

UNITED STATES – ORIGIN MARKING REQUIREMENT
(DS597)

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

February 11, 2022

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.
2. The circumstances giving rise to this dispute are deeply troubling.
3. Nearly forty years ago, in 1984, the People’s Republic of China and the United Kingdom signed the Sino-British Joint Declaration. In this declaration, the People’s Republic of China promised that a high degree of autonomy would be maintained in the Special Administrative Region, and fundamental freedoms, such as the freedom of speech, would remain unchanged for fifty years from the date of Hong Kong’s handover in 1997. U.S. policy toward Hong Kong, China, was set forth in the U.S.-Hong Kong Policy Act of 1992, in light of the promises made in the Joint Declaration, and is grounded in the determination to promote the prosperity, autonomy, and democratic way of life of Hong Kong, China. In 2020, the People’s Republic of China unilaterally imposed the National Security Law on Hong Kong, China. The United States then determined that Hong Kong, China, is no longer sufficiently autonomous to justify differential treatment in relation to the People’s Republic of China under the Act. In turn, Executive Order 13936 suspended or eliminated special and differential treatment for Hong Kong, China, including with respect to marking; export controls; immigration; the extradition and transfer of sentenced persons; training for law enforcement and security services; shipping tax; and cultural exchange programs. Executive Order 13936 further suspended or terminated bilateral agreements and cooperation, and blocked transactions with certain Hong Kong, China, persons.
4. The exchanges over the past few days make clear that Hong Kong, China, has brought this dispute with one goal in mind: to secure a recommendation that the United States withdraw

or modify its determination as to Hong Kong, China’s autonomy vis-à-vis the People’s Republic of China.

5. To that end, Hong Kong, China, argues that the *Agreement on Rules of Origin* covers measures – including a Member’s consideration of autonomy – that by its terms it does not.

6. Hong Kong, China, argues further that Article 2.1 of the TBT Agreement precludes Members from asserting a regulatory objective as a justification for a challenged measure. That is, that the non-discrimination provision of the TBT Agreement prohibits Members from achieving regulatory objectives in way that the non-discrimination provisions of the GATT do not. This is contrary to the terms of the TBT Agreement.

7. And beyond that, Hong Kong, China, argues that the WTO Agreement limits Members’ right to take actions they consider necessary to protect their essential security interests. That is, Hong Kong, China, argues that a Member’s invocation of Article XXI(b) of the GATT 1994 is subject to substantive panel review.¹ Hong Kong, China, wants the panel and the WTO to state that democracy and political autonomy cannot relate to U.S. essential security interests and to recommend withdrawal of the U.S. measure. Again, the text of Article XXI(b) does not provide for this.² And Members did not relinquish this fundamental right when they joined the WTO.

8. The United States is, of course, aware that the panel report in *Russia – Traffic in Transit* found that Article XXI(b) is reviewable to an extent. In making findings so as to assist the DSB

¹ See Opening Statement of Hong Kong, China at the Second Substantive Meeting with the Parties, paras. 6-10; Second Written Submission of Hong Kong, China, paras. 116-189.

² See Opening Statement of the United States of America at the Second Videoconference with the Panel, paras. 10-24; U.S. Second Written Submission, paras. 12-61; U.S. First Written Submission, paras. 27-214.

in making any recommendations, the Panel is to interpret the provisions of the covered agreements at issue, including Article XXI(b), in accordance with the customary rules of treaty interpretation. The analysis in the *Russia – Traffic in Transit* dispute does not reflect those rules, and the Panel should not reach a similar interpretation.³

9. Hong Kong, China, insists that the United States has made no articulation of its essential security interests. Yesterday, Hong Kong, China, even suggested that the United States has not made its invocation of Article XXI(b) in good faith, and today even hinted about the sincerity of such invocation – a baseless accusation that nonetheless reveals something important about the accuser. But notwithstanding that Article XXI(b) by its terms does not require such a showing, since its first written submission, the United States has provided with the Panel with significant evidence demonstrating its essential security interests in each successive submission, as well as explained how those interests are reflected on the face of the measures themselves.

10. In its strained interpretations of the WTO provisions at issue, and its continued refusal to address the evidence regarding the measures as well as surrounding circumstances, Hong Kong, China, seeks to characterize an essential security action, in particular a determination with respect to autonomy, as if it is a purely technical trade matter to be addressed by the WTO dispute settlement system. It is not.

11. Rather, the WTO Agreement addresses essential security issues by recognizing the right of a Member to determine, for itself, what actions are necessary to protect its essential security interests and in which circumstances, while providing recourse for Members that might consider

³ U.S. First Written Submission, paras. 215-265.

themselves impacted by such actions via non-violation nullification or impairment claims. This balance is reflected in the text, and preserves the role of the multilateral trading system as a forum for trade issues. Yet that is not the avenue that Hong Kong, China, has pursued. Hong Kong, China, wants the WTO to find that the United States was wrong.

12. This appears to be because Hong Kong, China, considers that any relationship between essential security interests and marking is “inconceivable”.⁴ Hong Kong, China, may consider the terminology that it uses to refer to a territory does not implicate its own essential security interests. But for purposes of this dispute, it is the U.S. consideration of whether the measures at issue are necessary to protect its essential security interests that matters.

13. The United States understands that Hong Kong, China, is aggrieved by the U.S. determination with respect to its autonomy. The United States itself regrets China’s actions, the increasingly dire situation in which Hong Kongers find themselves, and the circumstances that led to that determination. But – as reflected in Article XXI(b) – the WTO is not the forum to address those issues. And the credibility of the international trading system would be severely undermined by second-guessing the interests and the action at issue.

II. Conclusion

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

⁴ Second Written Submission of Hong Kong, China, para 112.