UNITED STATES – ORIGIN MARKING REQUIREMENT

(DS597)

OPENING STATEMENT OF
THE UNITED STATES OF AMERICA
AT THE SECOND VIDEOCONFERENCE WITH THE PANEL

February 9, 2022

1. Ms. Chairperson, and members of the Panel, on behalf of the U.S. delegation, I thank the Panel, and the Secretariat staff assisting you, for your work in this dispute.

2. The submissions filed since the first videoconference with the Panel have confirmed that this dispute is fundamentally about the sovereign right of a state to protect its essential security in the manner it considers necessary. And they have further clarified a divergence of views with respect to the role of the WTO in such matters.

3. The United States has invoked Article XXI(b) with respect to the measure at issue. As the United States has explained, the measures in dispute on their face make clear the essential security interests at stake. The United States has supplied the Panel with various evidence on how those U.S. essential security concerns have indeed since materialized.[1] These concerns relate in large part to the National Security Law, and we note that additional National Security Law related arrests of journalists and democratic politicians, as well as media outlet shutdowns, have occurred since the United States last updated this Panel in its Second Written Submission.[2] Just yesterday, on February 8, 2022, the United States and 20 other countries issued a joint statement rearticulating the concerns in Hong Kong, China. As mentioned in the statement, "A stable and prosperous Hong Kong in which human rights and fundamental freedoms are protected should be in everybody's interest."[3]

[1] *See* Exhibits US-119 to US-133, US-197 to US-200.

[2] *See e.g., Hong Kong pro-democracy news site closes after raid, arrests*, AP News (December 29, 2021), *available at* https://apnews.com/article/business-media-crime-arrests-hong-kong-2315777ace6e85c58eeb876c6c66feba (US-209).

[3] *Media Freedom Coalition Statement on Closure of Media Outlets in Hong Kong*, Office of the Spokesperson, U.S. Department of State (February 9, 2022) (US-210).

4. Hong Kong, China, has never disputed or contested any of those facts. Nor could it, because the chilling effect of the National Security Law on fundamental freedoms and human rights is deliberate and undisputable. Instead, it asserts that the United States has failed to articulate any essential security interests. And it asks this Panel to recommend that the United States withdraw or modify a measure that it considers necessary for the protection of its essential security interests. Thus, the Panel is presented with the fundamental question as to the role of the multilateral trading system in such matters.

5. The U.S. position on this issue has been clear and consistent. As the United States has explained, Article XXI of the GATT 1994 is, by its terms, self-judging. As such, a measure as to which Article XXI is invoked cannot be found to be inconsistent in the sense that it violates an obligation. However, such a measure may give rise to a claim of non-violation nullification and impairment. This structure is reflected in the text of the treaty, and it provides recourse with respect to a Member's essential security actions while preserving the role of the WTO as a forum to address trade issues – not to evaluate the merits of a Member's security actions.

6. This case highlights why Article XXI leaves essential security concerns to the judgment of the Member. In this case the essential security interests implicate, among other concerns, the values of fundamental freedoms and human rights. While Hong Kong, China, may not consider these principles to be valuable or relevant to its essential security interests, the United States considers these principles to lie at the core of its essential security interests. The multilateral trading system is not the appropriate platform to review, much less potentially undermine, the determination of a Member in this regard. Instead, the multilateral trading system provides a viable avenue of recourse through non-violation and nullification claims.

7. Hong Kong, China, takes the position that the Panel is required to determine whether the United States is wrong to "take action which it considers necessary" for the protection of its essential security interests. Indeed, Hong Kong, China, asserts that the text of the WTO agreements is meaningless if a panel is not empowered to make such a recommendation. In other words, Hong Kong, China, believes that the multilateral trading system not only permits, but also requires, a panel to substitute the sovereign judgment of a WTO Member with its own on what is an essential security matter.

8. This is a dangerous proposition. The balance struck in the text of Article XXI(b) reflects the understanding that the credibility of the trading system depends on its role as a forum for trade issues, not security issues. The ability of the WTO to perform its key functions would not be improved if it were to also take on the role of second-guessing Members' security actions. As this dispute makes clear, the sensitive nature of essential security actions does not lend itself to agreement among Members as to the appropriateness of such actions – including, for example, what a Member's essential security interests are, what measures are "necessary" to protect those interests, and what constitutes an "emergency" in international relations. Why, then, would Members empower a panel to evaluate those actions? The answer, in the text of Article XXI(b), is that they did not.

9. Today, the United States will again show that Hong Kong, China, is incorrect. First, the United States will explain that Article XXI(b) is self-judging in its entirety, and Hong Kong, China's interpretation to the contrary has no basis in the customary rules of treaty interpretation. Second, the United States will show that Hong Kong, China, also fails to apply the customary rules of treaty interpretation in arguing that Article XXI(b) does not apply to the claims under the

Agreement on Rules of Origin or the TBT Agreement. Finally, without prejudice to the U.S. position that, in light of the invocation of Article XXI(b), the Panel should not reach the merits of Hong Kong, China's claims, the United States will explain that Hong Kong, China, has failed to establish a breach of the *Agreement on Rules of Origin* or the TBT Agreement.

A. Article XXI(b) Is Self-Judging in its Entirety

10. As the United States has maintained since it joined the GATT 1947 and subsequently the WTO, Article XXI(b) is self-judging by its terms. Each WTO Member has the right to determine, for itself, what action it considers necessary to protect its own essential security interests. The self-judging nature of Article XXI(b) of the GATT 1994 is established by the text of that provision, in its context, and in light of the treaty's object and purpose.

