

DSB in making sufficiently precise recommendations and rulings. In our view, our findings under Article IX:1 capture the discriminatory dimension of the origin marking requirement that Hong Kong, China has challenged under Article I:1, and we have found it not to be justified under Article XXI(b)(iii).

7.366. We are cognizant that claims under Article 2.1 (non-discrimination obligations regarding technical regulations)⁵⁰⁶ of the TBT Agreement and non-discrimination provisions in the GATT 1994, such as Article IX:1, differ in some respects.⁵⁰⁷ However, similar to our view with respect to claims under Article I:1 of the GATT 1994, we do not consider that findings on an MFN violation under Article 2.1 of the TBT Agreement would be necessary to assist the DSB in making sufficiently precise recommendations and rulings. We do not see, and the parties have not argued, any significant difference on how the United States could implement the DSB's recommendations and rulings if they were based solely on a finding of inconsistency with Article IX:1, when compared with a finding of inconsistency both under Article IX:1 and Article 2.1 of the TBT Agreement.

7.367. Hong Kong, China brought claims under the ARO with respect to Articles 2(c)⁵⁰⁸ (with respect to rules of origin not requiring certain conditions for the determination of the country of origin) and 2(d) (a non-discrimination provision on the application of rules of origin).⁵⁰⁹ We recall that Hong Kong, China's arguments that the origin marking requirement is inconsistent with the ARO are based on the factual premise that the United States determines that the products subject to the origin marking requirement originate in China. As we noted above, our finding that the United States determines their origin to be Hong Kong, China means that the factual basis for contending that the present dispute involves "rules of origin" within the meaning of Article 1 of the ARO is incorrect.⁵¹⁰ We therefore do not consider it necessary to make additional findings under the ARO to assist the DSB in making sufficiently precise recommendations and rulings.

7.368. In light of the above, we exercise judicial economy on Hong Kong, China's claims that the origin marking requirement is inconsistent with Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2.1 of the TBT Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted to the invoking Member through the phrase "which it considers" in the *chapeau* of that

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

⁵⁰⁶ Article 2.1 of the TBT Agreement provides:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

⁵⁰⁷ As noted in para. 7.14 above, while Article IX:1 applies to origin marking requirements only, the TBT Agreement applies more generally to a wide variety of technical regulations, including those providing generally for "marking requirements" (Annex 1.1, second sentence of the TBT Agreement). Furthermore, Article 2.1 of the TBT Agreement has been interpreted to allow for the consideration of legitimate objectives in the assessment of less favourable treatment, whereas the legal standard in Article IX:1 itself does not include such consideration (see para. 7.206 above and Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.277-7.278 (with respect to the difference of analysis under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994)).

⁵⁰⁸ Article 2(c) of the ARO provides, in relevant part:

[R]ules of origin ... shall not ... require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.

⁵⁰⁹ Article 2(d) of the ARO provides, in relevant part:

[T]he rules of origin that they apply to imports and exports ... shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned.

⁵¹⁰ See para. 7.226 above.

provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel.

- b. The origin marking requirement is inconsistent with Article IX:1 of the GATT 1994 because it accords to products of Hong Kong, China treatment with regard to marking requirements that is less favourable than the treatment accorded to like products of any third country.
- c. The United States has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii).

8.2. The Panel exercises judicial economy on Hong Kong, China's claims that the origin marking requirement is inconsistent with Article I:1 of the GATT 1994, Articles 2(c) and 2(d) of the ARO, and Article 2.1 of the TBT Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent with Article IX:1 of the GATT 1994, it has nullified or impaired benefits accruing to Hong Kong, China under that agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under the GATT 1994.
