

***UNITED STATES – ORIGIN MARKING REQUIREMENT***  
**(DS597)**

**CLOSING STATEMENT OF  
THE UNITED STATES OF AMERICA  
AT THE PANEL’S FIRST VIDEOCONFERENCE WITH THE PARTIES**

**September 15, 2021**

## **I. Introduction**

1. Ms. Chairperson, and members of the Panel, on behalf of the U.S. delegation, I again thank the Panel, and the Secretariat staff assisting you, for your work in this dispute. We welcome the thoughtful exchanges that we have had during this videoconference. We think those exchanges have highlighted a number of important issues in this dispute. And three key questions are central to this dispute and the panel's work: what is this dispute fundamentally about; what is Article XXI fundamentally about; and what is fundamental about the multilateral trading system.
2. First, what is this dispute fundamentally about? It is about the right of a Member to take action that it considers necessary to protect its essential security interests. This is an inherent right of sovereign governments, and it is reflected in Article XXI.
3. In this case, as the measures at issue make clear, the United States has exercised that right in light of an erosion of freedoms and rights of the people in Hong Kong, China, as well as the institutional degradation of democracy in Hong Kong, China.
4. Second, what is Article XXI fundamentally about? At its core, it is a reflection of Members' rights with respect to their respective essential security interests. Article XXI(a) means that Members shall not be required to produce information they consider contrary to their essential security; Article XXI(b) means that each Member has the right to determine, for itself, what action it considers necessary to protect its own essential security interests; and Article XXI(c) means that a Member has the right to take action in pursuance of its obligations under the UN charter for maintenance of international peace and security. These are callings beyond the scope of the multilateral trading system.

5. With respect to Article XXI(b), the self-judging nature is established by the text of that provision, in its context, and in the light of the treaty's object and purpose. In turn, recognizing that Article XXI(b) is self-judging reflects the principle of effectiveness. Negotiators did not throw this fundamental right to the wayside when negotiating the Uruguay Round agreements, in particular the Agreement on Rules of Origin and the TBT Agreement.

6. Third, what is fundamental to the multilateral trading system? What Hong Kong, China, is asking the Panel to do is to find that a Member's consideration of what is necessary to protect its essential security interests is wrong. Hong Kong, China, considers this would contribute to the security and predictability of the system. Hong Kong, China, suggests that the agreements would be ineffective otherwise.

7. The United States disagrees. Negotiators recognized that the multilateral trading system would not be well served by foraying into security issues, as reflected in the text of Article XXI and by the availability of nonviolation nullification or impairment claims.

8. This is why – as much as we have appreciated the opportunity to engage with the Panel on any number of issues over the past few days – we want to reiterate that the Panel need not and should not delve into the merits of Hong Kong, China's claims.

9. To be clear, this is not because the United States considers that Hong Kong, China, has established, or could establish, a breach with respect to those claims.

10. This is because, as we noted, as a matter of treaty interpretation, Article XXI precludes such review.

11. And as a broader, systemic matter, reviewing the merits of claims in an essential security dispute such as the present one invites a panel to substitute a Member's assessment of its own essential security interests and what action it considers necessary to protect those interests with the panel's own assessment. This would transform the multilateral trading system into a forum for security issues. This is not what the people who built the multilateral trading system upon the GATT and negotiated the WTO agreements at issue in this dispute intended.

12. Rather, what the negotiators did – in order to keep trade issues separate from security issues – is provide nonviolation nullification or impairment claims as a recourse for Members affected by essential security actions. Such claims also permit a Member who takes action to protect its essential security interests to be held accountable for that action – but without another Member or a panel substituting its judgment as to the merits of that security action.

13. This is a path that is available to Hong Kong, China, to the extent that it disagrees with the U.S. assertion of its essential security interests – for example, if Hong Kong, China, does not consider the U.S. concerns regarding the loss of democracy and autonomy to implicate those interests – although we note that certain third parties appear to disagree.

14. Instead of acknowledging that it could properly pursue a dispute via a non-violation nullification or impairment claim, Hong Kong, China, invites the Panel to review the essential security measures at issue and to find that the United States could not consider its determination at issue – that Hong Kong, China, should not be treated differently with respect to the People's Republic of China for purposes of, among other things, an origin marking requirement – to be necessary for the protection of U.S. essential security interests. Put simply, there is no basis – in

either the GATT 1994, the Agreement on Rules of Origin, or the TBT Agreement – for the Panel to do so.

## **II. Conclusion**

15. The United States thanks the Panel for your questions. We hope that our exchanges in this videoconference will assist the Panel in making the appropriate findings in this dispute.