1 ARTICLE IX

1.1 Text of Article IX

Article IX

Marks of Origin

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or

> representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

1.2 General

1.1. In *Australia – Tobacco Plain Packaging*, Cuba argued that Australia's tobacco plain packaging measures were inconsistent with Article IX:4 of the GATT 1994. As Article IX had never before been interpreted in dispute settlement proceedings, the Panel made a number of general observations about Article IX.

1.2. Recalling statements made by the Appellate Body in previous cases (in which Article IX was not at issue)[1], the Panel noted that Article IX reflects the legitimacy of providing origin information to consumers through mark of origin requirements.[2]

1.3. With respect to the text and structure of Article IX, the Panel noted that the term "marks of origin" in the heading of Article IX is not defined in either the GATT 1994 or any other WTO covered agreement. The Panel therefore consulted dictionaries to ascertain the "ordinary meaning" of the term, and found that it "encompasses a sign, a token, an indication, a device, a stamp, a brand, a label, or an inscription on a product identifying from where such product originates".[3]

1.4. Additionally, the Panel noted that the subparagraphs of the Article lay down a number of specific disciplines for reducing to a minimum the difficulties and inconveniences that laws and regulations relating to marks of origin may cause to the commerce and industry of exporting countries.[4]

1.3 Article IX:1

1.3.1 General

1.5. In *US – Origin Marking (Hong Kong, China),* the Panel outlined three elements to be examined in assessing Hong Kong, China's claim that the United States' origin marking requirement at issue was inconsistent with article XI:1:

> "We need to assess the following three questions with respect to the origin marking requirement: (a) whether it is a marking requirement that falls within the scope of Article IX:1; (b) whether the products of Hong Kong, China are like products compared to those of any third country; and (c) whether the treatment accorded to the products of Hong Kong, China is less favourable than the treatment accorded to the like products of any third country."[5]

1.6. The Panel in *US – Origin Marking (Hong Kong, China)* noted that Article IX:1 contained provisions dealing specifically with origin marking requirements, and started its analysis with the complainant's claim under Article IX:1:

> "Article IX:1 of the GATT 1994 concerns specifically, and only, origin marking requirements, such as the one at issue in this case. In contrast, Article I:1 of the GATT 1994 applies to a broad category of measures. Similarly, the ARO and the TBT Agreement apply to broader categories of measures. The TBT Agreement applies to technical regulations and standards (including those providing for 'marking … requirements' more generally), as defined in its Annex 1, and the ARO applies to rules of origin, as defined in its Article 1. Therefore, Article IX:1 of the GATT 1994 applies more specifically to origin marking requirements and thus deals in more detail with the measure at issue in this case. Moreover, Hong Kong, China raised MFN claims

[1] Appellate Body Reports, *US – COOL*, para. 445; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.
[2] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3001.
[3] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3000.
[4] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.3001, 7.3003 and 7.3012.
[5] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.193.

> under non-discrimination provisions in the three agreements. We acknowledge that the ARO and the TBT Agreement contain obligations that are more detailed as compared with those in Article IX with respect to those measures subject to their disciplines. Nonetheless, in the context of this dispute, there are claims with respect to non-discrimination (MFN, in particular), which are similarly set out across the three agreements. We therefore disagree with Hong Kong, China that the agreement that deals most specifically and in detail with the origin marking requirement at issue is the ARO.
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> Based on the foregoing, we consider it appropriate to start our analysis with Hong Kong, China's claim under Article IX:1 of the GATT 1994."[6]

1.3.2 Marking requirements

1.7. The Panel in *US – Origin Marking (Hong Kong, China)* stated that "[r]equirements to mark goods with an origin mark, such as the origin marking requirement at issue in this dispute, fall squarely within the scope of Article IX:1".[7]

1.3.3 Like products

1.8. In *US – Origin Marking (Hong Kong, China),* the Panel found that the products produced in Hong Kong, China were subject to marking requirements whereas those originating in other countries were not. On this basis, the Panel concluded that these products "can be presumed to be 'like products' within the meaning of Article XI:1".[8]

1.3.4 Less favourable treatment

1.9. The Panel in *US – Origin Marking (Hong Kong, China)*, in interpreting the term "less favourable treatment" in Article IX:1, took into account prior interpretations of that term in the context of other GATT provisions or other covered agreements.[9] The Panel added that in so doing the particularities of Article IX:1 should be taken into consideration:

