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INTERNATIONAL DECISIONS

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World Trade Organization—General Agreement on Tariffs and Trade 1994—Agreement on Rules of Origin—Agreement on Technical Barriers to Trade—National Security Exception

UNITED STATES—ORIGIN MARKING REQUIREMENT, WT/DS597/R. *At* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm.
World Trade Organization Panel, December 21, 2022.

For almost seventy years, parties to the General Agreement on Tariffs and Trade (GATT) and members of the World Trade Organization (WTO) did not use multilateral dispute resolution mechanisms to address questions relating to the interpretation of security exceptions.[1] The *United States—Origin Marking Requirement (Hong Kong, China) (U.S.—Origin Marking Requirement)* Panel Report,[2] which is the latest addition to the limited but expanding WTO jurisprudence in this area, shows the growing importance of security exceptions in WTO law.[3] It is a highly politicized dispute in which the separate customs territory of Hong Kong, China invoked the multilateral dispute mechanism of the WTO for the second time since it joined the WTO as a founding member in 1995 and since it became a contracting party to the 1947 GATT in 1986. Notably, the *U.S.—Origin Marking Requirement* ruling is the only panel report issued in proceedings with Hong Kong as the disputing party.[4] Against the backdrop of the U.S.-China trade war, this important decision tests the limits of the WTO's architecture and has implications for its future relevance.

The origins of the dispute can be traced to July 14, 2020, when President Donald J. Trump issued the Executive Order on Hong Kong Normalization. Following a determination that Hong Kong was no longer sufficiently autonomous to justify differential treatment in relation to China, this executive order suspended the application of Section 201(a) of the United States-Hong Kong Policy Act of 1992, which had previously granted Hong Kong special

[1] Peter L.H. van den Bossche & Sarah Akpofure, *The Use and Abuse of the National Security Exception Under Article XXI(b)(iii) of the GATT 1994*, *in* A NEW GLOBAL ECONOMIC ORDER: NEW CHALLENGES TO INTERNATIONAL TRADE LAW (Chia-Jui Cheng ed., 2021); Panel Report, Russia—Measures Concerning Traffic in Transit, WT/DS512/R (adopted Apr. 26, 2019); Panel Report, Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights, WT/DS567/R (circulated June 16, 2020) Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AJIL 424 (1999).

[2] Panel Report, United States—Origin Marking Requirement, WT/DS597/R (circulated Dec. 21, 2022).

[3] Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45 (2019).

[4] Turkey—Restrictions on Imports of Textile and Clothing Products, Request for Consultations by Hong Kong, WTO Doc. WT/DS29/1 (Feb. 15, 1996).

https://doi.org/10.1017/ajil.2023.29 Published online by Cambridge University Press

trade and economic treatment separate from mainland China.[5] Acting on this executive order, on August 11, 2020, the U.S. Customs and Border Protection announced in the Federal Register a new country of origin marking requirement for imported goods produced in Hong Kong by which they could no longer be marked to indicate "Hong Kong" as their origin and instead would have to be marked to indicate "China."

In its report, the panel determined that the United States' implementation of origin marking requirements violated GATT (1994) Article IX:1, as it granted less favorable treatment to products from Hong Kong, thus breaching the Most Favored Nation (MFN) principle. Further, the panel found that as the United States had failed to show that the situation in Hong Kong was an emergency in international relations, the new origin requirements were unjustifiable under the security exception in GATT (1994) Article XXI(b)(iii). Importantly, the WTO panel reinforced the approaches taken by previous panels and confirmed that U.S. invocation of the security exception in Article XXI was inconsistent with WTO law. Three central themes in the Panel Report are worth highlighting: (1) the definition of an emergency in international relations; (2) the "One Country, Two Systems" within WTO law, which refers to the unique arrangement wherein Hong Kong maintains a separate legal and economic system from mainland China; and (3) the broader implications of marking goods made in Hong Kong as "Made in China."

