China – Measures Affecting Imports of Automobile Parts

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Table of Reports Cited

Short Form	**Full Citation**
Panel Report	Panel Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, circulated 18 July 2008
Canada – Autos (AB)	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
Canada – Wheat (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
GATT Panel Report*, EEC – Parts and Components*	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
EC – Computer Equipment (AB)	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
EC – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
India – Autos (Panel)	Panel Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted April 5, 2002
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – 1916 Act (Japan) (Panel)	Panel Report, *United States – Anti-Dumping Act of 1916*, WT/DS162/R, adopted 26 September 2000, as modified by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R

US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Hot-Rolled Steel (Panel)	Panel Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R
US – Section 301	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States challenged three Chinese measures: Policy Order 8, Decree 125, and Announcement 4 ("China's measures" or "the measures").[1] These measures set forth the legal obligation of auto manufacturers to pay a charge on imported auto parts "characterized as complete vehicles" and the procedural requirements necessary to administer and collect this charge. Section VII.A.1 of the Panel Report provides a thorough discussion of China's measures, which the United States summarizes briefly below.

2. Under the measures, China imposes a charge equivalent to the amount of the tariff rate applicable to complete vehicles (i.e. 25 per cent on average) on imported auto parts that are used in the production/assembly of complete vehicles, if those imported auto parts are "characterized as complete vehicles" according to the criteria set out in the measures.[2] A collection of imported parts is "characterized as complete vehicles" if they meet or exceed the criteria provided in the measures. These criteria include a specified number of parts/components or a 60 percent value threshold.[3]

3. In applying these thresholds, China's customs authorities wait until auto manufacturers finish the assembly of motor vehicles.[4] As a result, auto parts that might have been imported in multiple shipments, meaning imported at various times, in various shipments, from various suppliers, and/or from various countries can still be characterized as a complete vehicle.[5] In determining whether imported auto parts used in the assembly of vehicles in China should be characterized as complete vehicles, imported auto parts purchased by manufacturers from domestic suppliers or domestic part manufacturers are also counted toward the thresholds.[6]

4. To administer these requirements, automobile manufacturers are required to conduct a "self-evaluation" in respect of a specific vehicle model for which they plan to use imported auto parts and to register that vehicle model with Chinese authorities.[7] When registering the vehicle model, an auto manufacturer must submit detailed information about the prices of all parts used

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[1] *Policy on Development of the Automotive Industry* (Annex E-1), *Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles* (Annex E-2), *Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles* (Annex E-3).

[2] Panel Report, para. 7.24.

[3] Panel Report, para. 7.32.

[4] Panel Report, para. 7.35.

[5] Panel Report, para. 7.35.

[6] Panel Report, para. 7.38.

[7] Panel Report, para. 7.29. As discussed in more detail in Part D below, CKD/SKD kits may be exempted from the administrative procedures of the measures. Panel Report, para. 7.78

in the vehicle model.[8] Payment of the charge does not occur until Chinese authorities have completed a verification after the manufacturers finish the assembly of auto parts into complete vehicles.[9]

5. Although China asserts that the measures are customs regulations, the measures clearly focus on the manufacturing of automobiles in China. The manufacturer, not the importer, handles the administrative procedures and pays the charges. The thresholds under the measures are measured, not at the border, but by looking at the automobile produced in China. The measures focus on the amount of local and imported content in motor vehicles assembled in China, not on the importation of parts and components into China's territory.

6. The Panel correctly concluded that the charge imposed under China's measures is an internal charge inconsistent with Article III:2 of the GATT 1994, and that the challenged measures are inconsistent with its obligations under Article III:4 to afford no less favorable treatment to like imported products.[10] The Panel also concluded that even if the charge were considered an ordinary customs duty, the measures would have the effect of imposing duties on imported auto parts in excess of the commitments in China's Schedule of Concessions and thus inconsistently with Article II:1(a) and (b).[11] Finally, the Panel concluded that China violated its commitment under paragraph 93 of the *Working Party Report on the Accession of China* ("Working Party Report) that it will apply tariff rates of no more than 10 percent to CKD and SKD kits if it creates tariff lines for such kits.[12]

7. China has appealed the conclusions of the Panel with respect to Articles III:2 and III:4, and its alternative findings with respect to Article II:1(b) on remarkably narrow grounds, arguing only that the Panel erred in its interpretation and appreciation of a particular interpretative rule of the *Harmonized Commodity Description and Coding System* ("Harmonized System"). China has not asserted legal error in virtually any of the findings of the Panel which lead to the Panel's conclusions on these three provisions. Finally, China has asserted a variety of errors in the Panel's findings with respect to paragraph 93 of the Working Party Report.

8. The United States will begin by addressing China's claims of error related to the Panel's findings on the crucial issue of whether the charge imposed by China's measures is an "internal charge" within the meaning of Article III:2 or an "ordinary customs duty" within the meaning of Article II:1(b), first sentence. The United States will then address China's claims with respect to

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[8] Panel Report, para. 7.49.

[9] Panel Report, para. 7.53.

[10] Panel Report, paras. 7.223 and 7.272.

[11] Panel Report, paras. 7.523 and 7.612.

[12] Panel Report, para. 7.758.

Articles III:2 and III:4. Next, the United States will address China's arguments regarding the alternative findings of the Panel with respect to Article II:1(a) and (b). Finally, the United States will respond to China's claims of error relating to paragraph 93 of the Working Party Report.[13]

9. The United States respectfully requests that the Appellate Body reject China's appeal in its entirety for the reasons set forth below.

II. ARGUMENT

A. The Panel Correctly Determined that the Charge Imposed by China's Measures is an Internal Charge Governed by Article III:2 of the GATT 1994 and not an Ordinary Customs Duty Governed by Article II:1(b)

10. After examining the measures, the Panel noted that they expressly provide that the "classification" of the imported auto parts occurs *after* the parts have been assembled into complete vehicles.[14] The Panel found that (i) the charge is imposed on automobile manufacturers, not importers in general; (ii) the charge on a part is determined not based on the auto part as it enters the customs territory of China, but instead based on what other parts from other countries and/or other importers are used together with the good concerned in assembling a vehicle model; and (iii) identical imported parts included in the same shipment can be subject to different charge rates depending on which vehicle model they are assembled into.[15] The Panel also found that the charge is in some circumstances imposed on auto parts on which customs duties have already been paid.[16]

11. By examining the term "internal charges" in Article III:2 of the GATT 1994, the Panel concluded that a charge is an internal charge if it accrues because of an internal factor.[17] The Panel then examined the term "ordinary customs duty" in Article II:1(b), first sentence, including an examination of the critical phrase "on their importation". The Panel concluded that "ordinary customs duties" within the meaning of the first sentence of Article II:1(b) refers to duties on a product where "the obligation to pay ordinary customs duties is linked to the product at the

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[13] The United States has not attempted to rebut every argument or mischaracterization in China's submission but has, however, addressed and rebutted what appear to be China's main claims. The United States does not accept any of the grounds of China's appeal, and the United States would be pleased to address any questions that the Appellate Body may have on any aspect of China's arguments.

