

Dispute Settlement Body Meeting on 28 July 2023

Hong Kong, China's Statement

Item 2. United States - Origin Marking Requirement (Hong Kong, China) (DS597)

A. Statement by the United States

Hong Kong, China's 1st intervention

- Thank you, Chair.
- Since circulation of the DS597 panel report on 21 December 2022 and the US' notification to appeal on 26 January 2023, this is the fourth time that DS597 is discussed at the DSB and DSB regular meetings.
- Chair, Hong Kong, China has seriously considered objecting this item to be put on the agenda, given the grave procedural abuse and the damaging implications on the conduct of DSB business henceforth and on the rules-based dispute settlement system.
- Chair, as you have pointed out in your opening remarks, the Rules and Procedures governing DSB meetings make it very clear that *"[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record"*. We regret and strongly object that the US raises yet again the same issues in a ruled DS case for the fourth time in a time span of six months. The panel has already rightly dismissed the US' claims in the case. The US is abusing the use of regular DSB meetings by seeking to validate its claims that have already been rejected by the panel. Indeed, Chair and Members would recall that the US has lodged an appeal against the panel's rulings; true that the Appellate Body has already been dysfunctional also due to the US blocking its appointment of members, but since an appeal avenue has been chosen by the US, then the only proper way to handle the US' further claims relating to DS597 would be through the appeal avenue, be it a restored Appellate Body, or an appeal mechanism, however it looks like, after the DS reform.
- Chair, Hong Kong, China has pointed out repeatedly that the DSB is not a forum for discussions of another Member's internal affairs, or political aspirations of any individual Member; and we continue to hold this view. The

objectives of the DSB is to facilitate resolution of trade disputes, and enforcement of rights and obligations under the WTO covered agreements, among other things. It has no mandate to scrutinise any Member's internal affairs; nor should it be used by a certain Member to scrutinise another Member's internal affairs in order to achieve that certain Member's ulterior, political motive. Chair, by allowing the US to do this, not only twice, but for three times, for four times, and may still be counting, we are going down a slippery slope.

- There is no reason that the US may continue to smear on our internal affairs in this trade dispute resolution forum with no reprimand. There is no reason that Members attending DSB meetings should be forced to hear from the US their one-sided version of Hong Kong's internal affairs, on a nearly monthly basis. Nor should Hong Kong, China be forced to be answerable to the US' description of our city's state of affairs in its fact-twisting, out-of-context, or otherwise over-simplified version, in the DSB, a trade dispute resolution forum.
- But forced we are, to respond now, Chair, as the US has presented today yet again its biased and untrue descriptions of the current state of affairs in Hong Kong, to which we must register our strong objection on record and set the record straight in detail, again.
- We must put on record that the Hong Kong Special Administrative Region (Hong Kong SAR) Government steadfastly safeguards the rights and freedoms enjoyed by Hong Kong people as protected under the law. Human rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration have always been robustly, constitutionally guaranteed in our city, under the Basic Law and the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong. It is also true that such rights and freedoms are not absolute, as the ICCPR also expressly states that some of them may be subject to restrictions as prescribed by law that are necessary for protection of national security, public safety, public order or the rights and freedoms of others, etc.
- For those who actually know Hong Kong, we are a society underpinned by the rule of law. Article 25 of the Basic Law, our mini constitution, provides that all Hong Kong residents shall be equal before the law. All law enforcement actions taken by law enforcement agencies are based on evidence, strictly according to the law and for the acts of the people or organisations concerned, and have nothing to do with their political stance or

background. It would be totally contrary to the rule of law for someone to suggest that certain group of people could enjoy privileges and break the law without getting arrested or bearing legal responsibilities due to their capacity. Everyone, including journalists, politicians, tourists, etc. should abide by the law, as much as other Hong Kong citizens do. As in many other jurisdictions that uphold the “rule of law”, so long as people, institutions or organisations observe the laws in Hong Kong, they will not unwittingly violate the law, including the National Security Law.