11. As we have stated, Article XXI(b) is fundamentally about a Member taking an action "which it considers necessary". The relative clause that follows the word "action" describes the circumstances which the Member "considers" to be present when it takes such an "action". The clause begins with "which it considers necessary" and ends at the end of each subparagraph. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member.

12. This is the only grammatically correct reading of the English text of Article XXI(b), and the interpretation that best reconciles the equally authentic English, French, and Spanish texts under Article 33 of the VCLT. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances is committed to the judgment of that Member alone.

13. The interpretation of Hong Kong, China, of Article XXI(b) is contrary to the ordinary meaning of the terms and the grammatical structure of the provision. Hong Kong, China, seeks to cleave the single clause beginning with "which it considers" so that it does not qualify the subparagraphs.[4] To accomplish this, Hong Kong, China, suggests reordering the language of the provision, such that the language of the subparagraphs would come before the language "which it considers".[5] This is not how the text is written.

14. Moreover, there are no words before any of the subparagraphs – such as "and which" or "provided that" – to indicate a break in the single relative clause or to introduce a separate condition with respect to the subparagraphs. Put simply, Hong Kong, China's interpretation of Article XXI(b) requires reading into the provision words that are not there. This reinterpretation of the ordinary meaning of the text is not consistent with the customary rules of treaty interpretation and should therefore be rejected.

15. Hong Kong, China, also suggests reading a good faith obligation into the text of Article XXI(b). However, under the DSU, panels are limited to examining the consistency of challenged measures with cited provisions of "covered agreements". Nothing in the text of the provisions of the covered agreements at issue, including Article XXI(b), provides for a good faith obligation. While Article 3.2 of the DSU calls for the terms of the covered agreements to be interpreted in accordance with the customary rules of treaty interpretation, that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose", reading words into treaty text that are not there –

[4] U.S. Second Written Submission, paras. 21-27.

[5] Responses of Hong Kong, China, to Questions from the Panel, n. 103.

such as reading the requirements of the chapeau of Article XX in to Article XXI(b) – has no basis in those rules. Nothing in the DSU otherwise provides for the application of a panel of a "principle of good faith".

16. To be clear, the United States does not disagree that Members are to implement their obligations in "good faith" under international law. However, the terms of WTO obligations are set forth in the provisions of the covered agreements. It is those terms that a panel is called to interpret under the DSU, not a free-standing good faith obligation. In this dispute, Article XXI(b) is self-judging by its terms.

17. The interpretation that Article XXI(b), including the subparagraphs, is self-judging reflects the balance negotiators struck in the text. As the United States has shown, the negotiating history confirms this interpretation. Negotiators understood that the multilateral trading system would not be well-served by having panels evaluate a Member's essential security actions – including what circumstances justify taking such an action, or whether a Member really considers an action necessary for the protection of its essential security interests. Rather, as the negotiating history confirms, non-violation nullification or impairment claims are the appropriate recourse with respect to such actions.[6]

18. As the United States has also explained, interpretation of a treaty provision – here, Article XXI(b) – consistent with the customary rules of treaty interpretation reflects the principle of

[6] U.S. Responses to Panel Questions 64, 65; U.S. Second Written Submission, paras. 98-100.

effectiveness. That is, there is no separate principle of effectiveness (*effet utile*) that requires interpreting a text contrary to its ordinary meaning.[7]

19. Hong Kong, China, is therefore incorrect to argue that the principle of effectiveness requires that Article XXI(b) be interpreted to make the subparagraphs subject to review by a panel. Article XXI(b) should be interpreted based on its ordinary meaning, in its context and in light of the object and purpose of the treaty. Article XXI(b) is self-judging by its terms, and the context, the object and purpose, and the negotiating history confirm this interpretation. Article XXI(b) should not be interpreted contrary to its terms simply to achieve the result that Hong Kong, China, seeks – that is, to empower a panel to recommend that a WTO Member withdraw an essential security measure.

20. Hong Kong, China, fails to provide any textual basis for its assertion that the effectiveness of Article XXI(b) is contingent on the availability of review by a dispute settlement panel of the merits of a Member's invocation of that provision. Of course, Members have agreed to the terms of the DSU, but nothing in the DSU suggests that a provision that is self-judging by its own terms should be interpreted otherwise. To the contrary, the DSU calls for interpretation of WTO provisions in accordance with the customary rules of treaty interpretation. If those rules yield an interpretation that a provision is self-judging, as in the case of Article XXI(b), such an interpretation is fully consistent with the DSU.[8]

[7] U.S. Opening Statement, paras. 50-60; U.S. Responses to Panel Questions 46, 47.

[8] U.S. First Written Submission, paras. 321-327; U.S. Opening Statement, paras. 69-79; U.S. Responses to Panel Questions, paras. 4-6; U.S. Second Written Submission, paras. 212-213.

21. The United States likewise does not agree with Hong Kong, China's view that WTO provisions such as the subparagraphs of Article XXI(b) are ineffective if they provide guidance to Members. Rather, the United States considers that WTO Members take treaty language seriously in developing their domestic measures regardless of whether a WTO panel could find that such a measure is WTO-inconsistent.