[14] Panel Report, para. 7.206.

[15] Panel Report, para. 7.207.

[16] Panel Report, para. 7.208.

[17] Panel Report, para. 7.132.

moment it enters the territory of another Member."[18]

12. Based on these findings and conclusions, the Panel found that the United States demonstrated that the charge imposed by the measures[19] is an internal charge under Article III:2.[20]

13. Other than this ultimate conclusion that the charge imposed by China's measures is an internal charge rather than an ordinary customs duty, China does not directly challenge these findings and conclusions of the Panel.[21] Instead, China argues that the Panel erred by interpreting Article II:1(b) of the GATT 1994 without regard to the "context" provided by the Harmonized System. China asserts that "the classification rules of the Harmonized System cannot be separated from the question of whether the challenged measures impose ordinary customs duties within the meaning of Article II:1(b), first sentence",[22] and that the context provided by the Harmonized System was central to a proper evaluation of the issue.[23] Ignoring the careful and methodical analysis of the Panel, China constructs its own analysis concluding that "for the purpose of characterizing the nature of a charge, the relevant consideration is whether the charge relates to a valid classification of the product under the rules of the Harmonized System."[24]

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[18] Panel Report, para. 7.184.

[19] With the exception of the charge levied on the importation of CKD and SKD kits under the optional provision of Article 2(2) of Decree 125, as discussed later in this submission.

[20] Panel Report, para. 7.212.

[21] The United States would like to make two observations on this point. First, as China has appealed, in paragraphs 140-159 of its submission, the Panel's interpretation of the challenged measures regarding the Panel's findings with respect to CKD/SKD kits, China presumably made a conscious decision not to appeal the Panel's interpretation of the challenged measures with respect to the internal nature of the charge. Second, China's arguments in Section IV of its submission appear to specifically acknowledge the internal nature of its charges. China states that "the entire subject matter of the Rules concerns the classification of multiple entries of parts that, in their entirety, will have the essential character of a motor vehicle *following their assembly*." China's Appellant Submission, para. 143 (emphasis added). And later, "China explained to the Panel, and no party disputed, that when an importer enters CKD/SKD kits under China's regular customs procedures: (1) it declares these entries as CKD/SKD kits at the time of importation, *not* at the stage when complete vehicles are assembled". China's Appellant Submission, para. 154.

[22] China's Appellant Submission, para. 32.

[23] China's Appellant Submission, para. 12.

[24] China's Appellant Submission, para. 39.

14. Part II of China's Appellant Submission contains no discussion of the particular measures at issue in this dispute, no discussion of the terms of Article III:2 of the GATT 1994, and only passing reference to the terms of Article II:1(b). China would have the Appellate Body believe that the determination of this dispute turns solely on a theoretical analysis of a particular rule of interpretation of the Harmonized System. China's argument is inconsistent with Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), which provides that interpretative issues arising in WTO dispute settlement are to be resolved in accordance with the customary rules of interpretation of public international law. Moreover, even taken on its own terms, China's arguments contain a number of mischaracterizations and logical errors.[25]

1. The Panel Correctly Concluded that the Classification Rules of the Harmonized System are not Relevant in the Threshold Determination of Whether the Charge Imposed by China's Measures is an Internal Charge Within the Meaning of Article III:2 or an Ordinary Customs Duty Governed by Article II:1(b)

15. China begins its submission by asserting: "The principal issue in this dispute concerns a complex question of customs classification arising under the [Harmonized System]".[26] However, China is mistaken. The Panel correctly concluded that a threshold issue in this dispute is whether the charges imposed by China's measures are internal charges within the scope of Article III:2 or customs duties within the scope of Article II:1(b), and correctly proceeded to conduct its analysis by interpreting the terms of those articles in accordance with their ordinary meaning in their context and in light of the treaty's object and purpose. The Panel correctly determined that an examination of the rules of the Harmonized System may be relevant to its analysis of the terms of China's Schedule, but it does not have a role in interpreting the scope of Articles II:1(b) or III:2 of the GATT 1994.

a. China's Argument Ignores the Customary Rules of Treaty Interpretation As Reflected in the *Vienna Convention*

16. Pursuant to DSU Article 3.2, interpretative issues arising in WTO dispute settlement must be resolved through applying customary rules of interpretation of public international law, and it is well-settled in WTO dispute settlement that Articles 31 and 32 of the *Vienna Convention on*

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[25] Article 3.2 of the *Dispute Settlement Understanding*, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

[26] China's Appellant Submission, para. 1.

the Law of Treaties ("*Vienna Convention*") reflect such customary rules.[27] Article 31 of the *Vienna Convention* directs a treaty interpreter to interpret the terms of a treaty in accordance with their ordinary meaning in their context and in light of the treaty's object and purpose. Article 32 allows the treaty interpreter to have recourse to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning of the treaty term ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

17. As the Appellate Body has previously found, an examination of the Harmonized System may be useful in interpreting the meaning of a particular term in a Member's Schedule of Concessions, but China has provided no reason why the Harmonized System should be considered to provide context in the interpretation of the meaning of terms in Article II:1(b) itself. In *EC– Chicken Cuts (AB)*, the Appellate Body made the limited finding that the Harmonized System Convention could be "context" for interpreting the entries in a Member's Uruguay Round tariff schedule, at least with respect to agricultural products.[28] The Appellate Body made no finding that the Harmonized System was context for the interpretation of any other part of the GATT 1994, or for any other elements of the WTO Agreement, nor would there be any basis for such a finding. The Harmonized System Convention also does not meet any of the other conditions as "context" or "supplementary means" under the *Vienna Convention* for an analysis of the text of GATT Article II.

