

Statements by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, January 27, 2023

3. CHINA – MEASURES CONCERNING TRADE IN GOODS AND SERVICES
 - A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION (WT/DS610/8)

Statement by Ambassador María Pagán

- The United States would like to express its support for the complaint brought by the European Union. The United States requested to participate in the consultations in this dispute in light of its substantial trade interest, but we regret that request was denied by China without explanation.
- We are disappointed that China has not lifted its restrictions relating to goods and services of Lithuania and the European Union. We are also concerned at the lack of transparency on the basis for these restrictions.
- Accordingly, the United States continues to call on China to lift these coercive economic measures. The United States intends to participate in this dispute as a third party.

6. STATEMENT BY CHINA REGARDING THE PANEL REPORT IN THE DISPUTE:
"UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM
PRODUCTS" (DS544)

Statement by Ambassador María Pagán

- The United States is making this intervention with regard to the several agenda items involving national security.
- The United States regrets that this item has been placed on the agenda and that China and certain other Members seek to drag issues of national security into the WTO.
- The United States rejects the false portrayal of our actions and interests that we have just heard.
- The United States continues to be one of the most free, transparent, and competitive economies. The United States is the world's largest single-country importer, and U.S. tariffs are among the lowest in the world.
- The United States also continues to be one of the most transparent Members of the WTO. When the United States takes an action, the reasons are made clear both to U.S. citizens and to our trading partners at the WTO. You know where we stand – and why.
- At our recent Trade Policy Review, we appreciated many Members' recognition of our strong record on transparency and were gratified to hear many Members welcome our record of WTO leadership across all pillars of the organization, including on WTO reform. U.S. leadership at the WTO reflects our commitment to the organization.
- The United States has led by maintaining a fundamentally open economy. We played a key role in creating the GATT and subsequently the WTO, joining other likeminded countries to negotiate rules dedicated to fairness, transparency, and market-oriented competition, grounded in the rule of law and predicated on values that benefit all. And the system we helped build embodies an optimistic vision.
- However, we have been clear – and will continue to be clear – that the United States will not cede decision-making over its essential security to WTO panels. The Biden Administration remains committed to preserving U.S. national security including by protecting human rights and democracy across the globe.
- For over 70 years, the United States has held the clear and unequivocal position that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security.
- This position has been shared by many Members who expressed similar views throughout previous decades at the GATT and WTO when their own security measures were

questioned.¹ Despite this shared history and understanding, some Members have recently chosen to pursue legal challenges to U.S. national security measures in the WTO, undermining our common vision for the WTO as a trade organization.

- Adjudicating questions of national security in the WTO is not only incompatible with the purpose of the WTO, a trade organization, but will not advance WTO Members' shared interests in the WTO as a forum for discussion and negotiation.
- From the beginning of the trading system, it has been the U.S. view that the appropriate remedy where a Member is impacted by another Member's essential security measures is to seek a non-violation / nullification or impairment claim. The reality is we designed a WTO where rebalancing could take place without interfering with a Member's sovereign responsibilities in the area of national security.
- When it comes to national security, each Member plays a unique role and carries unique responsibilities. The United States has a responsibility to lead. The United States government is responsible for protecting its citizens' security, and, as a nation, the United States is responsible for its commitments to allies and partners. Neither of these responsibilities can be abridged by the WTO inserting itself into issues of national security. Nor should the roles and responsibilities of other Members.
- In this respect, the Panels' reports are particularly troubling because they suggest a Member may not take action to protect its essential security interests until after irreparable damage is done – for example, after “armed struggles or outbreak of hostilities” – as if deterrence or preparedness were not critical to national security.² Another report stated, notwithstanding “evidence of the United States and other Members being highly concerned about the human rights situation in Hong Kong, China”, that action might be taken only once the “situation has escalated to a point of breakdown or near-breakdown in the relations between states”.³ Are the reports suggesting that the

¹See Statements by the European Communities, Canada, and Australia, GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982). See also Statements by Japan, New Zealand, Norway, Singapore, and the United Kingdom. GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982).