22. That said, it is not the case that, because Article XXI(b) is self-judging, a Member invoking that provision faces no consequences under the DSU. Under the DSU, a panel may review whether a Member's benefits have been nullified or impaired by the essential security measure and assess the level of any such nullification or impairment. Article 26.1 sets out that the DSU "shall apply" to non-violation claims, subject to four adjusted procedures. And because the DSU applies, Article 22 on "Compensation and the Suspension of Concessions" applies to such claims. Article 22.2 confirms that a panel's recommendation to make a mutually satisfactory adjustment (as required by Article 26.1(b)), could, in turn, potentially lead to authorization to take countermeasures.

23. The issue in this dispute therefore is not whether the interpretation that Article XXI(b) is self-judging in its entirety means that there is no consequence for a Member's essential security actions. The question is whether the possibility of rebalancing of concessions under a non-violation nullification and impairment claim – following the procedures of the DSU – is meaningless, as Hong Kong, China, suggests, and whether instead WTO panels are required to instruct Members to revoke their essential security measures. The text of both Article XXI(b), and the DSU itself, which provides that recommendations may not diminish the rights of WTO Members, indicates that the answer to this question is no.

24. Although the U.S. position is that, in light of the self-judging nature of Article XXI(b), it is not compelled to invoke and make an evidentiary showing with respect to a specific subparagraph, Hong Kong, China, is also incorrect to assert that the United States has made no articulation of its essential security interests in this dispute.[9] The very measures that Hong Kong, China, chose to challenge reflect a determination that actions by the People's Republic of China to undermine Hong Kong, China's autonomy constitute "an unusual and extraordinary threat . . . to the national security, foreign policy, and economy of the United States".[10] The U.S. State Department report cited in the Executive Order documents numerous actions undermining the autonomy of Hong Kong, China, and the rights and freedoms of its people.[11] The United States has also provided significant evidence in the course of this dispute.[12] Third parties have been able to engage with the facts on the record in this regard. Hong Kong, China's own refusal to acknowledge those facts seems to support the conclusion that Members understood that the assessment of essential security actions and the circumstances in which they are taken are subjective, and the WTO is not the appropriate forum to address security issues.

B. Article XXI(b) Applies to the Specific Claims under the Agreement on Rules of Origin and the TBT Agreement.

25. The United States has shown, using the customary rules of treaty interpretation, that Article XXI(b) applies to the claims at issue under the *Agreement on Rules of Origin* and the TBT Agreement. The interpretative approach by Hong Kong, China, with respect to this

[9] Hong Kong, China, Second Written Submission, paras. 149-152.

[10] Executive Order 13936 of July 14, 2020, 85 Fed. Reg. 43413 (July 17, 2020) (US-2).

[11] 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5).

[12] U.S. First Written Submission, paras. 8, 16-21; U.S. Opening Statement, paras. 18-32; U.S. Second Written Submission, para. 5.

question is not grounded in those rules. As we will discuss, Hong Kong, China, suggests application of a results-driven principle of effectiveness or "necessary implication" test, neither of which is provided for in those rules. In addition, Hong Kong, China, incorrectly rejects the relevance of the structure of the WTO Agreement as context under those rules, both in terms of the overlapping nature of the claims at issue and the balance of rights and obligations provided by the single undertaking.

26. The arguments by Hong Kong, China, that Article XXI(b) does not apply in this dispute are not based on a proper application of the customary rules of treaty interpretation. Hong Kong, China, suggests that Members may have recourse to Article XXI(b) by only two ways: either Article XXI(b) is expressly incorporated in a non-GATT agreement, or it applies by "necessary implication".

27. As the United States has explained, the "necessary implication" standard suggested by Hong Kong, China, has no basis in the customary rules of treaty interpretation, and has no legal relevance for this dispute.

28. As the United States has also explained, nothing in the customary rules of treaty interpretation suggests that express incorporation is the only basis on which Article XXI(b) could apply to the claims at issue. The question of whether an exception is expressly incorporated is not a substitute for analysis under the customary rules of treaty interpretation. Those rules reflect the principle of effectiveness, such that interpretation in accordance with those rules reflects that principle. There is no separate principle of effectiveness that dictates interpreting treaty provisions simply in order to achieve a specific result – here, as Hong Kong, China, seeks, to

deny Members the right to take measures under the *Agreement on Rules of Origin* or TBT Agreement necessary to protect their essential security interests.

29. Moreover, in the context of this dispute, Hong Kong, China, conflates ineffectiveness with redundancy. That is, Hong Kong, China, asserts that the express incorporation of Article XXI(b) in certain non-GATT agreements would be ineffective if Article XXI(b) could apply in the absence of such incorporation. But as the United States has explained, language providing for express incorporation in those agreements still has legal meaning and is legally effective. A Member may still have recourse to an exception under a provision that expressly provides for it, even if that exception would otherwise apply.

30. Finally, Hong Kong, China, ignores the nature of the claims and measures at issue, and the relationship between those claims, by dismissing the relevance of the structure of the WTO Agreement. Again, the customary rules of treaty interpretation provide for taking account of the structure of the treaty as context. Past dispute settlement reports addressing the applicability of Article XX to non-GATT instruments have correctly recognized as much.[13] As the *China – Rare Earths (AB)* report noted, with respect to the applicability of exceptions, "The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, ***including the measure at issue and the nature of the alleged violation***."[14]

[13] *See, e.g.*, *Canada – Periodicals (Panel)*, para. 5.16; *China – Rare Earths (AB)*, para. 5.51.

