

Mexico, China, and Hong Kong Origin Issues in the Trade Spotlight

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The criteria for a country of origin analysis often are specified in trade preference programs and free trade agreements. As the U.S.-**Mexico**-Canada Agreement (“USMCA”) replaced the North American Free Trade Agreement (“NAFTA”), effective July 1, 2020, new rules of origin were introduced for many products from Mexico, including changes to tariff-shift rules, regional value content, de minimis requirements, and more.¹ Final implementing regulations were published by U.S. Customs and Border Protection (“CBP”) on July 6, 2021.² As a result of this change, importers were required to transition from NAFTA to the new agreement, overhauling established processes to incorporate the revised procedural requirements, in addition to re-analyzing products under the new rules of origin.³

Section 301 tariffs on goods of Chinese origin are an ever-present concern for many importers, but importers could face some relief soon through the reintegration of an exclusion process by the Office of the U.S. Trade Representative (“USTR”).

The escalating trade war between the United States and **China** has skyrocketed the financial risk associated with incorrectly determining that a product is not Chinese due to the potential penalties for underpayment of tariffs. In 2017, a review was initiated by USTR into China’s practices with respect to the transfer of technologies and intellectual property from U.S. entities to China pursuant to Section 301 of the Trade Act of 1974.⁴ After finding that “the acts, policies, and practices of the Government of China...are unreasonable or discriminatory and burden or restrict U.S. commerce,” USTR announced the imposition of 25% tariffs on \$34 billion worth of goods from China.⁵ The actions escalated from there, with most products of China now subject to additional tariffs ranging from 7.5% to 25%.⁶

Incorrectly determining that a product *is* or is *not* a product of China could therefore result in significant duty under- or overpayments. Furthermore, because penalties issued by CBP for improper declarations of the country of origin are often tied to the amount of underpaid duties,⁷ an error with respect to the country of origin could skyrocket any associated penalties.

However, in a long-awaited action, USTR recently requested comments on the reinstatement of a number of previously granted exclusions from the Section 301 tariffs, which could provide some relief for importers of the 549 products covered by the notice.⁸

Finally, due to the deteriorating geopolitical situation with respect to **Hong Kong**, goods can no longer be marked as products of Hong Kong as of November 9, 2020.⁹ On July 14, 2020, President Trump issued Executive Order 13936, suspending Hong Kong's previously recognized special status as separate from China.¹⁰ Although CBP has determined that products of Hong Kong will not be subject to the Section 301 action discussed above,¹¹ the goods must now be marked pursuant to 19 U.S.C. § 1304 as products of China, as opposed to products of Hong Kong.¹²

¹ See Implementation of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) Uniform Regulations Regarding Rules of Origin, 85 Fed. Reg. 39690 (July 1, 2020).

² See Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) Implementing Regulations Related to the Marking Rules, Tariff-Rate Quotas, and Other USMCA Provisions, 86 Fed. Reg. 35566 (July 6, 2021).

³ See 85 Fed. Reg. at 39690 (highlighting the change over to USMCA from NAFTA after July 1, 2020).

⁴ See Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40213 (Aug. 24, 2017).

⁵ See Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (June 20, 2018); Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14906 (Apr. 6, 2018).

⁶ See, e.g., 83 Fed. Reg. 28710; Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 3741 (Jan. 22, 2020).

⁷ See 19 U.S.C. § 1592.

⁸ Request for Comments on the Possible Reinstatement of Certain Exclusions in the Section 301 Investigation of China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 86 Fed. Reg. 56345 (Oct. 8, 2021).

⁹ *Frequently Asked Questions - Guidance on Marking of Goods of Hong Kong – Executive Order 13936*, U.S. Customs and Border Protection (Oct. 6, 2020), <https://www.cbp.gov/trade/rulings/frequently-asked-questions-guidance-marking-goods-hong-kong-executive-order-13936>.

¹⁰ See The President's Executive Order on Hong Kong Normalization, 85 Fed. Reg. 43413 (July 17, 2020).

¹¹ See *Section 301 Trade Remedies Frequently Asked Questions*, U.S. Customs and Border Protection, <https://www.cbp.gov/trade/programs-administration/entry-summary/section-301-trade-remedies/faqs> (last visited Oct. 7, 2021).

¹² 85 Fed. Reg. at 43414.

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