18. The first sentence of Article II:1(b) of the GATT 1994 provides:

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[27] *U.S.– Carbon Steel (AB)*, para. 61. See also *EC– Computer Equipment (AB)* at paras. 84-86.

[28] *EC– Chicken Cuts (AB)*, para. 199 ("The above circumstances confirm that, prior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an "agreement" between WTO Members "relating to" the *WTO Agreement* that was "made in connection with the conclusion of" that Agreement, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is "context" under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules.") While the United States does not agree that the Harmonized System is "context" for the interpretation of a Member's Schedule, the United States does agree that the Harmonized System can certainly be relevant in the interpretation of a Member's Schedule. In particular, under the customary rules of interpretation reflected in Article 32 of the *Vienna Convention*, the Harmonized System can be "supplementary means of interpretation."

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

The first sentence of Article II:1(b) involves the imposition of ordinary customs duties. There is nothing in the text of Article II:1(b) that would suggest that the Harmonized System, which is not part of the WTO Agreement (the treaty being interpreted), is "context" for the interpretation of that provision. Furthermore, Article 9 of the *International Convention on the Harmonized Commodity Description and Coding System* ("Harmonized System Convention") stipulates that "The Contracting Parties do not assume by this Convention any obligation in relation to rates of Customs Duties." It is thus unclear to the United States, as it was to the Panel, how the Harmonized System provides context for the interpretation of Article II:1(b) of the GATT 1994.

19. It is also unclear to which term in Article II:1(b) China asserts GIR 2(a) provides context. China states that it does not assert that the rules of the Harmonized System provide context for the meaning of the term "ordinary customs duty."[29] China also does not appear to argue that the Harmonized System provides context for the meaning of the term "products" as that term is used in Article II:1(b). Instead, China seems to argue that there is an ambiguity regarding the "particular products" at issue.[30] But any dispute concerning the particular product at issue is not the same as a dispute over the meaning of the term "products" in Article II:1(b).[31]

20. Although China has stated that the Panel erred by interpreting Article II:1(b) of the GATT 1994 without regard to the context provided by the Harmonized System,[32] the essence of its argument seems to be not that GIR 2(a) of the Harmonized System provides "context" for the interpretation of Article II:1(b), but rather that GIR 2(a) itself determines whether a charge is an "ordinary customs duty" within the meaning of Article II:1(b).[33] It is in this light that China

[29] China's Appellant Submission, paras. 33-34.

[30] China's Appellant Submission, paras. 20 and 28.

[31] Moreover, there is no ambiguity regarding the products on which China is imposing the charges subject to this dispute; they are the products subject to the measures identified in the U.S. request for the establishment of a panel. As the Panel found, "the products at issue are those subject to Policy Order 8, Decree 125 and Announcement 4." It is only after a charge is determined to be an "ordinary customs duty" that any issue of classification potentially arises.

[32] China's Appellant Submission, paras. 12 and 33.

[33] "Only by evaluating whether the charge imposed under the challenged measures is related to a valid classification of the product under the rules of the Harmonized System could the Panel determine whether the charge is an ordinary customs duty or, alternatively, an internal

argues that the principal issue in dispute concerns a question of customs classification arising under the Harmonized System.[34] The Panel, however, correctly concluded that this dispute is governed by the terms of the WTO Agreement, in accordance with their ordinary meaning in their context and in light of the treaty's object and purpose.

b. China's Argument Contains a Number of Mischaracterizations and Logical Errors

21. Even taken on its own terms, China's argument contains a number of mischaracterizations and logical errors. While not attempting to rebut every argument or mischaracterization, in the following sections the United States points out three of the more critical flaws in China's argument.

i. The "Condition" of a Product at the Moment of Importation Is Not Determined by the "Classification" of the Product

22. China argues that "the Panel's interpretation of the term 'ordinary customs duty' in Article II:1(b) presupposes a prior determination by the national customs authorities of the 'product' that is subject to the assessment of duty."[35] This, China asserts, is because the Panel concludes that to be an ordinary customs duty under Article II:1(b), a charge must be related to the "condition" or "status" of a product at the moment it enters the customs territory.[36] China

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charge." China's Appellant Submission, para. 35.

[34] China's Appellant Submission, para. 1.

[35] China's Appellant Submission, para. 25.

[36] China's Appellant Submission, para. 26. In referencing this conclusion, China includes a lengthy quotation from paragraph 7.184 of the Panel Report. China's quotation, however, deletes some significant text from that paragraph. The United States notes the significant deleted text in underline below:

> <u>We therefore conclude that the ordinary meaning of "on their importation" in Article II:1(b), first sentence, of the GATT 1994, considered in its context and in light of the object and purpose of the GATT 1994, contains a *strict and precise temporal element* which cannot be ignored.</u> This means that the obligation to pay ordinary customs duties is linked to the product at the moment it enters the territory of another Member. If the right to impose ordinary customs duties - and the importer's obligation to pay it - accrues because of the importation of the product at the very moment it enters the territory of another Member, ordinary customs duties should necessarily be related to the status of the product at that

argues that "[w]hat the Panel refers to as the 'condition' or 'status' of a product at the moment of importation is nothing other than the proper classification of that product under the rules of the Harmonized System."[37]

23. China's argument mischaracterizes the Panel's reference to the "condition" or "status" of the product at the moment of importation. The Panel's subsequent reference to the Appellate Body report in *EC– Chicken Cuts (AB)* demonstrates that the "condition" of the product to which the Panel refers involves an examination of the *objective characteristics* of the product at the moment of importation. The Panel refers to the finding of the Appellate Body in *EC– Chicken Cuts (AB)* that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border."[38]

24. When the Panel refers to the "condition" of a product, it is referring to the objective characteristics of the product. Classification of a product cannot determine its objective characteristics; to the contrary, those objective characteristics are the starting point for any eventual classification analysis. Thus, contrary to China's assertion, the "condition" of a product to which the Panel refers is not the classification of the product.

ii. Classification Rules are Only Relevant if the Charge

> single moment. It is at this moment, and this moment only, that the obligation to pay such charges accrues. As stated by the Appellate Body in *EC - Poultry*, "it is *upon entry* of a product into the customs territory, but *before* the product enters the domestic market, that the obligation to pay customs duties ... accrues." And it is based on the condition of the good at this moment that any contemporaneous or subsequent act by the importing country to enforce, assess or reassess, impose or collect ordinary customs duties should be carried out. (footnotes omitted)

China's selective quotation avoids any significant discussion of the central point of this paragraph, that Article II:1(b) contains a *strict and precise temporal element*.