[14] *China – Rare Earths (AB)*, para. 5.62 (emphasis added).

31. Here, the structure of the WTO Agreement is relevant context for the respective relationships between the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement, and it supports the interpretation that Article XXI(b) applies to the claims under those agreements. The inclusion of these agreements as part of the WTO Agreement in its Annex 1A is not merely a function of those agreements relating in some way to trade in goods, as Hong Kong, China, repeatedly suggests.[15] Rather, the inclusion of the GATT 1994, the *Agreement on Rules of Origin*, and the TBT Agreement in a single annex to the WTO Agreement is a legal structure, and must be taken into account in addressing the interpretative issues relating to these agreements, in particular the issue of applicability of Article XXI(b) as it relates to "***the measure at issue and the nature of the alleged violation.***"[16]

32. To be clear, the specific interpretative question at issue in this dispute can be framed as whether Article XXI(b) of the GATT 1994 applies to the *specific claims at issue*, which are all brought against the same measure, a marking requirement. The United States understands the Panel to have recognized this in its questioning during the first videoconference.[17]

33. However, Hong Kong, China, mischaracterizes the U.S. position as simply that Article XXI(b) applies to all the Annex 1A agreements on trade in goods because they relate in some way to goods.[18] Furthermore, its arguments that Article XXI(b) does not apply ignore the structure of the WTO as context. Instead, Hong Kong, China's arguments are largely premised on the unsupportable position that each Annex 1A agreement is a stand-alone agreement

[15] Hong Kong, China, Second Written Submission, para. 132.

[16] *China – Rare Earths (AB)*, para. 5.62 (emphasis added).

[17] *See e.g.*, Written Panel Questions to the Parties, Questions 21, 24, and 27.

[18] Hong Kong, China, Second Written Submission, para. 44.

establishing its "own balance" of rights and obligations. Because Hong Kong, China, views the non-GATT 1994 agreements in Annex 1A as entirely divorced from both the GATT 1994 and the WTO Agreement, it dismisses the overlapping MFN provisions as merely being an "inevitable consequence" of the agreements covering trade in goods.

34. This overlap is not an "inevitable consequence", particularly based on the way in which Hong Kong, China, has framed its claims. And the interpretative question at issue is not, as Hong Kong, China, suggests, whether, in the abstract, a measure justified under an exception under one agreement may benefit from that exception with respect to a claim under another agreement.[19] To recall, the measure being challenged here is an origin marking requirement. Marks of origin are disciplined specifically under Article IX of the GATT 1994; indeed, the article is entitled "Marks of Origin". The element of the measure being challenged is what Hong Kong, China, characterizes as a "sufficient autonomy" condition, and the marking of goods from Hong Kong, China, with the term "China". Hong Kong, China, challenges this as discriminatory under Articles I and IX of the GATT 1994, Article 2(d) of the *Agreement on Rules of Origin* and Article 2.1 of the TBT Agreement, and argues that this "condition" is impermissible under Article 2(c) of the *Agreement on Rules of Origin*. The substantive overlap among these claims, with respect to the same measure, is established by the claims themselves, as the United States has explained.

35. Nothing in the single undertaking structure of the WTO Agreement suggests that the principle of MFN or "less favorable treatment" should be understood differently among the

[19] Hong Kong, China, Second Written Submission, paras. 141-144.

agreements. Even Hong Kong, China, appears to recognize as much in this dispute;[20] it provides the same facts and legal arguments with respect to discrimination in support of all of its claims. Rather than being the "inevitable consequence" of each of the agreements at issue covering trade in goods as Hong Kong, China, suggests, this is an outcome that is etched into the text of the provisions at issue as well as the legal structure of the WTO Agreement.

36. In light of the substantive overlap between the claims with respect to the marking requirement at issue, the United States must once again highlight the absurd result that would occur if the exception does not apply in this dispute. The result would be that a Member could defend a marking requirement, which it imposed on the basis of essential security, against claims of discrimination under Articles I and IX of the GATT, and such an invocation of essential security would not be subject to panel review. However, the same element of that same measure would somehow be subject to review under two other agreements in the same annex within the legal structure of the WTO Agreement. It is absurd to conclude that negotiators were so concerned about essential security with respect to a specific discipline on origin marking (that is, in Article IX of the GATT 1994) that they provided a self-judging exception for it, but that such concern was somehow obviated if that origin marking were also considered a rule of origin or a technical regulation. Application of customary rules of treaty interpretation should not produce absurd results.[21]

[20] Hong Kong, China, Second Written Submission, para. 128; Hong Kong, China, First Written Submission, para. 66, 72, 77.

[21] Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984), at 120 (US-20).

37. However, Hong Kong, China, asserts that this was indeed the intent of the negotiators because, in its view, each Annex 1A agreement is a separate agreement "representing its own balance of rights and obligations." This position again disregards the single undertaking structure of the WTO Agreement, which is the overarching document that contains all the Annex 1A (as well as the Annex 1B and 1C) agreements. As a legal matter, the Annex 1A agreements are not separate agreements that can be read in a vacuum, as Hong Kong, China, argues. Not surprisingly, Hong Kong, China, provides no textual support, nor any basis in the customary rules of treaty interpretation, for its assertion.

38. And as noted, Hong Kong, China, makes no effort to further elaborate on this supposed "balance" in the context of this dispute. Hong Kong, China, fails to provide any textual or other analysis as to how essential security interests, as recognized in Article XXI(b), are "balanced" and reconciled in the *Agreement on Rules of Origin* or the TBT Agreement.