- Likewise for prosecutions. Pursuant to Article 63 of the Basic Law, the Department of Justice is independently responsible for criminal prosecutions, free from any interference. The prosecutors act strictly in accordance with a longstanding international practice that the decision to prosecute will only take into consideration the applicable laws and the admissible evidence to justify instituting proceedings. Cases will never be handled any differently owing to the political beliefs or backgrounds of the persons involved.
- Chair, for those who are familiar with common law jurisdictions, Hong Kong’s judicial system has always been highly regarded by international communities. Article 85 of the Basic Law clearly stipulates that the Judiciary shall exercise judicial power independently in accordance with the law, free from any interference. As guaranteed by the Basic Law and the Hong Kong Bill of Rights, everyone charged with a criminal offence has the right to a fair hearing.
- On Hong Kong National Security Law, it has clearly stipulated that human rights shall be respected and protected in safeguarding national security in the Hong Kong SAR. It provides clear definition to the specific elements of four categories of offences, namely secession, subversion of state power, terrorist activities, and collusion with a foreign country or with external elements to endanger national security.
- Endangering national security is a very serious offence, no country will watch with folded arms any acts and activities that endanger national security. The Hong Kong law enforcement agencies have been taking law enforcement actions based on evidence and strictly in accordance with the law in respect of the acts of the persons or entities concerned, and have nothing to do with their political stance, background or occupation. The actions of the Hong Kong Police Force to go after persons suspected of having committed offences under the National Security Law are reasonable, rational and legal.

- In respect of the action taken by the Hong Kong Police Force on 3 July 2023 to list eight persons as wanted persons; these eight persons have absconded overseas while suspected of having committed offences under the Hong Kong National Security Law. Again, our action is law-based.
- The eight persons concerned who have fled overseas are suspected of having continued to commit offences under the Hong Kong National Security Law that seriously endanger national security. The Hong Kong Police has the responsibility to take all necessary measures in accordance with the law to arrest the persons related to the cases and bring them to justice. The actions by the Police are reasonable, rational, legal, and indeed necessary.
- The scope of application of the Hong Kong National Security Law fully aligns with the principles of international law, international practice and common practice adopted in various countries and regions. Such practice is both necessary and legitimate, and is also in line with those of other countries and regions around the world. The national security laws of various countries also have extraterritorial effect under the principles of “personality” and “protective jurisdiction”. It is also a common and international practice for law enforcement agencies in other places to release information of fugitive offenders who have allegedly committed serious offences and are wanted, and appeal to members of the public to assist in bringing fugitive offenders to justice.
- Chair, I have to go into the details of the legal principles that are used in our National Security Law.
- In general, the criminal law of the Hong Kong SAR only regulates acts that take place in the Hong Kong SAR, and this is known as the “territorial principle” in the international law and international practice. At the same time, international law and relevant practice have also established exceptions to the “territorial principle”, including the “personality principle” and the “principle of protective jurisdiction”. Any State has the right to formulate laws based on these principles to exercise jurisdiction over criminal acts committed outside its territory. The Hong Kong National Security Law formulated by the Central Authorities defines the scope of application of the Law precisely in accordance with these principles of international law, international practice and common practice in various countries and regions.
- Article 36(1) of the Hong Kong National Security Law stipulates that “this Law shall apply to offences under this Law which are committed in the Hong Kong Special Administrative Region by any person. An offence shall be deemed to have been committed in the Region if an act constituting the

offence or the consequence of the offence occurs in the Region.” This provision is directed at criminal acts that are wholly or partly committed in the Hong Kong SAR, and reflects the “territorial principle”.

- Article 36(2) of the Hong Kong National Security Law is directed at “offences under this Law committed on board a vessel or aircraft registered in the Region”, which also complies with the provisions of the relevant international treaties.
- Under certain situations in line with international law and practice, the criminal law may regulate acts that take place outside the Hong Kong SAR. The Hong Kong National Security Law provides for two types of situations as follows.

