTIA explained that:

> Global multinational companies track very carefully the country of origin of components and finished goods. These same companies make investments in the purchase, implementation, and enhancement of complex automated systems to ensure data integrity and support the export and import of goods in countries around the world. Linking of product labeling and customs invoice data is standard practice to ensure compliance with customs requirements. Requiring that companies track multiple origin data points, in addition to marking goods one way for imports into the US and another way for shipments to any other country discourages the use of those very automated systems, making it not only difficult to comply with complex customs requirements, but also impossible to achieve standard business practices such as inventory rebalancing among countries across the globe.

Ibid. CompTIA is a trade association of companies that manufacture, import, and export information technology products around the world. Its members include companies like Cisco, Dell Technologies, Epson, Intel, Lexmark, Lenovo, and Panasonic.

[50] Prior Appellate Body and panel reports have found that more burdensome import requirements impose a disadvantage relative to imports that are not subject to those requirements, even if the more burdensome requirements do not ultimately deprive the goods of market access or result in higher import duties. See e.g. Panel Report, *Colombia – Ports of Entry*, paras. 7.331-7.352 (finding that the imposition of an advance import declaration requirement upon goods from Panama imposed a competitive disadvantage upon Panamanian products); Panel Report, *EC – Bananas III (Ecuador)*, para. 7.193 (finding that the increased procedural and administrative requirements imposed upon the importation of non-ACP bananas imposed a competitive disadvantage upon those imports relative to ACP bananas) (affirmed by the Appellate Body in Appellate Body Report, *EC – Bananas III*, para. 206).

[redacted]. Goods imported from Hong Kong, China into the United States are uniquely subject to this disadvantage because of the measures at issue.

64. For these reasons, the U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a technical regulation that accords less favourable treatment to goods imported from Hong Kong, China as compared to the treatment accorded to like products originating in other Members (and non-Members). It is therefore inconsistent with Article 2.1 of the TBT Agreement.

V. CLAIMS UNDER THE GATT 1994

65. In addition to their inconsistency with the ARO and the TBT Agreement, the measures at issue are inconsistent with multiple provisions of the GATT 1994, as Hong Kong, China will explain in this Part.

66. Before turning to the claims under the GATT 1994, Hong Kong, China wishes to emphasize that it considers these claims to be secondary to the claims that Hong Kong, China has advanced under the ARO and the TBT Agreement. The two claims that Hong Kong, China advances under the GATT 1994 both concern the ways in which the measures at issue are discriminatory and accord less favourable treatment to goods of Hong Kong, China origin. This is essentially the same subject matter as Hong Kong, China's claims under Article 2(d) of the ARO and Article 2.1 of the TBT Agreement, which are explained in the previous parts of this submission.

67. It is well established that a panel should begin its analysis with the agreement or agreements that deal specifically, and in detail, with the subject matter of the dispute, as compared to the agreement or agreements that deal more generally with the subject matter of the dispute.[51] If a panel finds that the measures at issue are inconsistent with the more specialized agreements relating to that subject matter, it is appropriate for the panel to exercise judicial economy in respect of the claims under the more general agreement or agreements.[52]

68. In this case, the ARO is the agreement that deals most specifically, and in detail, with the subject matter of this dispute, namely the rules for determining the country of origin as they apply to origin marking requirements. The TBT Agreement also deals specifically, and in detail, with the measures at issue as "marking … requirement[s]" that "apply to a product". The GATT 1994, by contrast, addresses the subject matter of this dispute only at a general level. Article I:1 of the GATT 1994 is, of course, the MFN treatment provision applicable to a broad array of measures affecting trade in goods, not just origin marking requirements. While Article IX:1 of the GATT 1994 specifically concerns marks of origin, it does not address the rules of origin that Members must use in the application of origin marking requirements (the

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[51] See e.g. Appellate Body Report, *Chile – Price Band*, para. 184; Appellate Body Report, *EC – Bananas III*, para. 204.

[52] See Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.104; Panel Report, *US – Hot Rolled Steel*, para. 7.266. See also Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19 ("[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute").

subject matter of the ARO). Moreover, the core discipline under that article, Article IX:1, is another MFN treatment provision of the type contained in Article 2(d) of the ARO and Article 2.1 of the TBT Agreement.

69. For these reasons, Hong Kong, China believes that the Panel must begin its analysis with Hong Kong, China's claims under the ARO, followed by its claims under the TBT Agreement and only then the GATT 1994. If the Panel finds that the measures at issue are inconsistent with the ARO, Hong Kong, China requests that the Panel exercise judicial economy in respect of its claims under the TBT Agreement and the GATT 1994. Hong Kong, China requests that the Panel address its claims under the TBT Agreement only in the event that the Panel finds, for whatever reason, that the measures at issue are not inconsistent with the ARO. Hong Kong, China requests that the Panel address its claims under the GATT 1994 only in the event that the Panel finds, for whatever reason, that the measures at issue are not inconsistent with both the ARO and the TBT Agreement. Given the clear inconsistency of the challenged measures with both the ARO and the TBT Agreement, as discussed in Parts III and IV above, respectively, Hong Kong, China does not believe that it should be necessary for the Panel to address its claims under the GATT 1994.