² See *United States – Certain Measures on Steel and Aluminum Products from China*, paras. 7.138-7.139 (“Based on its ordinary meaning, “war” involves a state of conflict characterized by the use of force. . . . the terms “guerre” and “guerra” similarly signify armed struggles or outbreak of hostilities. . . . the Panel considers that an “emergency in international relations” within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a “war” in terms of its impact on international relations.”).

³ See *United States – Origin Marking Requirement*, para. 7.289 (“tensions and differences in international relations cannot be characterized as resulting in an emergency in international relations unless the situation they give rise to is of a truly grave character for the relevant international relations that the situation implicates, in effect, a situation representing a breakdown or near-breakdown in those relations”); and para. 7.354 (“In particular we are of the view that the following considerations tend to run counter to a conclusion that the situation has escalated to a point of breakdown or near-breakdown in the relations between states or other participants in international relations. . . . Indeed, the evidence on record shows that the United States and Hong Kong, China's international relations continue to involve cooperation in a number of policy areas. We further note that trade has carried on between the United States and Hong Kong, China, largely as before.”); para. 7.357 (“there is no evidence or argument on the record that the United States or any other Member has severed its diplomatic, consular, or economic relations with China or Hong Kong, China.”); and para. 7.358 (“In summary, we consider that although there is evidence of the United

United States needs to take more numerous and severe actions to justify *this* national security action?

- The reports disregard the reality of sovereign nations, who must anticipate – not react to – issues of national security. The WTO as an institution has no business asserting its own standard that action may only be taken when it is too late.
- It was to avoid an outcome such as this that, at every step of these proceedings, from the requests for consultations, to the DSB’s establishment of panels, and throughout the panel proceedings, that the United States has been clear that the WTO is not the appropriate venue to adjudicate matters of national security. Therefore, the United States cannot support adoption of these fundamentally flawed and damaging reports, which would only further undermine the WTO.
- Despite these clear statements, China persisted in pushing the WTO to undertake this review, while simultaneously imposing illegal unilateral retaliatory measures on U.S. exports.
- We have seen in the past how China has sought to use WTO dispute settlement to undermine tools that were meant to address unfair trade, such as disciplines on dumping and subsidies. As we have said before, a WTO that serves to shield China’s non-market policies and practices is not in anyone’s interest.
- Likewise, China should not now be able to use the WTO to interfere with Members’ responses to national security issues related to those policies and practices.
- Indeed, with this dispute and others, we see China pursuing a strategy that would convert the WTO into a permanent venue for national security disagreements.
- The United States for long has been clear that it was a mistake to begin adjudicating national security at the WTO. We warned at the time that this would open the door to future disputes that would further undermine the foundations of the WTO.
- Allowing these erroneous reports to be adopted would only help erode the foundations of the multilateral trading system. The United States therefore has notified the DSB of its decision to appeal these damaging and erroneous reports.
- While there may be those who will criticize the U.S. decision to appeal – or perhaps *any* U.S. response – the United States will continue taking necessary if unpopular actions when it is the right thing to do.⁴

States and other Members being highly concerned about the human rights situation in Hong Kong, China, the situation has not escalated to a threshold of requisite gravity”).

⁴ The United States has been clear from the beginning that, with respect to *any* WTO disputes, “WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the

- The U.S. decision to appeal should not be misinterpreted as asking the WTO to reevaluate our national security decisions.
- The responsibility is on us – the Members – to tackle this issue head on.
- The United States believes that Members need to deepen their collective understanding of this issue that is so critical to all of us. We intend to raise this fundamental issue as part of our discussions on reform of the WTO dispute settlement system.
- Ultimately, we believe Members need to clarify and adopt a shared understanding of the essential security exception, and we therefore intend to seek an authoritative interpretation of Article XXI of the GATT 1994, pursuant to Article XI of the WTO Agreement.
- When we as WTO Members can trust that the system we built will respect the rules we agreed – and serve the purpose it is designed to serve – then that system can contribute to upholding rules-based trade, instead of forcing Members to move away and apart.

Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.” *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 316, at 659. “The statement of administrative action approved by the Congress ... shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. 3512(d).

10. STATEMENT BY TÜRKIYE REGARDING THE PANEL REPORT IN THE DISPUTE: "UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS" (DS564)

Statement by Ambassador María Pagán

- The United States notes that Türkiye has already illegally retaliated, and we refer to our earlier statement under agenda item 6.

12. STATEMENT BY HONG KONG, CHINA REGARDING THE PANEL REPORT IN THE DISPUTE: "UNITED STATES – ORIGIN MARKING REQUIREMENT" (DS597)

Statement by Ambassador María Pagán

- We refer to our statement under agenda item 6, and take this opportunity to remind Members of the serious consequences of the flawed interpretation of Article XXI of the GATT 1994 in the *US – Origin Marking Requirements* panel report.
- The report in this dispute further illustrates the deep concerns we raised earlier in this meeting – and over the course of this dispute.
- The challenged actions with respect to Hong Kong, China were based on well-grounded determinations implicating U.S. essential security interests relating to democracy and human rights.
- And the United States *does* consider democratic principles and human rights to be critical to its essential security interests – as is reflected in the U.S. National Security Strategy.
- These actions followed a series of actions by the People’s Republic of China (or PRC) that have increasingly denied the autonomy and freedoms promised to the people of Hong Kong, which culminated in part with the national security legislation imposed by the PRC on Hong Kong. My colleague will elaborate.

[U.S. Delegation:]

- As the challenged Executive Order states on its face: “Under this law, the people of Hong Kong may face life in prison for what China considers to be acts of secession or subversion of state power—which may include acts like last year’s widespread antigovernment protests. The right to trial by jury may be suspended. Proceedings may be conducted in secret. China has given itself broad power to initiate and control the prosecutions of the people of Hong Kong through the new Office for Safeguarding National Security. At the same time, the law allows foreigners to be expelled if China merely suspects them of violating the law, potentially making it harder for journalists, human rights organizations, and other outside groups to hold the PRC accountable for its treatment of the people of Hong Kong.”
- The U.S. Secretary of State has since continued to certify that Hong Kong, China, does not warrant treatment under U.S. law in the same manner as prior to July 1, 1997, in light of its findings that the PRC has taken new actions to erode rights and freedoms in Hong Kong, in direct contravention of its obligations under the Hong Kong Basic Law and the Sino-British Joint Declaration, which promised Hong Kong a high degree of autonomy.⁵

⁵ 2022 Hong Kong Policy Act Report (Mar. 31, 2022); 2021 Hong Kong Policy Act Report (Mar. 31, 2021).

- Indeed – and as we documented to the Panel – over the course of the dispute proceedings with Hong Kong, China, many of those serious concerns further materialized in Hong Kong.
- Most prominently, the National Security Law has been used as a blunt tool to quash democratic dissent, and as a result the electoral system in Hong Kong, China, was overhauled by “limiting political participation, reducing democratic representation, and stifling political debate.”⁶
- For example, former lawmakers and prominent pro-democracy activists were subsequently arrested or fled Hong Kong, China, to seek political asylum since the passage of the law. Many who remained were charged and sentenced to prison.⁷
- On July 14, 2020, the PRC warned that elections to select pro-democracy candidates for Legislative Council may violate the National Security Law.⁸ Subsequently, on July 30, 2020, various pro-democracy candidates were barred from running in the September 2020 Legislative Assembly election based on an alleged risk of collusion with foreign forces and opposition to the National Security Law.⁹
- On November 11, 2020, 15 pro-democracy politicians resigned from the legislature due to a measure imposed by Beijing to disqualify four sitting legislative members deemed to be “unpatriotic”.¹⁰ On January 6, 2021, more than 50 former lawmakers and pro-democracy activists were arrested for participating in or organizing elections in 2020.¹¹
- The National Security Law also had a chilling effect on the freedoms of speech and of the press. On July 2, 2020, only two days after passage of the law, the Hong Kong government declared a protest slogan illegal because it breaches the National Security

⁶ *Assault on Democracy in Hong Kong*, Press Statement, Anthony J. Blinken, Secretary of State available at <https://www.state.gov/assault-on-democracy-in-hong-kong/>.

