The Legal Forum on Interconnectivity and Development

Panel Session 2: Legal Instruments in addressing external challenges

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1. It is my honour to join this distinguished panel and discuss the use of legal instruments in addressing external challenges. Today, I will use the origin marking case brought by Hong Kong, China in the World Trade Organization ("WTO") dispute settlement body ("DSB") to illustrate how we have utilized the legal instruments under the WTO to safeguard our interests.

I. Hong Kong and the WTO

2. Before going into the case, I would like to share with you some background information about Hong Kong and the WTO.

3. Hong Kong became a party to the General Agreement on Tariffs and Trade ("GATT") in 1986 and participated as one of the founding members of the WTO in 1995.

4. Hong Kong has maintained its status as a separate customs territory member under the WTO, after reunification with the motherland in 1997. This unique status is based on the innovative and successful principle of "one country, two systems", as enshrined in the Basic Law. According to Articles 116, 151, and 152 of the Basic Law, Hong Kong shall be a separate customs territory and can become a distinct WTO member under the name of "Hong Kong, China" with the capability to conclude trade agreements on our own.

II. DS597: US – Origin Marking (Hong Kong, China)

5. Now, turning to the origin marking case. While Hong Kong, China has been actively involved in the WTO's DSB as a third party in the past, the origin marking case is the first case that Hong Kong, China acted as a complainant against the US.

6. In October 2020, we brought a case against the unilateral origin-marking requirement imposed by the US on products produced in Hong Kong. The origin-marking requirement mandates that all Hong Kong products must be marked as "China" instead of "Hong Kong" for origin marking purposes. In response, we launched a complaint with the WTO's DSB, contending that the origin-marking requirement was inconsistent with several WTO agreements, including Article IX:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").The US attempted to justify its discriminatory measure by invoking 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. We have just heard from Tony this argument is much favoured by the US. In December last year, the Panel rightly rejected the "self-judging" argument and ruled against the US. The Panel concluded that the US origin-marking requirement was inconsistent with Article IX:1 of the GATT 1994.

7. Specifically, the Panel found that the origin-marking requirement imposed a differential treatment on products from Hong Kong, China. While goods from other WTO members or non-members were required to be marked with their respective names, Hong Kong products were mandated to bear the name of another WTO member. This difference in treatment modified the conditions of competition to the detriment of Hong Kong products. Our

products were unable to compete in the US market under their own name and could not benefit from any value attached to their origin.

8. The Panel further ruled that the US's measure could not be justified on the grounds of an emergency in international relations under Article XXI(b)(iii). In particular, the Panel pointed out that the US and Hong Kong, China maintained cooperation in various policy areas, and the trade relationship had remained largely unaffected, except for the origin marking requirement and some export controls.

(a) Upholding a rules-based multilateral trading system to protect business and development interests

9. This case serves as an excellent example of how we have effectively utilized legal means to uphold the rules-based multilateral trading system and protect our business and development interests.

10. The imposition of a discriminatory origin-marking requirement by the US on Hong Kong products has imposed significant costs and complexities on local businesses. This unfair measure has forced Hong Kong enterprises to segregate their products based on different markets of destination, placing them at a disadvantage compared to WTO members. Such an unfair and discriminatory measure clearly infringes our rights under the WTO and impair our trade interests.

6. By pursuing the case under the WTO, we have demonstrated our readiness and determination to take necessary actions against any unfair and discriminatory trade practices that adversely affect the development and business interests of Hong Kong. This proactive stance also underscores our strong commitment to upholding WTO agreements and supporting a rules-based multilateral trading regime .

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

7. In addition to ruling on the violation of the WTO Agreement by the US, the Panel's findings reaffirmed Hong Kong's status as a distinct member of the WTO while being an integral part of the People's Republic of China. Hong Kong, China's membership under the WTO is based on its own merits as a separate customs territory, possessing full autonomy in conducting external trade relations, consistent with the "one country, two systems" principle enshrined in the Basic Law and recognized by the Marrakesh Agreement Establishing the WTO ("Marrakesh Agreement").

8. The findings by the Panel have confirmed that our status under the WTO is no different from that of the other WTO members. It is wholly misconceived to suggest that Hong Kong's unique status as an independent member of the WTO is unilaterally granted by a foreign country. We brought the case to remove any such misunderstanding and the Panel has ruled in our favour.

(c) Ensuring a predictable trading environment

9. Moreover, we brought the case to ensure a predictable trading environment through consistent interpretation and application of the WTO agreements. The Panel's finding in this case aligns with previous rulings, which have suggested 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. By upholding the principles of non-discrimination and openness,

the Panel's interpretations prevent the misuse of exceptions, such as the security exception, as a disguise for unilateralism or protectionism.

10. In fact, consistent interpretation and application of WTO agreements play a critical role in upholding the legitimacy, certainty, and predictability of the rules-based multilateral trading system. This fosters transparency and accountability in policy-making, ultimately benefiting the business community. By instilling confidence in the stability of the trading environment, it reduces uncertainty and enables businesses to make long-term investments, which will be conducive to trade and development in Hong Kong as well as among WTO members.

III. WTO Dispute Settlement Reform

11. Lastly, I have to mention that despite the unequivocal findings and the compelling ruling by the Panel, the US has lodged an appeal to the Appellate Body of the DSB earlier this year. As you may know, the Appellate Body of the DSB has been at an impasse since 2019 due to the blocking of appointments by a member. It is regrettable to see that the US has decided to appeal into the void, thereby causing delays in the implementation of the Panel's recommendations.

12. As such, this case also highlighted the urgent need for reforming the DSB to restore its appellate function.

13. In pursuit of this objective, Hong Kong, China has actively participated in making constructive contributions to the ongoing WTO dispute settlement reform process, collaborating with like-minded members. Our aim is to explore possible reforms to the dispute settlement mechanism that would reinstate a fully functioning, binding, and two-tiered dispute settlement system before the 2024 deadline outlined in the MC12 Outcome Document.

14. To preserve the appellate function while the Appellate Body remains dysfunctional, Hong Kong, China, together with 15 other WTO members, set up the Multiparty Interim Appeal Arbitration Agreement ("MPIA") in March 2020. This MPIA provides an alternative mechanism through arbitration. To date, 26 WTO members are parties to this arrangement. The MPIA therefore has helped to alleviate some of the problems caused by the impasse of the Appellate Body. For instance, China and and Japan have agreed to use MPIA mechanism to resolve any appeal in case of DS601 China - Anti-Dumping on Stainless Steel (Japan).

IV. Conclusion

15. To conclude, the impasse or abuse of the DSB by a member should not overshadow the legal value of the WTO agreements in promoting global trade and economic growth. Many WTO members have been engaging in fruitful discussions on possible measures and reform to tackle the problems. We still see the WTO agreements as essential and valuable legal tools in upholding a fair and open trading system.

16. Hong Kong, China, as an international trading centre and a "super-connector" to the world, we remain committed to support the WTO and uphold the rules-based multilateral trading system established under the framework. We also stand ready to take into account and make good use of the WTO agreements to address any challenges that we may face in international trade.

17. Thank you very much.