[37] China's Appellant Submission, para. 28. China continues on to state, "Simply put, the condition or status of a product at the moment of importation is what the Harmonized System prescribes it to be." China's Appellant Submission, para. 29.

[38] *EC– Chicken Cuts (AB)*, para. 246, quoted in Panel Report, para. 7.187. In the Panel's subsequent discussion of the meaning of the term "as presented", the Panel provided further clarity on this point. "We consider that this interpretation [of the meaning of the term 'as presented'] is also in line with the basic principle of classification as observed by the Appellate Body in *EC - Chicken Cuts*, i.e. goods must be classified based exclusively on their objective characteristics, which refer to their condition as they are presented to customs authorities at the time of importation." Panel Report, para. 7.415.

Imposed is an Ordinary Customs Duty

25. A fundamental problem with China's argument is that it asks the Panel to begin its analysis at the end and work backwards. The Panel correctly followed the analysis used by earlier panels, including the GATT Panel in *EEC– Parts and Components,* by first analyzing the threshold issue of whether the charge imposed by the challenged measures is an internal charge or an ordinary customs duty.[39] Assuming, in analyzing the alternative claim, that the charge were an ordinary customs duty, the Panel then looked to China's Schedule of Concessions to determine if the charge imposed by the challenged measures is in excess of that allowed by the Schedule. In order to interpret the specific term "motor vehicles" in China's Schedule of Concessions, the Panel was informed by the rules of the Harmonized System. China's proposed method of analysis, in contrast, starts with a product's classification and works backwards from there. In this way, China's proposed analysis essentially starts with the presumption that its measures impose an ordinary customs duty, the very question the analysis is supposed to examine.

26. As discussed above, the Panel correctly concluded that the Harmonized System may be relevant in interpreting the terms included in a Member's Schedule of Concessions, but that the Harmonized System Convention has no relevance in determining the scope of Article II:1(b) or Article III:2 of the GATT 1994.[40] As the panel recognized, quoting the prior GATT panel report in the *EEC– Parts and Components* dispute:

> The distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of "ordinary customs duties" for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with

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[39] GATT Panel Report, *EEC– Parts and Components*, para. 5.4. The Panel also quoted extensively from the Panel Report in *India - Autos* exploring the relationship between Articles III and XI of the GATT: "The Panel feels that it is vital that the task be approached solely through an application of the customary rules of interpretation of public international law as required by Article 3.2 of the DSU. This should occur without any presumption as to some preordained or systemic balance between the two Articles. The customary rules provide sufficient mechanisms to ensure an appropriate outcome that should deal with such concerns, as they require consideration of ordinary meaning in context and in the light of object and purpose of the treaty. In this regard, context includes a reading of each Article in relation to other potentially relevant provisions and an analysis, where necessary, of any differences in terminology. The principle of effectiveness would also apply to prevent reducing any provision to inutility." (Panel Report, para 7.121, quoting *India – Autos (Panel)*, para. 7.222.)

[40] Panel Report, para. 7.188.

> importation are in principle prohibited in respect of bound items (Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (Article III:2).[41]

27. The rules of the Harmonized System may be relevant in interpreting a Member's Schedule of Concessions to determine whether or not an item is subject to a tariff binding or the level of the binding, but both those issues arise only once a charge has already been determined to be an ordinary customs duty falling within the first sentence of Article II:1(b). The terms of a Member's Schedule of Concessions are not relevant to an analysis under Article III:2. By applying classification rules to the threshold analysis, China assumes the result of that analysis.

28. The Appellate Body has explained that "a panel may not ignore the 'fundamental structure and logic' of a provision in deciding the proper sequence of steps in its analysis, save at the peril of reaching flawed results."[42] In *Canada– Autos (AB)*, the Appellate Body found that "the fundamental structure and logic of Article I:1, in relation to the rest of the GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made *before* the consistency of that measure with any substantive obligation of the GATS can be assessed."[43] And in *Canada– Wheat* (AB), the Appellate Body noted that "panels that ignore or jump over a prior logical step of the analysis run the risk of compromising or invalidating later findings."[44] China's argument falls squarely into that trap. The Panel's method of analysis accords with the fundamental structure and logic of the issue before it.

iii. Whether or not a Charge is Based on a Valid Classification does not Determine Whether the Charge is an Ordinary Customs Duty

29. Concluding its argument, China repeatedly asserts that the charges China assesses on the basis of a valid method of classification "are ordinary customs duties, as they are based on a proper determination of the product that is subject to duty assessment."[45] Under this argument, the determinative factor in whether a charge is an ordinary customs duty is whether the method

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[41] Panel Report, para. 7.199.

[42] *Canada – Autos (AB)*, para. 151(citing *United States – Shrimp (AB)*, para. 119).

[43] *Canada – Autos (AB)*, para. 151.

[44] *Canada – Wheat (AB)*, para. 127.

[45] China's Appellant Submission, para. 41. "Thus, when an importing Member assesses an unassembled motor vehicle at its tariff rate for motor vehicles, instead of at the relevant tariff rates for auto parts, the charge is related to the status of the product at the moment of importation because it is assessed on the basis of a proper classification of the product. It is therefore an ordinary customs duty." China's Appellant Submission, para. 29

under which the challenged measure categorizes a product for purposes of the charge would be a permissible method of classification under the Harmonized System.[46]

30. There is no logic, however, behind China's assertion. Suppose a country were to require that a five percent deposit be paid on domestic sales of all plastic bottles falling within a certain tariff heading. According to China's theory, since the deposit was "based on a valid customs classification", the deposit would be an ordinary customs duty. By inverting the order of analysis and refusing to include key elements, China reaches a flawed result.[47]

2. The Panel did not Err in its Interpretation and Application of Article III:2 of the GATT 1994

31. Regarding the Panel's findings with respect to Article III:2 of the GATT 1994 and the interpretation of China's measures on which those findings are based, China simply states, "For the reasons set forth in Part II [of China's submission], the Panel erred in its conclusion that the charge imposed under the challenged measures is not an 'ordinary customs duty' within meaning of Article II:1(b), first sentence."[48] Since the Panel found that a particular charge cannot at the same time be an ordinary customs duty under Article II:1(b) and an internal charge under Article III:2, China then concludes that "the Panel also erred in its conclusion that the charge imposed under the challenged measures is an 'internal tax or other internal charge' within the meaning of Article III:2 of the GATT."[49]

32. China has not challenged any of the findings of the Panel with respect to the operation

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[46] In this regard the United States notes that China does not provide a basis in its submission for the Appellate Body to determine that the challenged measures constitute a customs classification consistent with the Harmonized System. The Panel found that, if the charges imposed by the challenged measures were deemed to be ordinary customs duties, the measures would nonetheless be inconsistent with the "essential character" requirements of GIR 2(a). Panel Report, paras. 7.588. 7.607, and 7.612. China has not appealed these findings and thus lacks an even theoretical basis for arguing that the charges imposed by the challenged measures are based on a valid customs classification.

