



Revoking Hong Kong's Preferential Trade Status: Legal Framework and Implications

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On July 14, 2020, the President [issued](#) an executive order finding the Hong Kong Special Administrative Region (Hong Kong) “no longer sufficiently autonomous to justify differential treatment in relation to the People’s Republic of China” (China) with regard to specific laws listed in the order, and suspending differential application of those laws to Hong Kong. One of the relevant laws, [19 U.S.C. § 1304](#), sets out how products from other territories must be marked to indicate their [country of origin](#). In response to the executive order, U.S. Customs and Border Protection (CBP) issued a [notice](#) requiring all goods previously marked with “Hong Kong” to indicate “China” as their country of origin. Since this action, Hong Kong has initiated a World Trade Organization (WTO) dispute by [requesting consultations](#) with the United States, arguing the new marking requirements violate several WTO agreements.

This Sidebar presents the legal framework that applies to Hong Kong’s status as a separate customs territory from China, and analyzes the implications of the U.S. actions as well as Hong Kong’s decision to initiate WTO proceedings. Although the President’s executive order suspended a number of statutory provisions that gave preferential treatment to Hong Kong and [invoked](#) authority to declare a national emergency with respect to the situation in Hong Kong, these actions are beyond this Sidebar’s scope.

Background

On May 28, 2020, the National People’s Congress of China [approved](#) a decision authorizing its Standing Committee to enact laws to prohibit acts and activities in Hong Kong it considers to undermine national security. The same day, Australia, Canada, the United Kingdom, and the United States issued a [joint statement](#) expressing “deep concern” about China’s decision, suggesting that such a law would “dramatically erode Hong Kong’s autonomy” and conflict with China’s international obligations to respect such autonomy stemming from, among other things, the [Sino-British Joint Declaration on the Question of Hong Kong](#). In addition, the U.S. Secretary of State issued a [report](#) finding Hong Kong no longer sufficiently autonomous from China to warrant certain privileges under U.S. law that allow Hong Kong to be treated differently than China. Thereafter, the President [announced](#) on May 30, 2020, that his Administration would take actions to curtail these privileges, including by no longer treating Hong Kong, the United States’ [15th-largest export market](#), as a separate customs territory from China.

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Following China’s adoption of a new national security law for Hong Kong (discussed in this [CRS report](#)), the President issued [Executive Order 13936](#) formally determining that Hong Kong is “no longer sufficiently autonomous to justify differential treatment in relation to . . . China.” Pursuant to this determination, the President, among other things, [suspended](#) certain sections of U.S. law, including immigration, export control, and customs provisions, that provided Hong Kong with different treatment than that extended to China, and ordered the relevant executive agencies to take steps to implement the suspensions. To implement the executive order’s suspension of [19 U.S.C. § 1304](#), CBP issued a [notice](#) requiring all products originating from Hong Kong to be marked “China” instead of “Hong Kong” effective September 25, 2020. CBP later [extended](#) the transition period to November 9, 2020.

Legal Framework for Hong Kong’s Preferential Trade Status

The U.S. legal framework that applies to Hong Kong was initially enacted in 1992 in anticipation of Hong Kong’s transfer from British to Chinese control. This section first provides a brief overview of Hong Kong’s legal status vis-à-vis China, and then sets out how the U.S. legal framework applies this status.

Hong Kong’s Legal Status as a Special Administrative Region

From 1842 to 1997, the United Kingdom [exercised sovereignty](#) over Hong Kong. In 1984, the Chinese and British governments negotiated the [Sino-British Joint Declaration on the Question of Hong Kong](#) (Joint Declaration), which transferred control of Hong Kong to China in 1997 while articulating certain rights for Hong Kong. In particular, the Joint Declaration states that Hong Kong shall be designated a “special administrative region” of China, as permitted by [Article 31](#) of China’s Constitution. The Joint Declaration also stipulates that Hong Kong “will enjoy a high degree of autonomy, except in foreign and defence affairs” for 50 years after 1997. Additionally, the Joint Declaration states that Hong Kong “will retain the status of a free port and a separate customs territory” and may enter into international agreements and participate in international organizations under the name “Hong Kong, China.”

These guarantees are codified in Hong Kong’s [Basic Law](#), passed by the National People’s Congress of China in 1990. The Basic Law also adds that, as part of Hong Kong’s status as a [separate customs territory](#), its “[e]xport quotas, tariff preferences and other similar arrangements . . . remain valid,” and it “may issue its own certificates of origin.” Pursuant to this arrangement, Hong Kong has remained a WTO member and has negotiated a number of [trade agreements](#), including one with [China](#).

