

US – ORIGIN MARKING (HONG KONG, CHINA)¹

(DS597)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Hong Kong, China</i>	<i>GATT Arts. I:1, IX:1 ROA Arts. 2(c), 2(d) TBT Art. 2.1</i>	Establishment of Panel	<i>22 February 2021</i>
			Circulation of Panel Report	<i>21 December 2022</i>
Respondent	<i>United States</i>		Notification of appeal	<i>26 January 2023</i>

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Requirement applied by the United States that imported goods produced in Hong Kong, China may no longer be marked to indicate “Hong Kong” as their origin, but must be marked to indicate “China” (origin marking requirement).
- **Products at issue:** Hong Kong, China products imported to the United States.

2. SUMMARY OF KEY PANEL FINDINGS

- **GATT Art. XXI(b) (self-judging nature of Art. XXI(b)(iii)):** The Panel examined the ordinary meaning of Art. XXI(b), focusing on the grammatical structure of the provision in the three authentic languages, and found that the phrase “which it considers” in the chapeau of Article XXI(b) does not extend to the subparagraphs following the chapeau. The Panel tested this meaning against the context of Art. XXI(b) and the object and purpose of the covered agreements and confirmed that it made sense. It concluded that Art. XXI(b) was only partly self-judging in that the subparagraphs were not subject solely to the invoking Member’s own determination, but were, instead, subject to review by a panel. The Panel thus rejected the United States’ request to (only) find that the United States had invoked its essential security interests and to so report to the DSB. Instead, the Panel proceeded to examine whether the United States had breached its obligation under GATT Art. IX:1.
- **GATT Art. IX:1:** The Panel found that the measure was a “marking requirement” within the meaning of GATT Art. IX:1, and that it applied to products from Hong Kong, China that could be presumed to be “like” products from any third country. The United States accorded products that it had determined to originate in Hong Kong, China different treatment from that which it accorded to products that it had determined (on the basis of the same rules of origin) to originate in any third country or Member. This was because it required products of Hong Kong, China to be marked with a mark of origin indicating the name of another WTO Member (China), while requiring products of any third country to be marked with a name corresponding to their origin. This difference in treatment modified the conditions of competition to the detriment of products of Hong Kong, China, because they were denied the possibility to compete in the US market under their own name, and thus to influence, develop, or benefit from, any value that may be attached, currently or in the future, to their origin. The Panel thus found that the measure was inconsistent with Art. IX:1.
- **GATT Art. XXI(b)(iii) (measures taken in time of war or other emergency in international relations):** The Panel examined the ordinary meaning of the phrase “emergency in international relations” in the three authentic languages, in the context of the other relevant provisions in the GATT 1994 and elsewhere in the covered agreements, and in light of its object and purpose. The Panel concluded that the phrase “emergency in international relations” refers to a state of affairs, of the utmost gravity, in effect a situation representing a breakdown or near-breakdown in the relations between states or other participants in international relations. The Panel noted that the focus under Art. XXI(b)(iii) is not about the underlying circumstances from which such a state of affairs appears to result, but rather about the gravity of the impact that such state of affairs has on the relations between two or more countries, or Members. According to the Panel, a determination of whether a given situation constitutes an emergency in international relations is to be examined on a case-by-case basis, considering the circumstances and context in which Article XXI(b)(iii) is invoked. The Panel found that, although there was evidence of the United States and other Members being highly concerned about the human rights situation in Hong Kong, China, the situation had not escalated to the threshold of requisite gravity to constitute an emergency in international relations that would provide justification for taking actions that were inconsistent with obligations under the GATT 1994.

3. OTHER ISSUES²

- **Order of analysis (GATT Art. IX:1, GATT Art. I:1, TBT Art. 2.1 and ROA Art. 2(d)):** The dispute involved claims on non-discrimination (MFN) similarly set out in GATT Art. IX:1, GATT Art. I:1, TBT Art. 2.1 and ROA Art. 2(d). The Panel began its analysis with the GATT Art. IX:1 claim, because it considered that GATT Art. IX:1 applied more specifically to origin marking requirements and thus dealt in more detail with the measure at issue.

¹ *United States – Origin Marking Requirement*. Panel Report subject to pending appeal.

² Other issues addressed: judicial economy; order of analysis (GATT Art. IX:1 and GATT Art. XXI(b)); order of analysis under GATT Art. XXI(b).