[47] By ignoring the temporal aspect of an ordinary customs duty, China ignores a critical factor in determining the scope of that term. The Panel correctly concluded that "the ordinary meaning of 'on their importation' in Article II:1(b), first sentence, of the GATT 1994, considered in its context and in light of the object and purpose of the GATT 1994, contains a *strict and precise temporal element* which cannot be ignored." Panel Report, para. 7.184. China appears to simply regard this finding as irrelevant.

[48] China's Appellant Submission, para. 118.

[49] China's Appellant Submission, para. 118.

and interpretation of Article III:2 or China's own measures. China merely challenges the ultimate conclusion of the Panel that the charge imposed by the challenged measures is an internal charge within the meaning of Article III:2. China is essentially arguing that a finding under Article II:1(b) takes precedence over a finding under Article III:2, and that the Appellate Body should simply disregard all the Panel's findings leading to its ultimate conclusion that the charge imposed by China's measures is an internal charge within the meaning of Article III:2. By ignoring and jumping over logical steps in the analysis, China's arguments on appeal lead to an untenable result.

33. For the reasons described in Section A.1 above, the Appellate Body should reject China's claims of error with respect to the Panel's finding that the charged imposed by the measures is not an "ordinary customs duty." Accordingly, China's claims of error with respect to the Panel's threshold determination that the charge imposed by China's measures is an internal charge within the meaning of Article III:2 of the GATT 1994 should be rejected.

B. The Panel Correctly Determined that China's Measures Affect the Internal Sale, Offering for Sale, Purchase, Transportation, Distribution or Use of Imported Products Within the Meaning of Article III:4 of the GATT 1994

34. As part of its examination of the U.S. claims under Article III:4 of the GATT 1994, the Panel correctly found that China's measures affect the internal sale, offering for sale, purchase, transportation, distribution or use of imported auto parts within the meaning of the GATT 1994.[50] China argues that the Panel erred in this finding and that as a result the Panel's finding that China's measures are inconsistent with China's obligations under Article III:4 should be reversed. Specifically China argues that (i) "the Panel's finding that the charge imposed under the measures is an 'internal charge' was in error" and as a result the Panel's findings with respect to Article III:4 cannot be sustained, and (ii) "[w]hatever 'influence' the measures have on an auto manufacturer's decision to use domestic over imported parts, this effect arises from the structure of the tariff rates bound in China's Schedule of Concessions."[51]

35. For the reasons provided in Section A.2 above, China's claim that the Panel erred in finding that the charge imposed by the measures is an internal charge should be rejected. As a result, China's first allegation of error with respect to Article III:4 should also be rejected.

36. The Panel correctly rejected China's second assertion that any influence that the measures may have on a manufacturer's decision to use domestic over imported parts is simply a result of the structure of China's Schedule of Concessions. The Panel noted that while China's tariff schedule provides an incentive to import auto parts instead of motor vehicles, the question before

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[50] Panel Report, para. 7.257.

[51] China's Appellant Submission, para. 121 and 123, respectively.

the Panel was whether the measures create an incentive to use domestic auto parts instead of imported auto parts.[52] The Panel concluded:

> [A]ny auto manufacturer/importer that seeks to avoid the charge at issue must ensure that imported auto parts used in the assembly of a given vehicle model do not meet any of the criteria set out in the measures. Under the measures, whether imported auto parts meet any of the criteria set out in the measures is assessed based on the final assembly of auto parts in China, which consequently requires the examination of auto parts imported in 'multiple shipments'. In our view, this aspect of the measures inevitably influences an automobile manufacturer's choice between domestic and imported auto parts and thus affects the internal use of imported auto parts.[53]

37. The Panel correctly determined that China's measures affect the internal sale, offering for sale, purchase, transportation, distribution or use of imported products within the meaning of Article III:4 of the GATT 1994, because the measures create an incentive for auto manufacturers to use domestic auto parts instead of imported auto parts. Accordingly, China's claims of error should be rejected.

C. The Panel Correctly Concluded that the Term "Motor Vehicles" in China's Schedule of Concessions does not Extend in Scope to Include Auto Parts Imported in Multiple Shipments Based on their Assembly into a Motor Vehicle[54]

38. After finding that China's measures impose an internal charge on imported auto parts that is inconsistent with Article III:2, the Panel turned to the U.S. alternative claim that, in the event

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[52] Panel Report, para. 7.256.

[53] Panel Report, para. 7.256 (footnotes omitted).

[54] China asserts that, "should the Appellate Body affirm the Panel's finding in Section VII.B of its Report that the charge imposed under the challenged measures is an internal charge subject to Article III of the GATT 1994, the Appellate Body should find that the Panel's alternative reasoning and findings in Section VII.D of its Report, as well as the alternative conclusions and recommendations set forth in Section VIII of its Report are moot and of no legal effect." China's Appellant Submission, para. 49. In Section II.A of this submission, the United States has explained why the Appellate Body should reject China's assertion of error and uphold the Panel's finding that the charge imposed by China's measures is an internal charge within the meaning of Article III:2. The United States agrees with China, however, to the extent that if the Appellate Body upholds the finding of the Panel that the charge imposed by China's measures is an internal charge within the meaning of Article III:2, the Appellate Body need not examine China's assertions of error regarding the alternative findings of the Panel.

that the Panel were to find that the charge constitutes an ordinary customs duty, China's measures would be inconsistent with Article II:1(b) because they would impose duties in excess of those set forth in China's Schedule of Concessions.[55]