⁷ *US – Origin Marking Requirement (DS597)*, Opening Statement of the United States of American at the Panel’s First Videoconference with the Parties (DS597 U.S. Opening Statement), para. 24; 2021 Hong Kong Policy Act Report (March 31, 2021); see also *Hong Kong Activists Sentenced For Their Role In Anti-Government Protest*, NPR (December 2, 2020) available at <https://www.npr.org/2020/12/02/941032196/hong-kong-activists-sentenced-for-their-role-in-anti-government-protest>.

⁸ DS597 U.S. Opening Statement, para. 25; *Beijing’s Hong Kong office warns pro-democracy pol could violate new security law*, Reuters (July 13, 2020) available at <https://www.reuters.com/article/us-hongkong-security/beijings-hong-kong-office-warns-pro-democracy-poll-could-violate-new-security-law-idUSKCN24F05Y>.

⁹ DS597 U.S. Opening Statement, para. 25; 2021 Hong Kong Policy Act Report (March 31, 2021); *EU calls for “immediate release” of Hong Kong activists*, AP News (January 6, 2021) available at <https://apnews.com/article/europe-democracy-hong-kong-arrests-china-71296e353e67b68f7bba590bf7048122>.

¹⁰ DS597 U.S. Opening Statement, para. 26; Hong Kong 2020 Human Rights Report at 10; *Hong Kong opposition lawmakers all quit after four members ousted*, The Guardian (November 11, 2020) available at <https://www.theguardian.com/world/2020/nov/11/china-pro-democracy-hong-kong-lawmakers-opposition-oust>.

¹¹ DS597 U.S. Opening Statement, para. 26; 2021 Hong Kong Policy Act Report (March 31, 2021); *EU calls for “immediate release” of Hong Kong activists*, AP News (January 6, 2021) available at <https://apnews.com/article/europe-democracy-hong-kong-arrests-china-71296e353e67b68f7bba590bf7048122>.

Law.¹² On July 5, 2020, the Education Bureau called for review of textbooks to ensure they do not violate the National Security Law.¹³ On July 8, 2020, the government banned in schools the singing of a popular protest song.¹⁴

- On August 10, 2020, media executive Jimmy Lai was arrested under the National Security Law for suspected collusion with foreign forces, and he was subsequently sentenced to prison for protests in 2019.¹⁵ The authorities later raided Apple Daily, the publication which he founded, on charges of using reporting to endanger national security,¹⁶ forced its closure,¹⁷ charged its executives with collusion with a foreign country, and denied their bail.¹⁸
- On February 4, 2021, the Education Bureau released guidelines for schools on national security and banned any political participation or expression on campuses.¹⁹ The Hong Kong Professional Teachers' Union, an organization with around 95,000 members, was disbanded due to the National Security Law.²⁰ More recently, Hong Kong University

¹² DS597 U.S. Opening Statement, para. 28; *Hong Kong Says Common Protest Slogan Calling for "Revolution" is Now Illegal Under National Security Law*, Time (July 3, 2020) available at <https://time.com/5862683/hong-kong-revolution-protest-chant-security-law/>; The Government of the Hong Kong Special Administrative Region, Government Statement (July 2, 2020) available at <https://www.info.gov.hk/gia/general/202007/02/P2020070200869.htm>.

¹³ DS597 U.S. Opening Statement, para. 28; 2021 Hong Kong Policy Act Report (March 31, 2021).

¹⁴ DS597 U.S. Opening Statement, para. 28; *Hong Kong bans protests anthem in schools as fears over freedoms intensify*, Reuters (July 8, 2020) available at <https://www.reuters.com/article/us-hongkong-protests-education/hong-kong-bans-protest-anthem-in-schools-as-fears-over-freedoms-intensify-idUSKBN2490OE>.