39. Rather, the premise of Hong Kong, China's argument appears to be simply that negotiators did not care about essential security. With respect to the *Agreement on Rules of Origin*, Hong Kong, China, dismisses essential security as a mere "policy consideration" that negotiators rejected in the preamble by referring to rules of origin being applied in an "impartial, transparent, predictable, consistent and neutral manner".[22] Of course, principles of transparency, impartiality, and predictability are fully consistent with essential security considerations, as reflected in the fact that those principles are likewise included in the GATT 1994.

[22] Hong Kong, China, Opening Statement, para. 29; Response of Hong Kong, China, to Question 33.

40. With respect to the TBT Agreement, Hong Kong, China, claims that such a "balance" is reflected in the fact that national security requirements are a legitimate objective provided for in Article 2.2, and that Article XXI(a) is reflected in the exception to notification obligations under the TBT Agreement. However, none of those aspects addresses the right to take action to protect essential security interests articulated in Article XXI(b). Indeed, the only place that refers to that right is in the preamble, which reflects the legal structure of the WTO Agreement.

41. Hong Kong, China's misplaced reliance on the individual agreements' "balance" highlights the fundamental systemic issue regarding the role of the multilateral trading system with respect to essential security issues. The position advocated by Hong Kong, China, appears to be that Uruguay Round negotiators considered, for example, that with respect to trade in goods wartime or emergencies in international relations were somehow only relevant to import licensing or trade-related investment measures, and as such that the WTO is the appropriate forum to address essential security issues with respect to other measures.

42. The U.S. position in this regard is clear. The WTO is not the appropriate forum for addressing essential security issues, whether with respect to trade in goods, or trade in services, or intellectual property, as reflected in the essential security exceptions provided for in each of Annex 1A, 1B, and 1C. In the context of this dispute, the United States has provided more than what is required in terms of the invocation of Article XXI(b). The United States has taken an action – in particular, a marking requirement – that ***the United States considers*** necessary for the protection of ***its*** essential security interests. This action may not be second-guessed under the claims at issue under either the GATT 1994, the *Agreement on Rules of Origin*, or the TBT Agreement.

43. Notwithstanding the U.S. invocation of the essential security exception, to be responsive to the Panel's questions and concerns, the United States now turns to address certain of the arguments made by Hong Kong, China, with respect to rules of origin and technical regulations.

C. Hong Kong, China, Fails to Establish a Breach of the Agreement on Rules of Origin

44. The United States recalls that the measure at issue is a marking requirement. This is, of course, about terminology – that is what a mark of origin is, under the ordinary meaning of the term.[23] Hong Kong, China's submissions throughout these proceedings confirm that what it is upset about is precisely terminology – in particular, that the term "China" is the required marking for goods in the United States.[24]

45. As the United States has explained, without prejudice to its position that the Panel should not evaluate the merits of the claims under the *Agreement on Rules of Origin*, Hong Kong, China, has failed to establish its claims with respect to the Agreement. Hong Kong, China's claim that the marking requirement at issue breaches the *Agreement on Rules of Origin* is based on a number of fundamentally flawed arguments with respect to the scope of the Agreement, as well as a mischaracterization of the measures at issue and their basis. The United States will address these points in turn. In particular, the United States will explain: first, that the *Agreement on Rules of Origin* applies only to those measures the Agreement defines as "rules of origin", and not to the instruments they administer, and provides a degree of discretion with respect to those rules of origin; second, that the measure at issue is a marking requirement, not a

[23] *See* U.S. Response to Panel Questions, para. 86; The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1700, 1698 (US-159).

[24] *See, e.g.*, Hong Kong, China, Second Written Submission, paras. 40, 44; Hong Kong, China, Responses to Panel Questions, para. 15, n.18, para. 32.

rule of origin, and that Hong Kong, China, errs in conflating the two; and, finally, that consideration of autonomy is not a rule of origin under the Agreement.

46. The *Agreement on Rules of Origin* applies to a defined set of measures. The Agreement defines "rules of origin" for purposes of the Agreement in Article 1. As the United States and a number of third parties have explained, Article 1 distinguishes between a rule of origin that is subject to the agreement, and the instrument it administers – whether that instrument is a marking requirement, an antidumping duty, or something else.[25] This distinction is confirmed by Article 2(b), which indicates that while rules of origin may not be used to pursue trade objectives, the underlying measure may. Thus, a marking requirement, and in particular the terminology used in marking, is not itself a "rule of origin" subject to the *Agreement on Rules of Origin*.

47. The *Agreement on Rules of Origin* also establishes two sets of disciplines with respect to rules of origin covered by the Agreement: those that apply before completion of the Harmonized Work Program, in Article 2; and those that apply after completion of the Harmonized Work Program, in Article 3.[26] During the transition period in which Article 2 applies, the *Agreement on Rules of Origin* does not prescribe specific rules of origin. As the *US – Textiles Rules of Origin* panel report explained, "There is no requirement in Article 2 of the RO Agreement to use a particular type of rule."[27]

[25] *See also* EU Third Party Submission, paras. 44-46; Responses of Japan to Panel Questions, paras. 5-6; Responses of the EU to Panel Questions, paras. 2; Responses of Canada to Panel Questions, para. 20.

[26] U.S. First Written Submission, para. 289.

[27] Para. 6.73.