A. The Measures at Issue Are Inconsistent with Article IX:1 of the GATT 1994

70. Article IX of the GATT 1994 is entitled "Marks of Origin". Article IX:1 provides that "each [Member] shall accord to the products of the territories of other [Members] treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country".

71. Article IX:1 is effectively identical to Article 2.1 of the TBT Agreement, but limited in scope to the particular case of origin marking requirements (which, as discussed in Part IV.A above, are a type of technical regulation). Whereas Article 2.1 of the TBT Agreement establishes both a national treatment obligation ("like products of national origin") and an MFN treatment obligation ("like products originating in any other country"), Article IX:1 of the GATT 1994 is limited to the MFN treatment obligation ("like products of any third country"). As discussed in Part IV.B above, Hong Kong, China's less-favourable treatment claims in this dispute relate to the MFN treatment obligation.

72. The measures at issue are inconsistent with Article IX:1 of the GATT 1994 for the same essential reasons that they are inconsistent with the MFN treatment obligation contained in Article 2.1 of the TBT Agreement. First, the requirement of likeness is satisfied because the measures at issue discriminate exclusively on the basis of origin and there can or will be products imported from other Members that are like those imported from Hong Kong, China.[53] Second, the measures at issue accord less favourable treatment to goods of Hong Kong, China in respect of marking requirements because the United States does not determine the country of origin of goods imported from Hong Kong, China in the same manner that it determines the country of origin of like products imported from other Members, with the result that

[53] See paras. 56-58, *supra.*

goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin.[54]

73. The history of Article IX:1 confirms that it is an advantage for Members and their enterprises to have the ability to mark their goods with a single mark of origin using the English name of the actual country of origin. In 1958, the Contracting Parties to the GATT 1947 adopted a decision on "Marks of Origin" building upon Article IX:1 to establish "certain rules which would further reduce the difficulties and inconveniences which marking regulations may cause to the commerce and industry of the exporting country".[55] The panel in *Australia – Tobacco Plain Packaging (Dominican Republic)* correctly found that this adopted decision constitutes guidance under Article XVI:1 of the WTO Agreement that bears upon the interpretation of Article IX of the GATT 1994.[56]

74. The fifth recommendation under the 1958 GATT Decision is that "[c]ountries 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'".[57] The report by the Working Party accompanying the 1958 GATT Decision explains that this recommendation is "intended to ensure that a product marked in accordance with this recommendation will be accepted generally, *and that producers do not need to mark their products differently depending upon the country of destination.*"[58] The fifth recommendation and the Working Party's explanation confirm that it is an advantage for enterprises to have the ability to mark their goods with a single mark of origin using the English name of the country of origin, and that it is a "difficulty" and "inconvenience" when they are required "to mark their products differently depending upon the country of destination".

75. Hong Kong, China enterprises have been compelled by the measures at issue to mark the same products differently and segregate those products according to their destination. Hong Kong, China enterprises must mark their products with the incorrect origin of "China" when the product is destined for the United States under the measures at issue, and with the correct country of origin when the product is destined for other markets. This is precisely the type of obstacle to international trade that Article IX and the 1958 GATT Decision were meant to alleviate. Clearly, then, it is less favourable treatment to subject goods of Hong Kong, China origin to these difficulties and inconveniences while allowing goods imported from all other Members to be marked with a single mark of origin using the English name of the actual country of origin.

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[54] See paras. 59-64, *supra.*

[55] Marks of Origin, Report by the Working Party as adopted by the CONTRACTING PARTIES at their meeting of 21 November 1958, GATT document L/912/Rev.1 (22 November 1958), p. 2 ("1958 GATT Decision")

[56] See Panel Report, *Australia – Tobacco Plain Packaging (Dominican Republic)*, para. 7.3009.

[57] 1958 GATT Decision, p. 3

[58] 1958 GATT Decision, p. 1 (emphasis added)

76. For these reasons, the measures at issue are inconsistent with Article IX:1 of the GATT 1994.

B. The Measures at Issue Are Inconsistent with Article I:1 of the GATT 1994

77. Because the measures at issue are inconsistent with the MFN treatment obligations contained in Article 2(d) of the ARO, Article 2.1 of the TBT Agreement, and Article IX:1 of the GATT 1994, it follows almost axiomatically that these measures are also inconsistent with the core MFN treatment obligation contained in Article I:1 of the GATT 1994. In fact, the measures at issue are inconsistent with that provision.