¹⁵ DS597 U.S. Opening Statement, para. 29; 2021 Hong Kong Policy Act Report (March 31, 2021); *Prominent Hong Kong Publisher Arrested Under New National Security Law*, NPR (August 10, 2020) available at <https://www.npr.org/2020/08/10/900758905/prominent-hong-kong-publisher-arrested-under-new-national-security-law>

¹⁶ DS597 U.S. Opening Statement, para. 29; *Two Apple Daily executives charged with collusion with foreign country*, Reuters (June 18, 2021) available at <https://www.reuters.com/world/china/hk-pro-democracy-tabloid-apple-daily-increases-production-after-police-raid-2021-06-18/>.

¹⁷ DS597 U.S. Opening Statement, para. 29; *Statement by President Joe Biden on Hong Kong's Apple Daily*, The White House Press Releases (June 24, 2021) available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/statement-by-president-joe-biden-on-hong-kongs-apple-daily/>

¹⁸ DS597 U.S. Opening Statement, para. 29; *Two Apple Daily executives charged with collusion with foreign country*, Reuters (June 18, 2021) available at <https://www.reuters.com/world/china/hk-pro-democracy-tabloid-apple-daily-increases-production-after-police-raid-2021-06-18/>.

¹⁹ DS597 U.S. Opening Statement, para. 30; 2021 Hong Kong Policy Act Report (March 31, 2021); Education Bureau Circular No. 3/2021, National Security: Maintaining a Safe Learning Environment Nurturing Good Citizens (February 4, 2021) available at <https://applications.edb.gov.hk/circular/upload/EDBC/EDBC21003E.pdf>.

²⁰ DS597 U.S. Opening Statement, para. 30; *Hong Kong teachers' union to disband due to "drastic" political situation*, Reuters (August 10, 2021) available at <https://www.reuters.com/world/asia-pacific/hong-kong-teachers-union-disband-due-drastic-political-situation-2021-08-10/>.

removed a statue from its campus out of fear of legal risks.²¹

- This is not a comprehensive list of developments that have occurred since the National Security Law was enacted, but the picture is clear. Indeed, many Members had publicly shared our concerns about the erosion of human rights, speech and press freedoms in Hong Kong, China.²²
- The United States explained to the panel that it considers democratic principles and human rights to be critical to its essential security interests. We acknowledge that not all Members value democratic principles or human rights, or perceive them as relevant to their essential security interests. But the United States *does* – as is reflected in the U.S. National Security Strategy²³ – and it was on this basis that the United States adopted the measure challenged by Hong Kong, China.
- Yet, the U.S. evaluation of these circumstances, and its determination that they required responsive action, was disregarded.
- Instead, the panel found that the pattern of human rights abuses and the erosion of autonomy in Hong Kong, China did not “meet the requisite level of gravity to constitute an emergency in international relations under Article XXI(b)(iii).”²⁴ The panel based its conclusion on a subjective assessment of the state of relations between Members, including the United States, China, and Hong Kong, China,²⁵ including in part on the finding that the United States continues to cooperate with Hong Kong, China, in certain areas.²⁶

²¹ DS597 U.S. Second Written Submission n.6; *Hong Kong University orders removal of Tiananmen Square massacre statue*, The Guardian (October 8, 2021) available at <https://www.theguardian.com/world/2021/oct/09/hong-kong-university-orders-removal-of-tiananmen-square-massacre-statue>.

²² DS597, U.S. Opening Statement at Second Videoconference with the Panel, para. 3. *Media Freedom Coalition Statement on Closure of Media Outlets in Hong Kong*, Office of the Spokesperson, U.S. Department of State (February 9, 2022) (<https://www.state.gov/media-freedom-coalition-statement-on-closure-of-media-outlets-in-hong-kong/#:~:text=Media%20Freedom%20Coalition%20Statement%20on%20Closure%20of%20Media%20Outlets%20in%20Hong%20Kong,-Media%20Note&text=The%20undersigned%20members%20of%20the,local%20media%20in%20Hong%20Kong>).

