

Asian Academy of International Law

WTO in an age of multilateral and bilateral Free Trade Agreements: Is it still relevant to Hong Kong?

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1. Good evening. I would like to express my gratitude to the Asian Academy of International Law for organising this seminar, and for inviting me to speak about the importance of the World Trade Organization (“WTO”) for Hong Kong, China.

I. Hong Kong and the WTO

2. First of all, I would like to briefly mention the relationship between Hong Kong and the WTO.
3. A primary objective of the WTO is to promote trade liberalization and encourage global economic growth. This objective is perfectly in line with Hong Kong’s trade policy, which is based on the principle of free trade. So, it comes as no surprise that Hong Kong was among the founding members of the WTO in 1995 and has remained an active participant and a strong supporter ever since.
4. While Hong Kong recognizes the benefits of free trade agreements (“FTAs”) and entered into FTAs with 20 economies in the past 25 years, it is undisputable that the multilateral trading system embodied in the WTO continues to play a pivotal role for Hong Kong in promoting free and open

trade. The multilateral trading system under the WTO not only reduces trade barriers but also fosters fair and open competition, enabling Hong Kong businesses to access a wide range of overseas markets and reinforcing Hong Kong as an international trading centre.

5. Hong Kong's unwavering commitment to free trade and the multilateral trading system is reflected in its active and constructive participation in all aspects of the WTO's work. These include recent negotiations on the prohibition of certain forms of fisheries subsidies, developing a transparent and predictable regulatory environment for electronic commerce, and promoting the participation of micro, small and medium-sized enterprise in international trade. Hong Kong's involvement in these initiatives shows its strong commitment to the multilateral trading system and promoting free trade on a global scale. The fact that these initiatives go beyond what is commonly found in traditional FTAs also highlights the continued importance and relevance of the WTO despite the proliferation of FTAs in recent years.
6. In addition to promoting trade liberalization and providing a platform for negotiation, the WTO also plays a critical role in facilitating peaceful resolution of trade disputes among members. The establishment of the Dispute Settlement Body ("DSB") within the WTO allows members to resolve trade dispute based on objective rules. This rules-based multilateral trading system therefore enhances the credibility and stability of the global trading system and establishes a level playing field for all WTO members.
7. Our commitment to respecting and upholding the WTO agreements is further evidenced by our impeccable record of never having been the subject of any complaints before the DSB, while Hong Kong has actively

participated in the DSB as a complainant or third party when there may be systemic interest for Hong Kong since the early days of the WTO.

II. Systemic Implications of the origin marking case for Hong Kong

8. The recent origin marking case brought by Hong Kong provides an excellent illustration of the systemic interest for Hong Kong under the WTO. This is a case regarding the origin marking requirement unilaterally imposed by the US on products produced in Hong Kong. This requirement mandates that all Hong Kong products must be marked as “China” instead of “Hong Kong” for origin marking purposes. The HKSAR Government lodged a complaint with the DSB, contending that the origin marking requirement was inconsistent with several WTO agreements, including the General Agreement on Tariffs and Trade (“GATT”) 1994. On the other hand, the US attempted to justify its discriminatory measure by relying on the essential security exception under Article XXI(b) of the GATT 1994. The US argued that the security exception was entirely “self-judging” by a WTO member. However, the Panel rightly rejected the “self-judging” argument, and found in favour of Hong Kong. The Panel concluded that the origin marking requirement was inconsistent with Article IX:1 of the GATT 1994, and the US’s measure could not be justified on the grounds of an emergency in international relations under Article XXI(b)(iii).

9. As Professor Lim will later look into the legal principles surrounding the Panel’s ruling and its legal implications, I would just focus on the broader systemic issues and implications of the case for Hong Kong.

(a) Safeguarding Hong Kong businesses interests

10. The first and foremost question to ask is why did we take the case to the WTO? The short answer is that the HKSAR Government's decision to lodge a complaint with the WTO is to demonstrate our commitment to upholding the rights and obligations under the WTO agreements, in order to support a rules-based multilateral trading system.

11. By lodging the case with the WTO, the HKSAR Government has also shown our readiness and willingness to take all necessary actions against any unfair and discriminatory trade practices that affect Hong Kong and its businesses' interests. The US imposition of a differential origin marking requirement on Hong Kong products has resulted in increased costs and complexity for Hong Kong businesses, which has forced them to segregate their products based on different markets of destination, putting them at a competitive disadvantage compared to other WTO members. Such an unfair and discriminatory measure clearly infringes on Hong Kong's rights and violates the US' obligations under Article IX:1 of the GATT 1994.

(b) Affirming the distinct membership of Hong Kong, China under the WTO

12. Apart from ruling on the violation of the WTO Agreement by the US, the Panel's finding also affirms Hong Kong's status as a distinct member of the WTO while being an inalienable part of the People's Republic of China. Hong Kong's membership in the WTO is based on its own merits as a separate customs territory with full autonomy in conducting external trading relations, in accordance with the "One Country, Two Systems"

principle enshrined in the Basic Law and recognized by the Marrakesh Agreement Establishing the WTO (“Marrakesh Agreement”).