39. In concluding Section II of its Appellant Submission, China submits,

> Should the Appellate Body decide to examine the Panel's "alternative" findings concerning GIR 2(a) and China's Schedule of Concessions, China requests that the Appellate Body (1) reverse the Panel's findings in Section VII.D.2 of the Report concerning the interpretation of GIR 2(a) and China's tariff provisions for motor vehicles, for the reasons set forth above; and (2) find that the charge imposed under the challenged measures is an ordinary customs duty under Article II:1(b), first sentence, because it is a charge that China imposes based on a valid classification of the product that is subject to the assessment of duty.[56]

China specifically does not request the Appellate Body to reverse the Panel's finding in Section VII.D.3 of the Panel Report. The Panel's finding in that section of the Panel Report provides an independent basis for the Panel's conclusion that the measures are inconsistent with Articles II:1(a) and (b) of the GATT 1994.[57] Therefore, reversal of this finding would also be necessary for the Appellate Body to reverse the Panel's ultimate conclusion with respect to the complainants' alternative claim. Thus while China challenges certain aspects of the Panel's alternative findings, the United States does not understand China to be challenging the ultimate conclusion of the Panel in its alternative findings that the measures, if determined to impose an ordinary customs duty, would impose duties in excess of those set forth in China's Schedule of Concessions.

40. In its alternative findings, the Panel examined the ordinary meaning of the term "motor vehicles" in China's Schedule of Concessions and the context provided by other terms in China's Schedule.[58] The Panel then looked to the interpretative rules of the Harmonized System to further inform the meaning of the term "motor vehicles", examining General Interpretative Rules 1 and 2 of the Harmonized System. China argues that (i) the Panel erred in its consideration of the ordinary meaning of "as presented" in GIR 2(a), and (ii) the Panel erred in its assessment of a 1995 Decision of the Harmonized System Committee and other historical documents relating to GIR 2(a).

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[55] Panel Report, paras. 7.369-70. In footnote 641, the Panel listed a number of reasons supporting its decision to analyze the complainants' alternative claim.

[56] China's Appellant Submission, para. 116.

[57] Panel Report, para. 7.612.

[58] Panel Report, paras. 7.379 and 7.382.

1. The Panel Correctly Determined that the Ordinary Meaning of "As Presented" in GIR 2(a) Provides a Temporal Element to that Rule

41. GIR 2(a) provides:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, *as presented*, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), *presented* unassembled or disassembled (emphasis added).

42. The Panel found that the plain meaning of the term "as presented" in GIR 2(a) denotes a temporal meaning, i.e., the moment when a good is presented to the customs authority.[59] China asserts two errors in the Panel's interpretation: (i) that alternative dictionary definitions are equally applicable to those selected by the Panel[60] and (ii) that the Panel's interpretation of "as presented" is inconsistent with the Panel's own finding that GIR 2(a) can apply to multiple shipments.[61]

43. The Panel understood the term "as presented" to mean "when something is offered for the eyes of someone, offered to sight or view."[62] The Panel found that the term denotes a temporal meaning, "the moment when a good is presented to the customs authority."[63] China argues that *The New Shorter Oxford English Dictionary* ("OED"), on which the Panel relies, also suggests an alternative to the definition used by the Panel. According to China, the OED also supports a reading of "as presented" to mean "in the manner that something is formally handed over for acceptance or action."[64] China argues that "[t]his places the focus of the term 'as presented' not on the temporal moment of importation, but rather on the manner in which the entry is documented ('presented') for the purpose of seeking customs classification."[65]

44. The Panel recognizes that the word "as" has an extensive list of dictionary meanings, but concluded that when considered in the context of GIR 2(a), the definition that the Panel selected

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[59] Panel Report, para. 7.412.

[60] China's Appellant Submission, para. 96-99.

[61] China's Appellant Submission, para. 94.

[62] Panel Report, para. 7.412.

[63] Panel Report, para. 7.412.

[64] China's Appellant Submission, para. 96.

[65] China's Appellant Submission, para. 97.

made the most sense.[66] Significantly, the Panel considered the ordinary meaning of the term "as presented" together with the context in which the term entered GIR 2(a). The Panel noted that the term "presented" had replaced "imported" which appeared in an earlier version of GIR 2(a) and that the change was "adopted to make clear that GIR 2(a) applies to a given article in the state in which it is presented for customs clearance."[67] The Panel further noted that reading "as presented" to denote a temporal meaning is consistent with the determination of the Appellate Body in *EC – Chicken Cuts (AB)* that goods must be classified based exclusively on their condition as they are presented to customs authorities at the time of importation.[68]

45. China also argues that the Panel's own findings indicate the GIR 2(a) can apply to multiple shipments and that the Panel thus erred in limiting application of the rule to single shipments.[69] China, however, fails to provide a citation to the part of the Panel Report containing this finding, and the United States does not understand the Panel to have made this finding. The question that the Panel examined was "whether the term 'as presented' in GIR 2(a) includes, as argued by China, the situation where parts are imported in multiple shipments *and* presented to customs authorities separately."[70] The Panel Report does not establish a requirement that parts be shipped in "single shipments", but rather examines how the term "as presented" relates to China's measures.[71]

46. The Panel correctly determined that the ordinary meaning of "as presented" supports the view that the scope of GIR 2(a) is limited to the specific moment when goods are presented to the customs authority for classification.[72]

2. The Panel Correctly Concluded that China did Not Present Sufficient Evidence to Show that the 1995 HS Committee Decision Pertains to "As Presented" in GIR 2(a) so as to Allow the Application of that Rule to the Multiple Shipments of Parts and Components Included in

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[66] Panel Report, fn. 701.

[67] Panel Report, para. 7.413.

[68] Panel Report, para. 7.415.

[69] China's Appellant Submission, para. 94.

[70] Panel Report, para. 7.411. (emphasis added)

[71] "In the absence of any other modifying words, 'as presented' in the context of GIR 2(a) thus appears to point to the moment when goods are offered to customs authorities for examination, without necessarily encompassing situations where parts and components of a good are offered at different times for observation or examination and later assembled together into a complete good." Panel Report, para. 7.412.

[72] Panel Report, para. 7.415.

China's Measures

47. In its Appellant Submission, China places great reliance on a 1995 Decision of the Harmonized System Committee (the "HS Committee") involving the interpretation of GIR 2(a).[73] Paragraph 10 of this Decision states that "the Committee decided that the questions of split consignments and the classification of goods assembled from elements originating in or arriving from different countries are matters to be settled by each country in accordance with its own national regulations."

