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UNITED STATES - ORIGIN MARKING REQUIREMENT

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY HONG KONG, CHINA

The following communication, dated 14 January 2021, from the delegation of Hong Kong, China to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a panel with respect to certain measures affecting marks of origin imposed by the United States.

On 30 October 2020, Hong Kong, China requested consultations with the Government of the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 7 of the Agreement on Rules of Origin, and Article 14.1 of the Agreement on Technical Barriers to Trade. Consultations were held on 24 November 2020 with a view to reaching a mutually satisfactory solution. Unfortunately, these consultations failed to resolve the dispute.

Therefore, Hong Kong, China submits this request pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 8 of the Agreement on Rules of Origin, and Article 14.1 of the Agreement on Technical Barriers to Trade, and asks that the Dispute Settlement Body (DSB) establish a panel with standard terms of reference as set out in Article 7.1 of the DSU.

In the paragraphs to follow, Hong Kong, China identifies the measures at issue and provides a brief summary of the legal basis for its claims against those measures.

A. Background

On 11 August 2020, the United States Customs and Border Protection (USCBP) published a notice that, after 25 September 2020, goods produced in Hong Kong must be marked to indicate that their origin is "China" for the purposes of the origin marking requirement set forth at Section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304. By subsequent notice, the USCBP extended the date for compliance with this requirement to 10 November 2020.

Section 304 of the Tariff Act of 1930 requires articles of non-United States origin imported into the United States to be marked "in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article". Prior to the imposition of the revised origin marking requirement as announced in the notice published on 11 August 2020, the United States has required, and therefore permitted, goods produced in Hong Kong, China to be marked to indicate that their origin is "Hong Kong". The United States' prior treatment of goods of Hong Kong, China origin was consistent with the fact that the United States generally permits goods originating within the territory of other WTO Members, including separate customs territory Members, to be marked with the English name of that territory.

The USCBP published the notice on 11 August 2020 pursuant to the "Executive Order on Hong Kong Normalization" signed by the President of the United States Donald J. Trump on 14 July 2020. The Executive Order suspends the application of Section 201(a) of the United States-Hong Kong Policy Act of 1992, 22 U.S.C. § 5721(a), to a variety of United States statutes, including Section 304 of the Tariff Act of 1930.

Under Section 201(a) of the United States-Hong Kong Policy Act of 1992, the laws of the United States apply to Hong Kong, China in the same manner as those laws applied to Hong Kong prior to the resumption of the exercise of sovereignty by the People's Republic of China on 1 July 1997, unless the President of the United States determines and issues an Executive Order that Hong Kong, China "is not sufficiently autonomous to justify treatment under a particular law of the United States ... different from that accorded the People's Republic of China". The suspension of Section 201(a) of the United States-Hong Kong Policy Act of 1992 as it applies to Section 304 of the Tariff Act of 1930 is the legal basis upon which the USCBP ordered that goods produced in Hong Kong "may no longer be marked to indicate 'Hong Kong' as their origin, but must be marked to indicate 'China'".

B. Measures at Issue

The measures at issue include, but are not limited to:

1. Section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304;
2. The USCBP regulations implementing Section 304, set forth at 19 C.F.R. Part 134;
3. Title II of the United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5721-5724;
4. The "Executive Order on Hong Kong Normalization" signed by the President of the United States Donald J. Trump on 14 July 2020;
5. The USCBP, "Country of Origin Marking of Products of Hong Kong", 85 Fed. Reg. 48551 (11 August 2020).

The measures at issue include any amendments, supplements, or extensions to the foregoing measures, including any official guidance or determinations relating to those measures, as well as any replacement or implementing measures or other measures that are related to the treatment of goods of Hong Kong, China origin pursuant to or as a consequence of the Executive Order on Hong Kong Normalization. These measures include, without limitation, any measures that the United States may adopt pursuant to or as a consequence of the Executive Order on Hong Kong Normalization that affect the tariff treatment of goods of Hong Kong, China origin.

The measures at issue also include the administration of any of the foregoing measures.

C. Legal Basis for the Complaint

The United States measures listed in the previous section of this request are inconsistent with the United States' obligations under the following provisions of the GATT 1994, the Agreement on Rules of Origin, and the Agreement on Technical Barriers to Trade:

1. Article I:1 of the GATT 1994, because in respect of the rules and formalities of importation pertaining to marks of origin, the United States does not extend to products of Hong Kong, China origin immediately and unconditionally the same advantages, favours, privileges, or immunities that the United States extends to like products originating in the territory of other countries;
2. Article IX:1 of the GATT 1994, because the United States does not accord to the products of Hong Kong, China treatment with regard to marking requirements no less favourable than the treatment that the United States accords to like products of other countries;
3. Article X:3(a) of the GATT 1994, because the United States does not administer its origin marking requirements in a uniform, impartial, and reasonable manner;
4. Article 2(c) of the Agreement on Rules of Origin, because in respect of products produced in Hong Kong, the United States requires the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin;

5. Article 2(d) of the Agreement on Rules of Origin, because the United States discriminates between Hong Kong, China and other Members in respect of the rules of origin that it applies to imports;
6. Article 2(e) of the Agreement on Rules of Origin, because the United States does not administer its rules of origin in a consistent, uniform, impartial, and reasonable manner;
7. Article 2.1 of the Agreement on Technical Barriers to Trade, because the origin marking requirements that the United States applies to imports are technical regulations and, in respect of those technical regulations, the United States does not accord to products imported from Hong Kong treatment no less favourable than the treatment that it accords to like products originating in other countries.

In addition, and as a consequence of the foregoing, the measures at issue appear to nullify or impair the benefits accruing to Hong Kong, China directly or indirectly under the cited agreements.

Hong Kong, China asks that this request for the establishment of a panel be placed on the agenda for the next meeting of the DSB, which is scheduled for 25 January 2021, and that the DSB establish a panel with standard terms of reference as set out in Article 7.1 of the DSU.