78. Article I:1 of the GATT 1994 provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

79. The Appellate Body has explained that:

> Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. The obligation set out in Article I:1 has been described by the Appellate Body as "pervasive", a "cornerstone of the GATT", and "one of the pillars of the WTO trading system". Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members. Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other Members.[59]

80. Origin marking requirements are clearly a "rule" or "formality" "in connection with importation". As described in Part II.A above, section 304 of the Tariff Act of

[59] Appellate Body Report, *EC – Seal Products*, para. 5.86 (emphasis original).

1930 and USCBP's implementing regulations impose an origin marking requirement as a precondition for the entry of goods into the United States.

81. As discussed in Part IV.B above in respect of Article 2.1 of the TBT Agreement, the requirement of likeness is satisfied because the measures at issue discriminate exclusively on the basis of origin and there can or will be products imported from other Members that are like those imported from Hong Kong, China.

82. A measure confers an "advantage" within the meaning of Article I:1 when it creates "more favourable competitive opportunities" for products of a particular origin or otherwise affects the commercial relationship between products of different origins.[60] The Appellate Body has explained in this regard that "Article I:1 … prohibits discrimination among like imported products originating in, or destined for, different countries. In so doing, Article I:1 protects expectations of *equal competitive opportunities* for like imported products from all Members."[61] The focus is on opportunities, not effects. It is well established that a complaining Member need not demonstrate actual trade effects in order to prove an inconsistency with Article I:1.[62]

83. For the reasons that Hong Kong, China explained in relation to Article 2.1 of the TBT Agreement and Article IX:1 of the GATT 1994, it is an "advantage" for enterprises to be able to mark their goods with a single mark of origin using the English name of the actual country of origin. Among other benefits, this advantage allows enterprises to benefit from any brand or reputational characteristics associated with a product's country of origin, and to minimize the costs and complexities of complying with different origin marking requirements or objectives. As context for the interpretation of Article I:1, the 1958 GATT Decision discussed in Part V.A above confirms that it is an advantage for enterprises to be able to mark their products with a single mark of origin regardless of the destination of the product. It is also an "advantage" for Members and their enterprises to be able to mark a product with its *correct* country of origin, i.e. the country of origin that results from the proper application of the rules of origin set forth in the ARO, including the requirement that any determination of origin must be based exclusively on considerations relating to where a good was manufactured or processed.

84. The United States has not extended these advantages "immediately and unconditionally" to like products originating in the customs territory of Hong Kong, China. A Member fails to accord an advantage "immediately and unconditionally" when it declines to accord an advantage for reasons relating to the origin of the product or the situation of the exporting Member.[63] In this case, the

[60] See e.g. Panel Report, *EU – Energy Package*, para. 7.1309; Panel Report, *Colombia – Ports of Entry*, paras. 7.341-7.346; Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.

[61] Appellate Body Report, *EC – Seal Products*, para. 5.87 (emphasis added).

[62] See Appellate Body Report, *EC – Seal Products*, para. 5.87.

[63] See e.g. Panel Report, *Canada – Autos*, para. 10.23 ("the extension of [the] advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin."); Panel Report, *Colombia – Ports of Entry*, para. 7.362; Panel Report, *US – Poultry (China)*, para. 7.437.

United States has failed to extend the same advantages to goods of Hong Kong, China origin for reasons relating to their country of origin and to the situation of Hong Kong, China, as perceived by the United States. In particular, as discussed in Part IV.B above, the United States has denied Hong Kong, China enterprises the advantage of marking their products with the English name of the actual country of origin on the grounds that, in the view of the United States, Hong Kong, China lacks "sufficient autonomy" from the People's Republic of China. The "sufficient autonomy" condition is a condition relating to the country of origin of products that the United States has invoked as the basis for denying goods of Hong Kong, China origin the same advantages in respect of origin marking requirements that the United States extends to like products originating in other Members (and non-Members).

85. For these reasons, the measures at issue are inconsistent with Article I:1 of the GATT 1994.

VI. REQUEST FOR FINDINGS AND RECOMMENDATIONS

86. For the reasons set forth in this submission, Hong Kong, China respectfully requests the Panel to find that:

a) The revised origin marking requirement is inconsistent with Article 2(c) and Article 2(d) of the ARO; and

b) In the event that the Panel concludes that the revised origin marking requirement is not inconsistent with the ARO, the U.S. origin marking requirement, as applied to goods imported from Hong Kong, China under the revised origin marking requirement, is a technical regulation that is inconsistent with Article 2.1 of the TBT Agreement.

87. In the event that the Panel concludes that the revised origin marking requirement is not inconsistent with both the ARO and the TBT Agreement, Hong Kong, China respectfully requests the Panel to find that the revised origin marking requirement is inconsistent with Article I:1 and Article IX:1 of the GATT 1994.

88. Hong Kong, China respectfully requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant WTO covered agreements.[64]

[64] Hong Kong, China has not developed in this submission its claims under Article 2(e) of the ARO and Article X:3(a) of the GATT 1994. Hong Kong, China reserves the right to develop those claims in subsequent submissions to the Panel, and to seek findings and recommendations in respect of those claims, depending on how the United States responds to the claims and arguments developed herein.