On June 5, 1997, the U.S. Customs Service issued a Federal Register notice, which provided that after Hong Kong's reversion to the sovereignty of China on July 1, 1997, goods produced in Hong Kong would continue to indicate their origin as "Hong Kong." The main ground for the 2020 executive order that rescinded the June, 5 1997 notice was the introduction of the Hong Kong National Security Law in June 2020.[6] This legislation was established by China's National People's Congress Committee in response to the 2019–2020 social unrest and mass protests in Hong Kong, which occurred in opposition to proposed legislative amendments to the Fugitive Offenders Ordinance following the murder of a Hong Kong citizen in Taiwan.[7]

The U.S. government argued that developments in Hong Kong—which included the arrests of politicians, activists, and protesters in Hong Kong on national security-related charges—breached the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (1984 Sino-British Joint Declaration).[8]

On October 30, 2020, Hong Kong requested consultations with the United States to challenge the change in origin marking requirements, citing multiple provisions from the Understanding on Rules and Procedures Governing the Settlement of Disputes, the GATT 1994, the Agreement on Rules of Origin, and the Agreement on Technical

[5] Exec. Order No. 13936, 85 Fed. Reg. 43413 (July 14, 2020).

[6] Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquan Fa (中華人民共和國香港特別行政區維護國家安全法) [The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020) 2020 Standing Comm. Nat'l People's Cong. Gaz. 591.

[7] Teresa Cheng, National Security Law – A New Horizon for the Successful Implementation of "One Country, Two Systems," *at* https://www.doj.gov.hk/en/community_engagement/speeches/pdf/sj20200824e1.pdf.

[8] *See* Yash Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law 231 (1997).

https://doi.org/10.1017/ajil.2023.29 Published online by Cambridge University Press

Barriers to Trade. Hong Kong argued that the new requirements violated several provisions, including GATT (1994) Article I:1, which establishes the MFN principle requiring equal treatment for all WTO members; GATT (1994) Article IX:1, which addresses the marking of imported goods and obliges countries to apply non-discriminatory and consistent rules for all WTO members; and GATT (1994) Article X:3(a), which mandates transparency, fairness, and uniformity in administering laws, regulations, and rulings related to trade. Additionally, Hong Kong cited Articles 2(c), (d), and (e) of the Agreement on Rules of Origin, which specify that origin rules should be transparent, predictable, and objective, and that they must not create trade barriers or disrupt international trade, as well as Article 2.1 of the Agreement on Technical Barriers to Trade, which provides that technical regulations must not discriminate between countries or create unnecessary obstacles to trade. The United States' main defense was that the origin marking changes were a response to the situation in Hong Kong, which it considered a threat to its essential security under Article XXI(b) of the GATT. It further maintained that as it considered this a "self-judging provision," its decision to change the marking requirements was effectively unreviewable.

The panel began its analysis by assessing Hong Kong's arguments on discriminatory MFN treatment regarding origin marking under GATT (1994) Article IX:1 (para. 7.15). After determining the applicability of the MFN provision, the panel then examined if Article XXI(b) is self-judging, thereby precluding it from exercising a review of the measures in issue (para. 7.3). The panel's interpretation relied on a comprehensive grammatical analysis of the relative clause in the preamble to Article XXI(b) (para. 7.47), as well as a comparative study of the French, English, and Spanish versions of the text (para. 7.70). In particular, the panel analyzed the context, purpose, and object of Article XXI in accordance with Articles 31(1) and 32 of the Vienna Convention on the Law of Treaties to determine the ordinary meaning of Article XXI(b) (para 7.142). On this basis, the panel concluded that Article XXI(b) is only partially self-judging and thus the measures in issue were reviewable (para 7.185). It held that the origin marking requirement introduced by the United States was inconsistent with GATT (1994) Article IX (para. 7.252) and unjustifiable under GATT (1994) Article XXI(b)(iii).

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Three important themes emerge from the Panel Report. First, as with previous panel decisions on security exceptions, the definition of an emergency in international relations was central to the panel's decision. Notably, the panel stated that an emergency in international relations did not necessarily have to arise from bilateral relations within a member's territory but could more broadly occur among more than two WTO members. However, the panel also explained that although the world is driven by a range of political, economic, social, and environmental tensions and divergences, this cannot be a sole ground for successful invocation of the security exception. In reaching its conclusions, the panel made factual analogies with the decision in *Russia—Traffic in Transit*, noting that the situation between Ukraine and Russia was recognized by the United Nations General Assembly as involving an armed conflict and that several countries had imposed sanctions against Russia.

