BEFORE THE
WORLD TRADE ORGANIZATION

UNITED STATES – ORIGIN MARKING REQUIREMENT

(WT/DS597)

FIRST WRITTEN SUBMISSION OF HONG KONG, CHINA

SUMMARY

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I. INTRODUCTION

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. As the rules of the ARO make clear, that determination must be made exclusively on the basis of where a good was manufactured or processed.

II. Background on the Revised Origin Marking Requirement

A. U.S. Country of Origin Marking Requirement

6. 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.

[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.

Section 304(a) provides that "every article of foreign origin (or its container …) 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. …".[2]

7. U.S. Customs and Border Protection ("USCBP") is responsible for implementing section 304 of the Tariff Act of 1930. Part 134 of USCBP's regulations, 19 C.F.R. Part 134, prescribes detailed rules concerning compliance with the origin marking requirement.[3] 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".[4] 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'".[5] 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.

8. 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".[6] 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".[7]

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

9. 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.[8] This was true both before and after 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

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

[3] 19 C.F.R. Part 134.

[4] 19 C.F.R. § 134.1(b).

[5] 19 C.F.R. § 134.1(b).

[6] 19 C.F.R. § 134.45(a)(1).

[7] 19 C.F.R § 134.45(b).

[8] In this summary (as in the submission itself), when discussing the U.S. origin marking requirements, Hong Kong, China uses the phrase "manufactured or produced". See 19 C.F.R. § 134.1(b). When discussing Article 2(c) of the ARO, Hong Kong, China refers to "manufacturing or processing". Hong Kong, China understands the meaning of these phrases to be materially the same.

"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.

10. 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".[9] By subsequent notice, USCBP extended the date for compliance with this requirement to 10 November 2020.[10]

11. 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.[11] 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.[12] 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".[13] 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.

12. 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".

[9] 85 Fed. Reg. 48551 (11 August 2020) ("August 11 Federal Register notice").

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

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

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

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

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

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

13. 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".[14] Article 1.2 elaborates upon this 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".

14. 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.

15. Article 2(c) of the ARO provides in relevant part that "rules of origin 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." 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."[15] 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."[16]

16. Thus, 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.

17. 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

[14] Emphasis added.

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

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

company or transaction.[17] 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 Hong Kong, China to goods manufactured or processed in the customs territory of Hong Kong, China.

18. For these reasons, the United States has "require[d] the fulfilment of a certain condition not related to manufacturing or processing" 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.

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

19. 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".

20. 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.

21. 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. 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

22. The U.S. origin marking requirement, as applied to goods of Hong Kong, China origin under the revised origin marking requirement, is a

[17] 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.

"technical regulation" within the meaning of Annex 1, paragraph 1, of the TBT Agreement because the requirement to mark an imported product with its country of origin is a "marking … requirement" that "appl[ies] to a product".

23. 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."

24. 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). 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 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. 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.[18]

25. 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, including the considerable brand and reputational value to be derived from marking a product as one having the origin of a particular Member, a simplified and less costly exportation process that does not require segregating products based on conflicting regulatory requirements adopted by different export markets, and the avoidance of confusion and potential error in the regulatory treatment of goods stemming from the inaccurate marking 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.

26. 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

27. Before turning to the claims under the General Agreement on Tariffs and Trade 1994 ("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. Hong Kong, China believes that the Panel must

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

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.

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

28. 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".

29. 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 Most-Favoured-Nation 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. 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 goods imported from Hong Kong, China may not be marked with the full English name of their actual country of origin.

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

30. Article I:1 of the GATT 1994 provides that "with respect to … all rules and formalities in connection with importation and exportation … any advantage … 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."

31. Origin marking requirements are clearly a "rule" or "formality" "in connection with importation". Section 304 of the Tariff Act of 1930 and USCBP's implementing regulations impose an origin marking requirement as a precondition for the entry of goods into the United States.

32. 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. 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.

33. 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.[19] In this case, the 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. 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).

VI. REQUEST FOR FINDINGS AND RECOMMENDATIONS

34. For the reasons set forth in its submission as summarized above, 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.

35. 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.

36. 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.

[19] 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.