> "We are cognizant that any such guidance must take into account the specific nature of Article IX:1 as an MFN obligation and the context provided by the remaining provisions of the GATT 1994, including the immediate context of Article IX and its title 'Marks of Origin'. In that sense, we note that Article III:4 contains a national treatment rather than an MFN obligation. As the Appellate Body noted in *EC – Seal Products*, while those are 'both fundamental non-discrimination obligations under the GATT 1994, their points of comparison, for the purposes of determining whether a measure discriminates between like products, are not the same' (Appellate Body Reports, *EC – Seal Products*, para. 5.79)."[10]

1.10. The Panel in *US – Origin Marking (Hong Kong, China)* explained the steps in the assessment of less favourable treatment, as follows:

> "As an MFN obligation, Article IX:1 first requires a comparison between the treatment accorded to imported products from different countries to ascertain whether there is a difference in treatment. A formal difference in treatment between imported products from different countries is, however, neither necessary, nor sufficient to establish that the imported products from the complaining party are accorded less favourable treatment than that accorded to like imported products of any third country. The next step is to assess whether the challenged measure accords less favourable treatment by modifying the conditions of competition in the relevant market to the detriment of

[6] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.14.
[7] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.198.
[8] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.203.
[9] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.204.
[10] Panel Report, *US – Origin Marking (Hong Kong, China),* fn 279.

> the imported products of the complaining party, and thus has a detrimental impact on the competitive opportunities for those products versus other imported products."[11]

1.11. The Panel in *US – Origin Marking (Hong Kong, China)* rejected the argument that the assessment of "less favourable treatment" under Article IX:1 should involve an inquiry into the regulatory objective of the challenged measure:

> "We disagree with the United States to the extent that it suggests that the legal standard of 'less favourable treatment' under Article IX:1 includes an inquiry as to whether the detrimental impact is related to, or can be explained by, the regulatory objective pursued by the measure at issue. Any such inquiry, in the context of the GATT 1994, takes place in, and is subject to, the conditions of, the exceptions in the GATT 1994."[12]

1.12. The Panel in *US – Origin Marking (Hong Kong, China)* underlined the difference between the determination of the origin of a product and the trade policy instrument that makes use of such an origin determination:

> "[T]he determination of the origin of a product is distinct from, and should not be conflated with, the trade policy instrument that makes use of this origin determination.[13] In other words, as the United States and several third parties emphasize, the determination that a specific country is the country of origin for marking purposes is distinct from the requirement to use a mark of origin on imported products. The determination of origin is the result of the application of a Member's origin criteria, which leads to 'a conclusion as to the country from which the goods are considered to originate' and allows, on that basis, to 'specify to which treatment [a] good will be subjected because of the country it stems from'. Origin is used for the implementation of trade policy instruments of various types, including origin marking requirements.
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> The distinction between origin determination and the trade instrument that makes use of this origin determination is complicated in the case of origin marking requirements, because these requirements by their nature are intended to indicate the origin of a product. In that sense, a requirement to use the mark of origin 'China' could be perceived by purchasers as an indication that the US authorities have determined China to be the product's country of origin. Nevertheless, we do not consider that this should result in a conflation between origin determination and an origin marking requirement, which is a trade policy instrument, in the application of which the origin determination is used."[14]

1.13. The Panel in *US – Origin Marking (Hong Kong, China)* found no violation of the obligation in Article IX:1 with regard to origin determination.[15] However, it did find a violation of that obligation because the challenged measure required that the goods originating in the territories of the complainant be marked with a different origin:

> "Therefore, whereas US law provides that for products of all other countries there should be correspondence between the origin determined and the origin marked, it does not provide for such correspondence for products of Hong Kong, China, but instead requires that these products be marked to indicate the origin of another WTO Member. This constitutes different treatment for the purposes of our analysis under Article IX:1.
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> We therefore conclude that the United States requires goods of Hong Kong, China to be marked with a mark of origin indicating the name of another WTO Member,

[11] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.205.
[12] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.206.
[13] *(footnote original)* This also follows from the definition of rules of origin in Article 1 of the ARO, referring to rules "applied … to determine the country of origin of goods", which are then "used … in the application of" various trade policy instruments, including origin marking.
[14] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.219-7.220.
[15] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.226.