48. This means that different Members may determine the origin of a particular good to be a different country. Indeed, given the discretion that Article 2 allows in determining the criteria that confer origin,[28] a rule of origin that is inconsistent with the Agreement might produce the same result with respect to country of origin of a good as a rule of origin that is not inconsistent. In other words, the Agreement does not preclude the United States, or any other Member, from determining that the country of origin of a particular good is "China", or any other country.[29]

49. The measure at issue is a requirement to mark goods with the term "China". As the United States has explained, for purposes of marking goods imported into the United States, the same analysis that would apply to determine the origin of any good from any source applies with respect to goods produced in Hong Kong, China. This analysis is conducted on a case-by-case basis. If, as a result of this analysis, a finished good is a product of Hong Kong, China, that product would be marked with "China".[30]

50. The measures at issue make clear why this is the case. Section 201(a) of the US-Hong Kong Policy Act of 1992 provides for the continued application of U.S. laws to Hong Kong, China, in the same manner as applied prior to the July 1, 1997, handover from Great Britain to the People's Republic of China, based on promises in the Joint Declaration.[31] "Hong Kong" continued to be acceptable marking for purposes of U.S. law after the handover.

[28] *US – Textiles Rules of Origin (Panel)*, para. 6.24.

[29] *See also* Responses of Canada to Panel Questions, para. 16.

[30] U.S. Response to Panel Question 4; U.S. Second Written Submission, para. 165.

[31] U.S. First Written Submission, paras. 16-17.

51. As set forth in the State Department's 2020 Hong Kong Policy Act Report[32] and Executive Order 13936, and as explained at length in previous U.S. submissions,[33] the circumstances have changed. As such, in May 2020 the Secretary of State reported that Hong Kong, China, no longer warrants treatment under U.S. law in the same manner as those laws were applied before July 1, 1997. The President then determined in Executive Order 13936 that "in light of a series of actions by the People's Republic of China to undermine the autonomy and freedoms promised in the Joint Declaration, Hong Kong, China, is no longer entitled to differential treatment vis-à-vis the People's Republic of China" for purposes of the U.S. marking statute and a number of other laws. Thus, as provided in the *Federal Register* notice, the marking for goods produced in Hong Kong, China, is "China". That is, "China" is the term that should appear on goods.

52. In arguing that these measures breach the *Agreement on Rules of Origin*, Hong Kong, China, persists in erroneously equating a mark of origin with both a determination of origin and the rule of origin used to make that determination. According to Hong Kong, China, these are all subject to the disciplines of the *Agreement on Rules of Origin*.[34] But this is just not the case. The text of the agreement explicitly provides otherwise.

53. A dumping duty, for example, is not a rule of origin subject to the *Agreement on Rules of Origin* just because a Member must make a determination of origin in deciding whether to apply

[32] 2020 Hong Kong Policy Act Report (May 28, 2020) (US-5).

[33] U.S. First Written Submission, paras. 8, 16-23; U.S. Opening Statement, paras. 18-32; U.S. Second Written Submission, para. 5.

[34] *See, e.g.*, Hong Kong, China, Responses to Panel Questions, paras. 13-16; Hong Kong, China, Second Written Submission, paras. 16-19.

the duty.[35] A TRQ is not a rule of origin subject to the Agreement just because a Member must make a determination of origin in deciding whether a good qualifies for in-quota treatment. Likewise, an origin mark – and, more particularly, the terminology used as a mark – is not a rule of origin subject to the *Agreement on Rules of Origin* just because a Member makes a determination of origin in determining what mark might be permissible. Contrary to Hong Kong, China's repeated assertions, the fact that a dumping duty, or qualification for in-quota treatment, or a mark of origin "results from" or "involves" a rule of origin does not make it a rule of origin within the scope of the *Agreement on Rules of Origin*.[36] This is the fundamental problem with Hong Kong, China's claims under the Agreement.

54. The fact that the *Agreement on Rules of Origin* does not have the expansive scope sought by Hong Kong, China, does not make the agreement meaningless, as Hong Kong, China, suggests.[37] It simply means that the Agreement does not produce the result that Hong Kong, China, seeks in this dispute.

55. Perhaps to address the fact that the Agreement on its face does not apply to instruments that a rule of origin is used to administer (as opposed to the rule of origin itself), Hong Kong, China, claims that consideration of autonomy is a rule of origin disciplined by the Agreement. There is no basis for this assertion in the text of the *Agreement on Rules of Origin*. Questions of

[35] See Hong Kong, China, Second Written Submission, para. 19.

[36] *See, e.g.*, Hong Kong, China, Second Written Submission, para. 20.

[37] Hong Kong, China, Second Written Submission, paras. 18, 51.

the autonomy of a country and over what territory that country exercises such autonomy do not apply to goods, nor has Hong Kong, China, explained how they could.[38]

56. Article 1 of the *Agreement on Rules of Origin* defines rules of origin as "as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods". Autonomy, and over what territory, is a question of political determination, within the right of a Member to make. This is not a determination that is made with respect to goods, and Members did not cede their right to make such a determination by agreeing to the *Agreement on Rules of Origin.*

57. The text of the *Agreement on Rules of Origin* makes clear that it does not apply to considerations of autonomy. First, the text of the Agreement indicates that rules of origin address the technical criteria that a Member applies to determine the origin of a good – such as "the criterion of change of tariff classification" (in Article 2(a)(i)); "the ad valorem percentage criterion" (in Article 2(a)(ii)); and "the criterion of manufacturing or processing" (Article 2(a)(iii)). These criteria are applied to a good to determine its origin. Such criteria are distinct from the question of whether that geographic area possesses autonomy, and what terminology is used for that geographic area.