13. Under Article 151 of the Basic Law, Hong Kong is a separate customs territory, and may, use the name “Hong Kong, China”, participate in relevant international organizations and international trade agreements including the GATT. The first explanatory note to the Marrakesh Agreement further provides that the term “country” as used in the WTO agreements, is understood to include Hong Kong as a separate custom territory member of the WTO.

14. Accordingly, Hong Kong’s economic and trade status is the same as that of other members of the WTO. In this regard, it defies logic to suggest that Hong Kong’s unique status as a distinct member of the WTO is unilaterally granted by certain foreign countries.

(c) Ensuring a predictable trading environment

15. Moreover, the origin marking case underlines the importance of ensuring a predictable trading environment through consistent interpretation and application of the WTO agreements. The Panel’s finding in this case is in line with previous rulings, such as *Russia – Traffic in Transit* and *Saudi Arabia – IPRs*, which have shown that the security exception is not entirely “self-judging”. The Panel emphasized that while the multilateral trading system allows for sufficient flexibility for Members to adopt measures they consider necessary for the protection of their security interests, it at the same time ensures that this flexibility is exercised within the limits intended by its drafters. This ruling ensures that the security exception is not used as a “safe-harbour” for unilateralism or protectionism,

disregarding the core principles of the WTO such as non-discrimination and openness.

16. In addition, consistent interpretation and application of WTO agreements is crucial for maintaining the legitimacy, certainty, and predictability of the rules-based multilateral trading system. Governments can take into account the ruling of the panel when formulating policies with the confidence that the obligations under the WTO agreements will be interpreted and applied consistently. This, in turn, promotes greater transparency and accountability in policymaking, ultimately benefiting the business community. Businesses can have greater confidence in the stability of the trading environment, thereby reducing uncertainty and allowing them to make long-term investments. In short, the WTO's role in ensuring a predictable trading environment cannot be overstated, and the consistent interpretation and application of WTO agreements by the panel is key to this goal.

(d) Importance of the need to reform the DSB

17. *Last but not least*, this case highlights the importance of the need to reform the dispute settlement mechanism. The Appellate Body (“AB”) of the DSB is currently in an impasse due to a lack of active members caused by the blocking of appointments by a Member since 2019. In the origin marking case, despite an unequivocal and impartial conclusion reached by the Panel, it is regrettable to see that the US has decided to appeal into the void and delay the implementation of the Panel's recommendations.

18. By blocking appointments and holding the system hostage, the proper functioning of the WTO dispute settlement system has been called into

question. This case therefore highlights the urgent need to reform the DSB with a view to restoring the appellate function.

19. To this end, Hong Kong has been actively engaged in making constructive contributions to the WTO dispute settlement reform exercise with other like-minded members. Our Deputy Secretary for Justice met with the Director General of the WTO in Geneva in March earlier this year to reaffirm Hong Kong's full support for WTO's endeavours, including any possible reform of the dispute settlement mechanism to restore a fully functioning, binding and two-tiered dispute settlement system before the 2024 deadline set out in the MC12 Outcome Document

20. In order to preserve the appellate function while the AB remains dysfunctional, Hong Kong, along with 15 other WTO members, set up the Multiparty Interim Appeal Arbitration Agreement (MPIA) in March 2020. The MPIA provides for the use of arbitration as an alternative mechanism. To date, 25 WTO members are parties to this arrangement. On 21 December 2022, the first MPIA appeal arbitration award, *DS591: Colombia – Frozen Fries* was issued. Recently, both China and Japan have notified the DSB of their agreement to use the MPIA mechanism to resolve any appeal in the case of *DS601 China - Anti-Dumping on Stainless Steel (Japan)*.

21. As such, the MPIA has helped to alleviate some of the problems caused by the impasse in the AB. The WTO remains a vital trade forum and continues to play an important role for promoting a fair and open trading system.

III. Conclusion

22. The impasse in the AB or any abuse of the mechanism by a member should not overshadow the WTO's other essential roles and functions in promoting global trade and economic growth. The WTO still provides many other crucial functions, in particular, trade negotiations which remain dynamic and operational. Rather than dismissing the WTO's relevance, it is more constructive to explore possible ways to improve the organization to better serve its intended purpose. Hong Kong remains committed to support the WTO and the rules-based multilateral trading system under the WTO.

23. I hope that my presentation today has provided you with some insights into the significance of the WTO in promoting a stable and predictable global trading environment, as well as its relevance to Hong Kong. We will continue to make constructive contribution and give support to the work of the WTO, which we believe is beneficial for enhancing Hong Kong's status as an international trading centre.

24. Thank you very much and I look forward to the insightful discussion and sharing by other distinguished speakers.