> whereas the United States requires goods of any third country or Member to be marked with a name that corresponds to their origin. We consider that this amounts to the United States according goods that it identifies as manufactured, produced, grown, or substantially transformed in Hong Kong, China treatment different from that which it accords to goods that it identifies (on the basis of the same rules of origin) as manufactured, produced, grown, or substantially transformed in any third country or Member."[16]

1.14. The Panel in *US – Origin Marking (Hong Kong, China)* agreed with Hong Kong, China's argument that there is an inherent advantage for exporters in being able to mark their products with their actual country of origin:

> "[T]he origin of a product, and how that origin is indicated to the ultimate purchaser in the import market, affect the competitive relationship between imported products, to the extent that when origin is indicated, it becomes a relevant factor in purchasing decisions. In that sense, an origin mark, as argued by Hong Kong, China, has an inherent value in the import market."[17]

1.15. The Panel in *US – Origin Marking (Hong Kong, China)* pointed out that the origin of a product and how that origin is indicated are factors that affect the competitive relationship between imported products:

> "When a WTO Member requires all imported goods to be marked with a mark of origin, as the United States does, it introduces origin marking, an element that affects the choice of an ultimate purchaser, into the conditions of competition between imported products on the import market. In other words, imported products compete in the US market with an indication of their origin and this indication affects their competitive opportunities.
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> Differentiating the application of that element of competition between products imported from different countries logically alters the competitive relationship between those products."[18]

1.16. The Panel in *US – Origin Marking (Hong Kong, China)* also found that:

> "As a result of this alteration, goods of Hong Kong, China are not allowed to compete in the US market with an indication of their origin as it is determined by the United States, i.e. to compete under Hong Kong, China's 'own name'. This in turn means that, following the introduction of the origin marking requirement, a marking indicating Hong Kong, China as the country of origin of the products is no longer available in the US market. Contrary to exporters of goods of any third country, exporters of goods of Hong Kong, China are denied the possibility to influence, develop, or benefit from, any value that may be attached, currently or in the future, to the origin of their goods. This adversely affects the competitive opportunities of these products in the US market. For products of Hong Kong, China, compliance with the origin marking requirement would thus involve a competitive disadvantage compared with products of any third country.
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> We consider that Hong Kong, China has therefore demonstrated, on the basis of the design, structure and expected operation of the measure, that the origin marking requirement modifies the conditions of competition to the detriment of products of Hong Kong, China. We consider this to be sufficient to demonstrate detrimental impact."[19]

1.17. Based on the above reasoning, the Panel in *US – Origin Marking (Hong Kong, China)* found that "the mere exclusion of the possibility for products of Hong Kong, China origin to compete in the US market with an indication of their origin as determined by the United States, when products

[16] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.234-7.235.
[17] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.244.
[18] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.245-7.246.
[19] Panel Report, *US – Origin Marking (Hong Kong, China),* paras. 7.247-7.248.

of third countries are granted that same possibility, affects the competitive opportunities to the detriment of products of Hong Kong, China".[20]

1.4 Article IX:2

1.18. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body stated that Article IX:2 "calls for a *reduction* of difficulties and inconveniences that laws and regulations relating to marks of origin may cause to exporters".[21] According to the Appellate Body, this provision therefore calls for a "limitation of the impact of the use of marks of origin".[22]

1.5 Article IX:4

1.5.1 General

1.19. In *Australia – Tobacco Plain Packaging*, the Panel noted that Article IX:4 has two main components:

> "a. '[t]he laws and regulations of Members relating to the marking of imported products', which identifies the scope of the obligation, namely the types of measures and signs covered by this provision; and
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> b. 'shall be such as to permit compliance without … materially reducing the[] value [of imported products]', which spells out the specific obligation under Article IX:4 that Cuba invokes in its claim."[23]

1.20. The Panel thus considered that in analysing Cuba's claim, it needed to address two issues: first, whether the challenged measure constituted a law or regulation relating to the marking of imported products, and was therefore covered by the scope of Article IX:4; and second, whether the challenged measure was such as to permit compliance without materially reducing the value of the relevant imported products.[24]

1.21. In the course of closely examining each of the two components listed above, the Panel made a number of general observations concerning the purpose and structure of Article IX:4. The Panel remarked that "the purpose of Article IX:4 is not to discipline whether Members may require marks of origin but to discipline how compliance with origin marking requirements may be prescribed".[25] Additionally, the Panel considered that Article IX:4 reflects a balance between the legitimacy of providing origin information to consumers through marks of origin requirements with the need to limit the impact that compliance with those requirements has on exporters.[26] According to the Panel, the purpose of Article IX:4 is precisely to prevent excessive burdens arising from compliance with marks of origin requirements adopted by a Member, that could jeopardize exporters' interests in marketing their goods in that Member's territory.[27] Put another way, the purpose of the provision is to prevent exporters' interests in marketing their goods in an importing Member's territory from being jeopardized by excessively cumbersome or costly marks of origin requirements adopted by such Member.[28]