U.S. Statutory Framework on Hong Kong’s Status

To recognize the Joint Declaration, the United States enacted the [U.S.-Hong Kong Policy Act of 1992](#), which it later amended in the [Hong Kong Human Rights and Democracy Act of 2019](#). Under this legal framework, Congress [stated](#), among other things, the “United States should continue to fulfill its obligations to Hong Kong under international agreements, so long as Hong Kong reciprocates,” and the “United States should respect Hong Kong’s status as a separate customs territory, and as a WTO member country.” Further, it [adds](#) the United States should “grant the products of Hong Kong nondiscriminatory trade treatment by virtue of Hong Kong’s membership in the General Agreement on Tariffs and Trade” (i.e., GATT, the WTO’s predecessor) and “recognize certificates of origin for manufactured goods issued by” Hong Kong.

To implement these policy statements, these Acts [approve](#) the following: (1) continued application of existing U.S. laws to Hong Kong in the same manner as they applied prior to July 1, 1997, unless otherwise provided for by law or executive order; and (2) continuation of all international agreements to

which the United States and Hong Kong are members, provided these agreements were in force on or after July 1, 1997, and entered into before November 27, 2019.

Under the U.S.-Hong Kong Policy Act, the President may [decide](#) to suspend application of a U.S. law that provides Hong Kong with treatment different than that accorded to China if he determines that “Hong Kong is not sufficiently autonomous to justify” such different treatment. Such a determination must be made via executive order and may be rescinded by a subsequent executive order if the President determines that Hong Kong has regained sufficient autonomy to qualify for differential treatment. With respect to international agreements between Hong Kong and the United States, the President may [determine](#) whether Hong Kong is legally competent to carry out its international obligations or “that the continuation of Hong Kong’s obligations or rights under any such treaty or other international agreement is not appropriate under the circumstances.” Such a finding must be [reported](#) to Congress. The precise consequences of the President’s exercise of this authority are unclear, as the statute does not set out what the President may do following such a finding. This may reflect the fact that the processes for suspending, terminating, or withdrawing from treaties and other international agreements [differ](#) depending on the terms of the agreements.

When executing his powers under these Acts, the President “shall [consult](#) appropriately” with Congress. This requirement reflects the Executive Branch’s sole authority to [recognize](#) governments and their boundaries (i.e., to recognize that China is not only sovereign over but also controls Hong Kong) *and* Congress’s role in certain aspects of [foreign affairs](#), including regulation of [foreign commerce](#).

Implications of Revoking Hong Kong’s Trade Status

Pursuant to the President’s July 2020 executive order, CBP issued a notice requiring goods from Hong Kong to list “China” as the place of origin. This section discusses the effects of CBP’s notice on the treatment of goods from Hong Kong under U.S. law, and then discusses Hong Kong’s decision to initiate a WTO dispute regarding the notice.

Changes to Hong Kong’s Customs Status Under U.S. Law

In 1997, the U.S. [Department of Commerce](#) and U.S. [Customs Service](#) (now U.S. Customs and Border Protection) promulgated regulations to treat Hong Kong as a separate customs territory in the same manner as it had been treated while under British control, even after control of Hong Kong passed to China. CBP’s 2020 [notice](#) requiring goods produced in Hong Kong to be marked with “China” as the country of origin eliminates part of that preferential treatment. CBP has [stated](#) that the regulatory change applies only to how the country of origin is marked, but not to country-of-origin determinations for purposes of assessing customs duties. Thus, certain additional duties that apply to China, such as the [Section 301](#) tariffs imposed after an investigation into China’s trade-related practices, do not apply to goods produced in Hong Kong.

Hong Kong and the WTO

In October 2020, Hong Kong initiated a WTO dispute against the United States, requesting consultations and arguing the U.S. actions taken with regard to how products originating from Hong Kong must be marked may violate WTO rules. This part provides an overview of Hong Kong’s status at the WTO and then discusses its WTO dispute against the United States.

Hong Kong's Status at the WTO

Hong Kong retains its own [membership](#) in the WTO—separate from China—as the organization [permits](#) customs territories in addition to countries to join. As stated, the Joint Declaration and Basic Law permit Hong Kong to retain its membership in the WTO's predecessor (i.e., GATT) and carry over this membership to the WTO in 1995 (which China did not join until 2001). Other nonsovereign customs territories are also WTO members, including [Macao](#) and [Taiwan](#), which has led to what some refer to as a “[One China, Four WTO Memberships](#)” phenomenon.