²³ U.S. National Security Strategy (October 2022), available at <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf> (“Americans will support universal human rights and stand in solidarity with those beyond our shores who seek freedom and dignity, just as we continue the critical work of ensuring equity and equal treatment under law at home. We will work to strengthen democracy around the world because democratic governance consistently outperforms authoritarianism in protecting human dignity, leads to more prosperous and resilient societies, creates stronger and more reliable economic and security partners for the United States, and encourages a peaceful world order.”).

²⁴ *US – Origin Marking Requirement*, para. 7.353.

²⁵ *US – Origin Marking Requirement*, para. 7.307, 7.324.

²⁶ Panel Report, para. 7.354.

- The United States fundamentally disagrees with the panel’s approach, which suggest a state ought to defer consideration of its essential security interests until after a breakdown in relations. A WTO Member cannot be expected to wait until it is too late to act, or be required to sever relations as a prerequisite for other action it considers necessary.
- The WTO does not have the competence or the authority to assess the foreign affairs relationships of a Member. Nor does it have the competence or authority to pass judgment on the value that the United States – and some other Members – place on freedom and human rights, and the actions they take in seeking to secure those values.
- Again, the United States cannot support adoption of this fundamentally flawed and deeply concerning report, which would only further undermine the WTO.

Second Intervention: Statement by Ambassador María Pagán

- The United States welcomes China’s and Hong Kong’s recognition that the WTO is not a forum for adjudicating national security.
- That is what we have been saying all along.
- The United States would like to know: Does China intend to maintain that position with respect to its new challenge?

13. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS
(WT/DSB/W/609/REV.23)

Statement by Ambassador María Pagán

- Members are aware of the longstanding U.S. concerns with WTO dispute settlement. Those concerns remain unaddressed, and the United States does not support the proposed decision.
- The United States believes that fundamental reform is needed to ensure a well-functioning WTO dispute settlement system. A well-functioning dispute settlement system supports WTO Members in the resolution of their disputes in an efficient and transparent manner, and in doing so limits the needless complexity and interpretive overreach that has characterized dispute settlement in recent years.
- The first step towards reform is to better understand the interests of all Members in WTO dispute settlement. The United States has been engaging with Members to advance this goal and we look forward to continued engagement. We appreciate the deeply substantive and informative discussions over the past several months. These informal discussions, which are guided by an interest-based approach, reflect a significant departure from the stale conversations of past years. We are pleased that delegations trusted in the merits of interest-based problem solving and took these opportunities to speak *with* one another, rather than *at* another. These dialogues enabled delegations to gain a better understanding of each other's perspectives on the value of dispute settlement and how that value might be maximized across the WTO Membership.
- We acknowledge that considerable work remains and that achieving dispute settlement reform – that is, fundamental reform to meet the needs of all WTO Members to the greatest extent possible – will not be easy. But the United States continues to believe that working collectively towards that goal provides the greatest chance of achieving durable, lasting reform.
- The United States is committed to working towards an improved system. We look forward to engaging further with those Members that also see value in an improved and reformed dispute settlement system that is accessible to all.

14. OTHER BUSINESS

A. STATEMENT BY NORWAY CONCERNING THE PANEL REPORT IN UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS (DS552)

Statement by Ambassador María Pagán

- The United States refers to its statement under agenda item 6.
- The United States also refers Norway to the U.S. notification to the DSB of its intention to appeal, stating U.S. willingness to confer with Norway on the way forward in this dispute.

B. STATEMENT BY SWITZERLAND CONCERNING THE PANEL REPORT IN UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS (DS556)

Statement by Ambassador María Pagán

- The United States refers to its statement under agenda item 6.
- The United States also refers Switzerland to the U.S. notification to the DSB of its intention to appeal, stating U.S. willingness to confer with Switzerland on the way forward in this dispute.