1.5.2 "[t]he laws and regulations of Members relating to the marking of imported products"

1.22. The Panel in *Australia – Tobacco Plain Packaging* first considered the interpretation of the phrase "[t]he laws and regulations of Members relating to the marking of imported products".[29] After examining dictionary definitions of the relevant terms, the Panel found that the phrase "[t]he

[20] Panel Report, *US – Origin Marking (Hong Kong, China),* para. 7.249.
[21] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.
[22] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.
[23] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2993.
[24] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2994.
[25] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3000.
[26] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3003.
[27] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3014.
[28] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3020.
[29] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2996-7.7.3021.

laws and regulations of a Member relating to the marking of imported products" refers to rules of a WTO Member's domestic legal system connected to the action of putting a mark on goods introduced into the territory of such Member from another country or WTO Member.[30] More specifically, the Panel explained that Article IX:4 covers only those laws and regulations relating to markings that indicate or identify the origin of imported products.[31] Thus, the Panel explained that:

> "[T]he phrase '[t]he laws and regulations of Members relating to the marking of imported products' does not encompass all laws and regulations relating to the marking of imported products generally but rather covers those setting out the conditions for complying with requirements for 'marks of origin', i.e. signs, tokens, devices, stamps, brands, labels or inscriptions on products identifying where such products originate."[32]

1.23. The Panel next observed that while Article IX:4 focuses on compliance with laws and regulations establishing an obligation to affix marks of origin, aspects of other laws and regulations could also fall under the obligation of Article IX:4 insofar as they prescribe requirements that must be complied with for the marking of imported products, e.g. in what form marks of origin should appear.[33] However, the Panel explained that the purpose of Article IX:4 is not to discipline whether or to what extent Members may require marks of origin but to discipline *how* compliance with origin marking requirements may be prescribed. Accordingly, Article IX:4 does not cover measures that impose limitations "*on* the use of marks of origin".[34]

1.24. Turning to the case before it, the Panel held that Australia's tobacco plain packaging measures did not fall within the scope of Article IX:4 because they operated to restrict or limit the ways in which exporters could use marks of origin (that is, they were restrictions *on* marks of origin), rather than imposing requirements that must be complied with for the marking of imported products (that is, conditions on *how* marks of origin were to be used).[35]

1.5.3 "such as to permit compliance without materially reducing the value" of imported products

1.25. The Panel in *Australia – Tobacco Plain Packaging* noted that Article IX:4 identifies three types of impact that laws and regulations relating to the marking of imported products must not produce: seriously damaging the products, materially reducing their value, or unreasonably increasing their cost. As Cuba only alleged that Australia's tobacco plain packaging measures materially reduced the value of Cuban products, the Panel focused its analysis on the meaning of that limb of the provision.[36]

1.26. The Panel began by examining the meaning of the phrase "materially reducing". According to the Panel, a material reduction is a reduction that is important, relevant, significant, and substantial.[37] Thus, in the Panel's view, Article IX:4 tolerates certain negative consequences of law and regulations relating to the marking of imported products, and only prohibits a reduction in value that reaches the threshold of materiality.[38] In this connection, the Panel observed that Article IX:4 strikes a balance between the "legitimacy of providing origin information to consumers through mark of origin requirements, on the one hand, with the need to limit the impact that the use of marks of origin has on exporters, on the other hand".[39]

1.27. The Panel next recalled its earlier finding that Article IX:4 is concerned with limiting the impact *of* the use of marks of origin, rather than to discipline limitations *on* the use of such marks. In the light of this finding, the Panel found that Article IX:4 does not protect the use of

[30] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2998.
[31] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2999 and 7.3004.
[32] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3021.
[33] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3026.
[34] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3027.
[35] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3028.
[36] Panel Reports, *Australia – Tobacco Plain Packaging,* para. 7.3031.
[37] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3037.
[38] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3037.
[39] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3038.

origin-related signs on products *per se*, and therefore also does not protect the added value or price premium that the use of such origin-related signs may accord to imported products.[40]

1.28. Turning to the case before it, the Panel held that Article IX:4 does not cover the kind of reduction in value about which Cuba was complaining, namely, the reduction in value of tobacco products that could no longer be affixed with certain graphic labels (a "Habanos" GI and a Cuban Government Warranty Seal[41]) indicating their Cuban origin.[42]

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Current as of: December 2023

[40] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3040.
[41] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2974-7.2983.
[42] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3403.