The “personality principle”

- The first type of situation concerns an offender whose identity has close connection with the Hong Kong SAR, rather than a foreigner who has absolutely no ties with the Hong Kong SAR, and this is known as the “personality principle”. Under this principle, a State may exercise jurisdiction over criminal acts committed by its citizens outside its territory. As a matter of fact, as a citizen or permanent resident of a country or region, it is incumbent on him or her to abide by the laws of respective country or region, regardless of where he or she is.
- To this end, Article 37 of the Hong Kong National Security Law stipulates that “this Law shall apply to a person who is a permanent resident of the Hong Kong SAR or an incorporated or unincorporated body such as a company or an organisation which is set up in the Region if the person or the body commits an offence under this Law outside the Region.”
- There are also numerous overseas examples of national security laws that tackle criminal acts committed outside the sovereign territory in accordance with the “personality principle”, such as the offences of treason, unlawful disclosure of classified information and the Logan Act which targets activities of collusion with a foreign country or with external elements in the US; the offence of treason and the Terrorism Act 2000 in the UK; the foreign interference offence in Australia; the offence of treason in Canada and the offence of dissemination of propaganda material of unconstitutional and terrorist organisations in Germany, etc.

The principle of “protective jurisdiction”

- The second type of situation arises when the criminal acts go against and undermine the security or the vital interests of Hong Kong, and this is the principle of “protective jurisdiction”. Under the principle of “protective jurisdiction”, if foreigners commit criminal acts abroad against a sovereign State that endanger its security or its vital interests (such as government systems or functions), the sovereign State can adopt laws with extraterritorial effect to exercise prescriptive criminal jurisdiction.
- To this end, Article 38 of the Hong Kong National Security Law stipulates that “this Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside of the Region by a person who is not a permanent resident of the Region.”
- The national security laws of other countries in which the protective principle is applied include the terrorism offences in the US, the National Security Bill currently at the final legislative stage in the UK, the espionage offence in Australia, the espionage offence in Canada and the offence of theft of state secrets in Germany.
- So in gist, it is noted that the national security laws of various countries, including the US, the UK, Australia, Canada and the Member States of the European Union, also have extraterritorial effect under the principles of “personality” and “protective jurisdiction”, which amply exposes that any criticism by the relevant countries against the law enforcement authorities in Hong Kong is nothing but double standards and sophistry.
- It is the inherent right and obligation of our Country as a sovereign State to enact the Hong Kong National Security Law as well as to exercise prescriptive extraterritorial jurisdiction over the relevant offences endangering national security, in which other countries should not meddle. It is the constitutional duty of the Hong Kong SAR to safeguard national security and the Hong Kong SAR Government would definitely spare no effort in taking all necessary measures in accordance with the law and to pursue the liability of those who have allegedly committed offences under the Hong Kong National Security Law outside Hong Kong.
- Now, turning back to DS597.
- Chair, Hong Kong, China is a staunch supporter of the multilateral trading system with WTO at its core. We take our rights and obligations under the WTO covered agreements seriously. The DS597 decision was reached after

the parties and panelists have gone through all the stipulated rules and procedures under the DSU.

- The US, in DS597, was given ample opportunities to put forth, elaborate and clarify its arguments and respond to Hong Kong, China's submissions and responses before the Panel, composed of three independent and fair-minded experts. The Panel had considered the submissions that set out in full all the facts and issues of law that are considered relevant by the US and Hong Kong, China, as well as submissions from the third parties. The Panel considered all these submissions, in full and in totality, and came to the unanimous decision that the challenged measure in question is discriminatory and WTO-inconsistent, and that the US should bring its WTO-inconsistent measure into conformity.
- As the US has already notified the DSB on 26 January 2023 of its decision to appeal to the Appellate Body issues of law covered in the DS597 panel report and legal interpretations developed by the Panel, we invite the US to either stop blocking appointments to the Appellate Body so that the Appellate Body can restore its operation and consider the US' claims further; or the US should work with other Members in full sincerity for a reformed DS system, under which, presumably, DS597 would be further processed alongside other cases that have appealed into the void.
- Chair, we appeal to you and Members that such abuse of DSB regular meetings for one to continue its "appeal" with sheer political motivation must be curtailed and must not be encouraged. Ultimately, it is the membership's fundamental systemic interest that the rules-based dispute settlement system be respected and Members allow the adjudicative process to do its work per the governing rules and procedures.
- Thank you, Chair.