To date, the United States has not suggested it would refuse to recognize Hong Kong's rights under the WTO agreements or find Hong Kong not legally competent to carry out its treaty obligations. However, if the President were to make such a determination pursuant to [Section 201](#) of the U.S.-Hong Kong Policy Act of 1992, at least two limitations on such a determination could be relevant. First, the determination would not affect Hong Kong's status as a WTO member vis-à-vis other WTO members. In other words, Hong Kong would not lose its WTO membership due to any potential U.S. actions to revoke its trade privileges under U.S. law; other WTO members are not required to adhere to a U.S. decision on the matter. Second, it is unclear whether such a determination would relieve the United States of its international legal obligations to Hong Kong. On one hand, one might argue the United States no longer needs to respect its WTO obligations to Hong Kong, as only actors with [international legal personality](#) may incur or be owed international obligations. On the other hand, one could argue that Hong Kong retains its legal personality, at least with respect to trade, as this status remains in effect under the [Basic Law](#); therefore the United States would still have to respect its international obligations owed to Hong Kong as a matter of international law.

Hong Kong's Challenge to U.S. Actions

On October 30, 2020, Hong Kong [requested](#) WTO consultations with the United States, in which the United States [agreed](#) to participate. Hong Kong's request for consultations [stated](#) that the new marking requirement may violate provisions of three WTO agreements: the [GATT](#); the [Agreement on Rules of Origin](#); and the [Agreement on Technical Barriers to Trade](#). Hong Kong's complaints under all three agreements contend the new marking requirement violates various nondiscrimination obligations, as goods from Hong Kong are treated differently under U.S. law from goods of other WTO members. With regard to the Agreement on Rules of Origin, Hong Kong also asserts the marking requirement violates U.S. obligations not to impose eligibility conditions for determining the country of origin that are unrelated to manufacturing or processing, and to ensure U.S. rules of origin are applied in a “consistent, uniform, impartial and reasonable manner.” Hong Kong has further [indicated](#) that it may extend its complaint to any future changes in tariff treatment resulting from the July executive order and implementing actions. In other words, if executive agencies attempt to apply certain duties to Hong Kong that currently apply only to China (e.g., Section 301 tariffs or other [antidumping or countervailing duties](#)), then Hong Kong might argue this also violates WTO provisions.

To date, the United States has not publicly stated its position as to whether it agrees with Hong Kong's assertions. However, in its decision to participate in consultations, the United States [noted](#) its acceptance was “[w]ithout prejudice to whether [the dispute] raises issues of national security not susceptible to review or capable of resolution by WTO dispute settlement.” This may suggest that if Hong Kong were to request that a WTO panel hear the dispute, the United States may argue that, even if its actions violate the WTO agreements, it is entitled to invoke the “essential security” exception in GATT Article XXI(b) because its actions were motivated by national security concerns. This statement may also suggest the United States will argue that a WTO panel cannot review the disputed actions because the Article XXI(b) exceptions are “self-judging.” That is, because the [text](#) states the agreement shall not prevent a WTO member “from taking any action *which it considers* necessary for the protection of its essential security

interests,” WTO members themselves decide what is necessary to protect their essential security interests. Under this interpretation, WTO panels may not second-guess these decisions.

The United States has [articulated](#) this position on the security-interests exception in other ongoing WTO disputes. In two disputes not involving the United States, WTO panels rejected similar arguments from other WTO members that invoked GATT Article XXI(b) and its mirror provision in the Agreements on Trade-Related Aspects of Intellectual Property (see [DS512](#) and [DS567](#)). As suggested by James Bacchus, a former WTO Appellate Body member and Member of Congress, while these WTO panel decisions are not binding on successive panels, they may “[remove the foundations for the U.S. argument.](#)” Thus, if Hong Kong proceeds with a dispute against the United States, the WTO panel considering the case might also conclude that it may review whether the U.S. measures meet Article XXI(b)’s requirements.

As of this writing, Hong Kong and the United States have not proceeded beyond the consultation stage of the dispute. Because the parties do not appear to have resolved the dispute within the [60 days](#) after Hong Kong requested consultations (in this case, by December 29, 2020), Hong Kong may request establishment of a WTO panel to hear the dispute. Although Hong Kong is now legally entitled under WTO rules to request a panel, it is not required to do so; the parties may agree to extend consultations, as has been done in other WTO disputes.

Author Information

Nina M. Hart
Legislative Attorney

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