58. In addition, there is no equivalent of Article 2(c) in Article 3, that is, after completion of the Harmonized Work Program. This is not because, after the transition period in which Article 2 applies, the Harmonized Work Program will have addressed and resolved issues of autonomy, and require all Members to use the same marking terminology. It is because questions of

[38] *See also* Canada's Third Party Submission, paras. 5-6; Responses of Canada to Panel Questions, para. 13; Responses of the EU to Panel Questions, paras. 12-13.

autonomy and terminology are not rules of origin, and they are not subject to the *Agreement on Rules of Origin*.

59. Put simply, the United States requires the marking of a good produced in the geographic region of Hong Kong, China, as China. The United States uses its normal rules of origin in determining the applicable region, and then has chosen the name to be associated with the region of Hong Kong, China, based on its essential security interests, in light of China's escalating interference in the governance, democratic institutions, and human rights and freedoms of the people of Hong Kong, China. It is clear that, notwithstanding the fact that Hong Kong, China, is part of China, Hong Kong, China, is unhappy that the United States requires goods to be marked with the term "China". But this determination of the appropriate marking is not the basis of a claim under the *Agreement on Rules of Origin*.

D. Hong Kong, China, fails to establish a breach of the TBT Agreement.

60. The United States recalls that the text of Article 2.1 prohibits technical regulations that accord "less favorable treatment" to the concerned imported products as compared to other foreign like products based on origin. That is, when based on an overall assessment of the facts and circumstances, if it is found that there is detrimental impact to the conditions of competition of the concerned imports as a result of the operation of the disputed measure, and if that detrimental impact is based on the administration of an origin-based discrimination, the element of "less favorable treatment" can be established. However, if the detrimental impact can be explained on the basis of origin-neutral factors, including the regulatory purpose and accompanying facts and circumstances, then those circumstances are indicative of non-discrimination.

61. Thus, to establish its claim under Article 2.1 of the TBT Agreement, Hong Kong, China, needs to establish the following: one, that the disputed measures fall within the scope of the TBT Agreement; two, there is detrimental impact to the conditions of competition; three, this impact is attributed to an origin-based discrimination as a result of the disputed measures; and four, this attribution must also take into account the existence of any origin-neutral factors, including the factual circumstances as well as the regulatory objective.

62. Hong Kong, China, has failed on all four counts. The United States will not readdress whether the disputed measure actually falls within the scope of the TBT Agreement because Hong Kong, China, has not added any new arguments since its first written submission. The United States will address the deficiencies in points two through four with respect to Hong Kong, China's Article 2.1 claim in the following order: First, Hong Kong, China, does not show how the disputed measure actually accords "less favorable" treatment under Article 2.1 on the basis of an origin-based discrimination. Second, Hong Kong, China, fails to engage with the regulatory objective of the disputed measure. Third, the detrimental impact claims by Hong Kong, China, are baseless.

63. First, Hong Kong, China, has not shown "less favorable" treatment as a result of an origin-based discrimination. Hong Kong, China, attempts to convey that there is "less favorable" treatment by arguing that its products are denied the treatment of using their "full English name". In its submissions following the first videoconference, Hong Kong, China, has alleged that this is

de jure discrimination, and therefore there is "less favorable" treatment because it absolves them of "any additional analysis."[39]

64. As the United States explained in its prior submission, a formally different requirement does not automatically mean there is "less favorable" treatment. Hence, there is need for "additional analysis." Furthermore, the term "*de jure*" is found nowhere in the text of Article 2.1 and does not relieve the complainant of the burden to establish all the elements of that provision. In addition, Hong Kong, China, does not appear to contest the right of Members to require origin marking. Rather, Hong Kong, China, is challenging the determination of the terminology used in such a requirement. As the United States has explained, however, the treaty provisions at issue – including Article 2.1 – by their terms do not require a Member to use a particular term to identify a country, or purport to define what the "actual" country of origin is or how that would be determined.

65. Moreover, the terminology used in marks of origin by its nature distinguishes on the basis of origin. In other words, imports from Hong Kong, China, are required to be marked with terminology as determined by the United States, just as imports from other countries are also required to be marked with terminology as determined by the United States. Products of Hong Kong, China, are able to use its "full English name" with the terminology that the United States has determined, in light of the lack of autonomy vis-à-vis China. The fact that Hong Kong, China, disagrees with what the United States has determined to be the correct terminology does not mean that goods of Hong Kong, China, are being subjected to any "less favorable" treatment.

[39] Response of Hong Kong, China, to Panel Questions, para. 53.

66. Second, as the United States explained in its submissions, detrimental impact, if any, that can be rationally related to any origin-neutral factor is indicative of non-discrimination. And in the present dispute, the United States has explained that the disputed measure has a regulatory objective that is origin-neutral. That is, the basis of the "sufficient autonomy" condition that is being challenged is to protect U.S. essential security interests, including with respect to the U.S. concerns regarding fundamental freedoms, human rights, and democratic norms. This is a global concern, and the U.S.-Hong Kong Policy Act even spells out that "support for democratization is a fundamental principle" of overall U.S. foreign policy.