A comparison was also made with the severance of diplomatic, consular, and economic ties between Qatar and Saudi Arabia in *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*. This factual comparison by the panel may be criticized as an

https://doi.org/10.1017/ajil.2023.29 Published online by Cambridge University Press

indication that to make a successful security exception argument, the United States was required to prove a complete breakdown of relations with similar gravity as the events which have now resulted in the full blown *Russian—Ukraine War.* Yet, noting the different contexts of Russia-Ukraine relations and China-U.S. relations, the panel noted that the findings in the *Russia—Traffic in Transit* 2019 decision would play a key role in its analysis due to the extensive submissions and reliance of all parties on the findings in *Russia—Traffic in Transit* (para. 7.33). The panel's interpretation, which did not consider the negotiating history of GATT security exceptions, has been described by a commentator as flawed and inconsistent with the reasoning adopted in previous cases.[9] While the negotiating history of the exceptions may be relevant for understanding the history of the U.S. approach to security exceptions within the framework of the International Trade Organization project in the 1940s, its contemporary relevance appears to be minimal in the Post-1995 international trade regime.[10]

The panel placed a predominance on the United States to provide sufficient proof that an emergency in international relations had occurred. It noted that, notwithstanding concerns about the human rights situation in Hong Kong, there had been no total breakdown of relations. To the contrary, there was a lack of evidence that the United States took measures against China for the human rights situation; U.S. measures against Hong Kong only targeted certain areas; there had not been a significant change in relations between the United States and Hong Kong; the tariff treatment was similar to treatment pre-dating the imposition of the origin marking requirement; and there was no evidence that the United States or other WTO members had severed diplomatic, consular, or economic relations with China or Hong Kong. This raises the question of whether the United States could have satisfied the burden of proof by providing stronger evidence that the situation in Hong Kong was deleterious to international relations, but the answer is probably not. The Panel Report seems to establish a high threshold for the application of the essential security exceptions.

Second, the Panel Report provides valuable insights into the legal position of Hong Kong within the multilateral trading system, as it is the first panel report to analyze and interpret the implications of China's "One Country, Two Systems" policy. This policy allows Hong Kong to maintain a separate legal and economic system from mainland China, preserving its unique status in international trade relations. A central argument made by Hong Kong was that its 1997 basic law provides that, even though Hong Kong is an inalienable part of China, it is a separate customs territory member of the WTO (para. 7.223 n. 320). While China joined the WTO in December 2001, the Hong Kong Special Administrative Region has continued to participate in the WTO as a separate member using the name "Hong Kong, China," even though it has limited sovereignty in foreign affairs and national defense. Two other entities have a similar status within the WTO: Macao, China (Macao); and Chinese Taipei, officially known as the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu. In the 2000s, predictions were made that as a result of China's accession and the resulting four

[9] Hitoshi Nasu, US – Origin Marking Requirement*: Did the WTO Panel Get the Balance Right Between Trade Security and National Security?*, EJIL:*Talk!* (Jan. 25, 2023), *at* https://www.ejiltalk.org/us-origin-marking-requirement-did-the-wto-panel-get-the-balance-right-between-trade-security-and-national-security.

[10] Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 Mich. J. Int'l L. 109 (2020).

https://doi.org/10.1017/ajil.2023.29 Published online by Cambridge University Press

separate WTO memberships, the Dispute Settlement Understanding would be ineffective for dealing with disputes between Taiwan, Macao, Hong Kong, and/or China. [11] These predictions have largely proven to be true

The panel noted the complexity stemming from Hong Kong's status both as a separate customs territory, and an inalienable part of China which was related to the U.S. assessment that "Hong Kong . . . is no longer sufficiently autonomous to justify differential treatment in relation to the People's Republic of China." However, the panel also noted that there was no disagreement on Hong Kong's separate WTO membership and its territorial boundaries. By recognizing Hong Kong's separate WTO membership and the effect of differential labeling requirements on this status, this decision has opened an avenue for Hong Kong and Macao to use the WTO dispute resolution mechanism more actively and strategically. Additionally, the decision paves the way for future legal developments concerning proxy trade wars that involve a mix of bilateral, regional, and multilateral interests. It highlights the potential for the non-state territories of as Macao and Hong Kong which form part of the Guangdong-Hong Kong-Macao Greater Bay Area, to utilize the WTO dispute resolution mechanism to defend their interests more effectively. As the only non-state territory members of the WTO, the *U.S.—Origin Marking* case demonstrates how small but economically strong territories like Macao and Hong Kong can harness the power of the WTO framework to safeguard their trade rights and interests, even amidst complex trade disputes that span various levels of international cooperation.