Hong Kong, China's 2nd intervention

- Thank you, Chair.
- I have said enough just now of the legal structure and operation of the Hong Kong National Security Law and the enforcement actions of the Law in Hong Kong. I have also said enough of how our National Security Law and practice have been in line with international law and practice, which are also adopted by many of the Members in this room; I therefore will not repeat them here.

- On the US continued accusation that it is Hong Kong, China bringing all these issues into the WTO or DSB, we would like to recall our second intervention under Item 4 at the DSB meeting on 28 April 2023.
- We would also like to add that should the US be genuine about not to bring these issues in the WTO or DSB, we invite the US not to raise this agenda item again, now that it has been raised for the fourth time and discussion of substantive points, if any, have long been exhausted, and let the adjudicative process do its work per the governing rules and procedures.
- If the US has any concern over an alleged overreach in a ruling of a panel or the Appellate Body, we understand that there are certain proposals under deliberation in the informal DS reform process. The fact that there are proposals under deliberation reflects that per the current rules and regulations, the DSB regular meetings are not a forum for this purpose.
- Thank you, Chair.

Hong Kong, China's 3rd intervention

- Thank you, Chair. I shall be very brief.
- Chair, from a systemic interest point of view, it is a very dangerous suggestion that despite all the rights and obligation set out in the WTO covered agreements, Members should impose self-sanction in excising their legitimate rights and obligations under the said agreements, just because a Member is not happy with certain rulings in previous cases, and in the current one.
- Thank you, Chair.

Item 6. Appellate Body Appointments: Proposal by Afghanistan; Angola; Antigua and Barbuda; Argentina; Australia; Bangladesh; Benin; Plurinational State of Bolivia; Botswana; Brazil; Brunei Darussalam; Burkina Faso; Burundi; Cabo Verde; Cambodia; Cameroon; Canada; Central African Republic; Chad; Chile; China; Colombia; Congo; Costa Rica; Côte D’Ivoire; Cuba; Democratic Republic of Congo; Djibouti; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Eswatini; The European Union; Gabon; The Gambia; Ghana; Guatemala; Guinea; Guinea-Bissau; Honduras; Hong Kong, China; Iceland; India; Indonesia; Israel; Kazakhstan; Kenya; Republic of Korea; Lesotho; Liechtenstein; Madagascar; Malawi; Malaysia; Maldives; Mali; Mauritania; Mauritius; Mexico; Republic of Moldova; Morocco; Mozambique; Myanmar; Namibia; Nepal; New Zealand; Nicaragua; Niger; Nigeria; North Macedonia; Norway; Pakistan; Panama; Paraguay; Peru; The Philippines; Qatar; Russian Federation; Rwanda; Saint Kitts and Nevis; Saint Lucia; Senegal; Seychelles; Sierra Leone; Singapore; South Africa; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Tanzania; Thailand; Togo; Tunisia; Türkiye; Uganda; Ukraine; United Kingdom; Uruguay; The Bolivarian Republic of Venezuela; Viet Nam; Zambia; and Zimbabwe (WT/DSB/W/609/REV.25)

- Thank you, Chair.
- Chair, the grave concerns expressed in our statement under Item 2 exactly reflect why a fully-functioning, two-tiered appeal mechanism is so important for a small delegation like Hong Kong, China, to pursue our legitimate rights and honour our obligations under the WTO covered agreements. It remains our position that any issue of law in dispute between two parties should be independently and objectively adjudicated by a fully-functioning, two-tiered DS system.
- I trust that Members would recall that avoidance or prevention of power dynamics meddling in trade dispute resolution is one of the core values we share, under the current DS system, and in moving along the informal DS reform process.
- Hong Kong, China would like to reiterate our concern about the Appellate Body impasse and our commitment to work constructively with other Members in the informal DS process underway, on the basis that there should be no erosion of Members’ legitimate rights and obligations.

- Last but not least, I would like to thank Mr Marco Molina of Guatemala for his work in the informal DS reform process in his personal capacity, as well as his work in keeping this issue of AB appointments alive. I would also like to welcome Laos PDR for joining this proposal.
- Thank you.