67. The policies deployed in light of such concerns vary based on facts and circumstances, which furthermore highlights the self-judging nature of actions "necessary" to protect essential security interests. But the concern is universal and is not discriminatorily applied. While Hong Kong, China, questions the genuineness and legitimacy of those concerns, it has not provided any argument that they are not origin-neutral considerations other than to say it disagrees.

68. Indeed, Hong Kong, China, does not address or account for the regulatory objective of the measures at issue at all. Instead, Hong Kong, China, suggests that the question of whether security interests are a regulatory objective that should be taken into account in an Article 2.1 analysis is not one that needs to be addressed (although it hints that it considers the answer to be no).

69. As the United States explained, *security interest*, as opposed to ***essential*** *security interest*, is a regulatory objective that must be taken into account in the evaluation of whether there is a breach of Article 2.1 of the TBT Agreement. If the objective deals with interests of *essential security*, then there can be no finding on the merits of the issue due to the self-judging nature of

Article XXI(b). If the objective deals with security interest, a panel may take into account the objective and appropriately evaluate the detrimental impact, and whether and how it is attributable to the disputed measure under Article 2.1.

70. The fact that Hong Kong, China, up until this second videoconference with the Panel, has been unable to articulate a position as to whether *as a legal matter* security interests (or, indeed, any regulatory purpose) should be taken into account under Article 2.1 is rather surprising, considering that Hong Kong, China, chose to bring a claim under this provision. Instead, Hong Kong, China, seeks to dismiss the relevance of the issue by asserting that the United States has not articulated its essential security interests in this dispute. However, although the United States is not required to do so, the United States has provided plentiful information regarding the essential security interests at stake, both publicly on the face of the measures and as evidence to the Panel. It is Hong Kong, China, that has declined to engage with or rebut these facts, and instead simply stated that it considers a relationship between the measures at issue and security interests to be "inconceivable".[40]

71. Instead, Hong Kong, China, simply argues that mark of origin requirements are origin-based, and therefore the regulatory objective is irrelevant. But as the United States has explained, while an origin marking requirement is inherently origin-based, the regulatory basis for the terminology requirement with respect to goods from Hong Kong, China, is origin-neutral.

72. Lastly, Hong Kong, China, has failed to show detrimental impact attributable to the measures at issue. As the United States just mentioned, a formally different requirement does

[40] Second Written Submission of Hong Kong, China, para. 112.

not automatically mean there is "less favorable" treatment. It must still be shown that there is detrimental impact. In addition to having failed to show any origin-based discrimination, Hong Kong, China, has failed to produce sufficient evidence to demonstrate detrimental impact.

73. As an initial matter, the evidence it has produced is anecdotal; Hong Kong, China, has not provided evidence of actual market and consumer views or economic and trade impact data. Nonetheless, Hong Kong, China, alleged that there is detrimental impact to the brand and reputational value of its products as well as increased costs and complexity of exportation.

74. With respect to brand and reputation, Hong Kong, China, appears to misunderstand the purpose of marks of origin. Again, the United States made a determination that Hong Kong, China, is no longer sufficiently autonomous from the People's Republic of China, and the terminology for the goods manufactured in that Chinese city must be marked as originating from "China". Hong Kong, China, suggests that this requirement makes goods less valuable in terms of brand and reputation. However, Hong Kong, China, has failed to show how the terminology used in origin marking impacts the brand or reputation of a product itself. For example, a tin of mooncakes produced from a reputable and famous bakery in Hong Kong, China, would be subject to the same marking requirement as a tin of mooncakes produced from any other bakery in another Chinese city. And any tin of mooncakes produced anywhere else in the world would be subject to the same requirements under the marking statute. By their nature, marks of origin will distinguish between countries. Being required to use a particular mark of origin – here, "China" – cannot, in itself, be evidence of detrimental impact, as Hong Kong, China, suggests. And Hong Kong, China, has not shown how this mark has actually impacted brand and reputational value.

75. With respect to cost and complexity of exportation, Hong Kong, China, has not provided any actual data associating the increased costs with the disputed measure. In fact, the United States notes that the effective date of the disputed measure and the date on which Hong Kong, China, filed its evidence in this dispute occurred just before, and in the early stages of the pandemic, when overall trade was severely impacted. The anecdotal evidence submitted by Hong Kong, China, fails to account for any pandemic-related impacts.

76. Given the dearth of actual evidence of detrimental impact, it is clear that the core of all the claims by Hong Kong, China, including those under the GATT and the *Agreement on Rules of Origin*, is actually very simple. Hong Kong, China, is simply unhappy that a finding has been made with respect to the status of its autonomy as well as the associated public criticisms of its National Security Law. It is simply unhappy that for the past 25 years, it was considered sufficiently autonomous under the U.S.-Hong Kong Policy Act, but due to a confluence of events affecting its people punctuated by the PRC's National Security Law, it is no longer considered sufficiently autonomous under that legislation. It is simply unhappy that its products need to be marked as coming from "China" as a result.

E. Conclusion

77. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB. The United States recalls that this is the only finding that the Panel may make consistent with the DSU. Finding that an essential security measure breaches the provisions at issue, and in turn recommending that it be modified or withdrawn, would diminish the right of a Member to take action it considers necessary to protect its essential security

interests. And, as the United States has made clear repeatedly, tasking dispute settlement panels with evaluating security issues and recommending Members to eliminate them serves neither the security and predictability, nor the credibility, of the multilateral trading system.

78. The United States thanks the Panel for its attention and looks forward to answering its questions.