48. Following a thorough examination of the 1995 HS Committee Decision, however, the Panel correctly concluded that China did not present sufficient evidence to show that the HS Committee Decision pertains to "as presented" in GIR 2(a) so as to allow the application of that rule to parts and components imported in multiple shipments for assembly.[74] China argues that the Panel erred in its interpretation of the meaning of "split consignments" and "elements originating in or originating from different countries" in the 1995 HS Committee Decision.

49. The Panel examined the HS Committee Decision and was ultimately unconvinced that the Decision was directly relevant to the interpretation of the term "motor vehicles" in China's Schedule of Concessions.[75] The Panel also noted that the parties agreed that the HS Committee Decision is not binding on the Contracting Parties to the Harmonized System Convention.[76] The Panel also determined that Decisions of the HS Committee that have not been codified into legal texts of the Harmonized System or its Explanatory Notes are not entitled to the same evidentiary weight as the GIR itself or the HS Committee Decisions that have been codified into legal texts or Explanatory Notes.[77]

a. The Panel Correctly Determined that the Multiple Shipments of Parts that are Considered as Complete Vehicles Under China's Measures are Not Comparable to "Split Consignments"

50. In relation to the first situation noted in paragraph 10 of the HS Committee Decision, that of "split consignments", the Panel determined that the multiple shipments of parts considered as complete vehicles under China's measures were not comparable to the concept of a "split

[73] Panel Exhibit CHI-29, Decision of the Harmonized System Committee, HSC 39.235 (HSC/15), Interpretation of General Interpretative Rule 2(a).

[74] Panel Report, para. 7.445.

[75] Panel Report, para. 7.445.

[76] Panel Report, para. 7.420.

[77] Panel Report, para. 7.421.

consignment".[78] In its Appellant Submission, China argues that the Panel erred in determining that the reference to split consignments concerns a unique situation where imported parts and components were intended to be part of a single consignment but were then split into multiple consignments for reasons mainly relating to transportation.[79] China argues that this determination is directly contradicted by the WCO and is inconsistent with the negotiating history of GIR 2(a).[80]

51. As an initial matter, the Panel correctly noted that, during the panel proceedings, the parties expressed a common understanding of the term "split consignment" as a situation where the carrier breaks the consignment of a set of goods into multiple consignments (multiple deliveries) for reasons such as the need to balance loads, cost savings in shipment, or the nature of the goods shipped.[81] The Panel understandably relied on this common understanding of the parties, which it noted is also consistent with the ordinary meaning of "split consignments".[82]

52. Contrary to China's argument on appeal, the 16 July 2007 letter from the WCO Secretariat to the Panel does not "directly contradict" the Panel's conclusion. The letter from the WCO Secretariat contained the following question and response:

> *Question*: Does the principle of the second sentence of GIR 2(a) with respect to "articles presented unassembled or disassembled" cover only situations where parts necessary to assemble a complete article arrive at the border in one shipment at once or does it also cover situations where parts to assemble a complete article arrive separately in multiple shipments, including those arriving at different times in different ports from different places of origin?

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[78] Panel Report, para. 7.436.

[79] China's Appellant Submission, para. 68.

[80] China's Appellant Submission, paras. 69 and 82.

[81] Panel Report, para. 7.434. Drawing on China's response to Panel Question No. 138, the Panel continued in footnote 729:

> In particular, both China and the United States provide the same definition of "consignment": a consignment refers to a set of goods handed over to the custody of a carrier for delivery, whether those goods are packed in one container or in multiple containers. A consignment is split when the carrier breaks the consignment into multiple deliveries (e.g. it loads the containers making up the consignment onto different vessels).

See also Panel Report, footnotes 738 and 741.

[82] Panel Report, para. 7.435

> *Response*: I would use the expression "split consignments" to identify the kinds of shipments you describe. "Split consignments" is not formally defined but is used widely to describe a range of trading practices.[83]

First, the response begins "*I would use*", and is thus a personal opinion and not intended as a definitive statement of the WCO Secretariat.[84] Secondly, the response states that the term "split consignments" is *not formally defined*. The clear import of the letter from the WCO Secretariat is that the Secretariat is aware of no official interpretation of the term "split consignments". The WCO letter thus provides no definitive guidance on the meaning of "split consignments" in the 1995 HS Committee Decision and therefore cannot "directly contradict" the conclusion of the Panel.[85]

53. Similarly, and contrary to China's assertion, the observations of the Nomenclature Directorate in a 1963 document of the Customs Co-operation Council ("CCC")[86] do not contradict the Panel's findings. On the second page of that document, the Nomenclature Directorate quotes from the Geneva Nomenclature, "The importation of machines in an unassembled state, even if forwarded in several consignments, shall not affect their classification." That reference to "several consignments" is entirely consistent with the Panel's conclusion that split consignments may be forwarded in multiple consignments,[87] and in no way contradicts the conclusions on the Panel.

54. The letter from the WCO Secretariat and the observations of the Nomenclature Directorate accordingly do not require the Appellate Body to reverse the determination of the Panel that, based on the ordinary meaning of "consignment" and the common understanding of the parties expressed during the panel proceedings, the multiple shipments of parts that are considered as complete vehicles under China's measures are not comparable to "split

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[83] Annex C-4, Question No. 10.

[84] In other places in its letter, the WCO Secretariat does phrase responses as "The Secretariat . . .". For example another response from the Secretariat states that "it is the Secretariat's understanding that the text is merely an explanation of historical reasons for articles being shipped unassembled or disassembled." Annex C-4, page C-16.

[85] The United States also notes that the Panel's question refers to a complete article. China's measures cover bulk shipments of parts where, at the time of importation, there is no discrete collection of parts constituting a particular vehicle. As such, the question does not accurately reflect the operation of China's measures, so the response should not be read as an evaluation of those measures, even if only a personal one.

[86] Panel Exhibit CDA-18.