Third, the panel decision has implications for the marking of goods with the label, "Made in China." Unlike in previous decisions relating to rules of origin, such as the *U.S.—Rules of Origin for Textiles and Apparel Products*, this panel did not treat as dispositive, evidence that exports had been disrupted. Although the panel stated that Hong Kong did not need to provide any additional evidence that the change in origin marking had led to a detrimental impact, it also referred to the importance of the reasons provided by Hong Kong. These factors included the potential damage to brand image and reputation due to the altered labeling, the increased financial burden on Hong Kong businesses, and the heightened complexity in export processes they would have to navigate. The brand and reputational consequences stem from the perception that products marked as "Made in Hong Kong" might differ in quality or have distinct attributes compared to those marked "Made in China." The additional costs refer to the expenses that Hong Kong enterprises would incur in adjusting their supply chain, packaging, and marketing materials to comply with the new origin marking requirements. Lastly, the increased complexity of exportation arises from the challenges faced by Hong Kong businesses in navigating the trade regulations and potential barriers associated with the "Made in China" designation. However, these factors did not appear to be the main driving force for Hong Kong, which is ranked as one of the world's top ten leading exporters and importers in world merchandise trade. In its arguments, Hong Kong kept its statements strictly to the point and appeared to avoid any implied assertions that goods made in Hong Kong had a stronger reputation than goods made in China. In remarks made following the Panel Report, Hong Kong's secretary for commerce and economic development noted that Hong Kong exports to the United States account for only 0.1 percent of Hong Kong's total exports amounting to $7.4 billion. He thus noted that, even though the financial

[11] Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes Between China and Taiwan?*, 5 J. INT'L ECON. L. 747, 756 (2002).

https://doi.org/10.1017/ajil.2023.29 Published online by Cambridge University Press

implications of the change in original marking were minimal, the main reason for instituting the WTO proceedings was to uphold the status and position of the Hong Kong Special Administrative Region as a separate customs territory.[12] Thus, the main significance of this decision for Hong Kong is clearly the preservation of its autonomy, and not the difficulties or financial implications of the marking requirement.

For the most part, the panel recognized the importance placed by the United States on the protection of human rights and democratic principles and its essential security interests but reiterated that measures must meet the conditions set by WTO jurisprudence. Until recently, the WTO played a marginal role in interpreting national security matters, and states invoked Article XXI in rare instances. Overall, *United States—Origin Marking Requirement* underscores the challenges the WTO faces in a multipolar world, wherein national security has become the center of state challenges to the multilateral trading system. While the WTO recognizes that the security and predictability of the multilateral trading system are intricately linked to the rights of members to pursue unilateral trade-related actions, it also recognizes that the use and non-use of security exceptions must remain within confined limits. *United States—Origin Marking Requirement* contributes to the consistency of WTO jurisprudence, reaffirming that, for the time being, political actions fall outside the purview of the WTO dispute resolution process. This demonstrates a collective commitment to maintaining a stable and predictable legal framework within the international trading system, while simultaneously emphasizing the boundaries between trade regulations and political motives. By so doing, the WTO aims to checkmate politically driven disruptions to the global trade regime disguised under domestic regulatory objectives and to ensure that trade disputes are resolved based on established principles.[13] Beyond MFN non-discrimination obligations, *United States—Origin Marking Requirement* raises broader questions on geoeconomics and the legality of proxy trade wars, increased protectionism and trade wars, the politics of international law, and the future of the WTO in the multilateral trade regime.[14] The United States has strongly rejected all five recent WTO panel reports on security exceptions, including *United States—Origin Marking Requirement*, and maintained its stance that issues of national security should not be reviewed in WTO dispute settlement. The U.S. January 26, 2023 notification to the Dispute Settlement Body appealing the panel decision may be self-contradictory, considering that it has paralyzed the functioning of the Appellate Body by blocking future appointments.[15] However, this reiterates the importance of the WTO and its dispute settlement mechanisms for predictability and certainty in international trade law.

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doi:10.1017/ajil.2023.29

[12] Transcript of Remarks by Mr. Algernon Yau, Hong Kong Secretary for Commerce and Economic Development (Dec. 22, 2022), *at* https://www.info.gov.hk/gia/general/202212/22/P2022122200283.htm.

[13] Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655 (2019).

[14] Mona Pinchis-Paulsen, *Let's Agree to Disagree: A Strategy for Trade-Security*, 25 J. INT'L ECON. L. 527 (2022).

[15] U.S. Notification of Appeal to DSB (Jan. 26, 2023), *at* https://ustr.gov/sites/default/files/2023-01/US.DSB.Notification.of.Appeal.fin.(DS552)%20(to.post).pdf.

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