[87] Panel Report, 7.434.

consignments".

b. The Panel Correctly Determined that China Failed to Demonstrate that the Second Situation in Paragraph 10, the "Elements Originating in or Arriving from Different Countries" Refers to the Multiple Shipment of Parts Situation of China's Measures

55. After examining Paragraph 10 of the 1995 HS Committee Decision and other historical documents relating to the development of GIR 2(a), the Panel determined that China had not provided evidence to show that the second situation discussed in paragraph 10 of that Decision, the "elements originating in or arriving from different countries" refers to the multiple shipments of auto parts that are treated as complete vehicles under China's measures.[88]

56. China argues that the Panel erred in its interpretation of documents relating to discussions at the Nomenclature Committee of the CCC regarding GIR 2(a).[89] Specifically, China argues that the Panel erred in determining that the negotiating history of GIR 2(a) indicates that goods imported for industrial assembly were not intended to be covered by that rule. China argues that "[t]he Panel apparently did not realize, however, that the observations from which it quoted reflected a set of views that the Nomenclature Committee considered, <u>but ultimately rejected</u>."[90] China asserts that "[i]t is clear from the Panel's analysis that its erroneous assessment of the negotiating history of GIR 2(a) affected the Panel's entire understanding of how GIR 2(a) relates to the classification of unassembled articles that enter the customs territory in multiple shipments."[91]

57. The Panel looked to the historical documents to shed light on the meaning of the second situation described in paragraph 10 of the 1995 HS Committee Decision, on which China placed great emphasis. The Panel looked at the 1995 HS Committee Decision to inform the meaning of "as presented" in GIR 2(a), namely whether the Panel correctly interpreted that phrase as indicating a temporal meaning.[92] And the Panel looked at GIR 2(a) as providing context to the ordinary meaning of "motor vehicles" in China's Schedule of Concessions. Accordingly, the historical documents were several steps removed from the relevant issue of interpretation, the meaning of the term "motor vehicles". There is no indication in the Panel Report that the Panel placed great weight on the 1995 HS Committee Decision or the statements of the Nomenclature

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[88] Panel Report, para. 7.445.

[89] China's Appellant Submission, para. 88.

[90] China's Appellant Submission, para. 88.

[91] China's Appellant Submission, para. 90.

[92] See Panel Report at para. 7.416.

Directorate. As discussed above, the Panel correctly noted that HS Committee Decisions are not binding and that "the HS Committee Decision, in particular parts of the Decision that have not been codified into legal texts of the HS or Explanatory Notes to the HS, do not afford the same evidentiary weight as the GIR itself or the HS Committee Decisions that have been codified into legal texts or Explanatory Notes."[93] And notably, the Panel did not base its conclusions on these documents but rather simply concluded that China did not present sufficient evidence to show that the 1995 HS Committee Decision pertains to "as presented" in GIR 2(a) so as to allow the application of that rule to the multiple shipments of parts and components included in China's measures.[94]

58. Although China asserts that the statements of the CCC Secretariat quoted by the Panel were ultimately rejected by the Nomenclature Committee, it provides no direct evidence of this. The language discussed in that document, "essentially for convenience of handling, packing or transport", was not ultimately included in the text of the rule, but the only specific rationale for its exclusion in the record is contained in the Nomenclature Committee Report. The language in the Nomenclature Committee Report states simply, "In order to give the proposed Rule the same scope as the various Section and Chapter Notes which it will replace, the Committee decided that it should not contain a restriction limiting it to those goods which are imported unassembled or disassembled mainly for reasons of convenience of handling, packing or transport."[95]

59. As the Panel notes, Explanatory Note (V) to GIR 2(a) provides that when goods are presented unassembled or disassembled, it is *usually* for reasons such as "requirements or convenience of packing, handling or transport."[96] The Panel noted that given that the phrase was not inserted in the text of GIR 2(a) and that the word "usually" was inserted, it understood that the circumstances mentioned in Explanatory Note (V) are not the only circumstances under which GIR 2(a), second sentence applies. The Panel concluded, "More importantly, China has not directed us to any evidence showing that the second question in paragraph 10 of the HS Committee Decision refers to the multiple shipment situation of parts and components imported for the assembly of motor vehicles."[97]

60. The Panel noted that the 30 July 2007 Letter from the WCO Secretariat also demonstrates that the second phrase at issue in paragraph 10 does not concern the multiple shipment

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[93] Panel Report, para. 7.421.

[94] Panel Report, para. 7.445.

[95] Annex C-4, p. C-23, Report of the CCC Nomenclature Committee (30 October 1963), appended to the 30 July 2007 Letter from the WCO Secretariat.

[96] Panel Report, para. 7.441.

[97] Panel Report, para. 7.441.

situation.[98] The Letter from the WCO Secretariat states that this phrase reflects the view of the HS Committee that the Harmonized System does not address the applicability of GIR 2(a) to the classification of goods of mixed origin, i.e. that rules of origin are outside the field of the HS nomenclature.[99]

3. The Panel Acted Consistently with Article 3.2 and Article 11 of the DSU

61. China argues that the Panel, in its alternative findings, acted inconsistently with Articles 3.2 and 11 of the DSU in purporting to resolve a known interpretative issue within the meaning of the Harmonized System. China states, "It is simply not the role of WTO dispute settlement panels to purport to resolve known issues concerning the interpretation of another international agreement, particularly when the organization responsible for administering that agreement has identified the issue and has a mechanism in place for resolving it."[100] China asserts, "To do so is to 'determine rights and obligations outside the covered agreements', which is not a function of panels under Articles 3.2 and 11 of the DSU."[101]

62. The Panel was not attempting to and did not "determine rights and obligations outside the covered agreements" as China alleges. The error that China alleges is merely a reflection of China's own assertion that "[t]he principal issue in this dispute concerns a complex question of customs classification arising under the [Harmonized System]."[102] As described above, the Panel Report interprets the covered agreements. The Panel looked to the Harmonized System not to determine a party's rights under that system, but rather to provide context to help it interpret the meaning of a term within the covered agreements - namely the meaning of "motor vehicles" in China's Schedule of Concessions.

63. The Panel acted consistently within its mandate under Articles 3.2 and 11 of the DSU.

D. The Panel Correctly Determined that China's Measures are Inconsistent with China's Commitment under Paragraph 93 of China's Working Party Report

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[98] Panel Report, para. 7.442.

[99] Panel Report, paras. 7442. See also 20 June 2007 Letter from the WCO Secretariat stating, "The phrase 'elements originating in or arriving from different countries' encompasses the possibility of goods being of (preferential on non- preferential) origin from the country of shipment or from another country." Annex C-2, p. C-9.

[100] China's Appellant Submission, para. 106.

[101] China's Appellant Submission, para. 108.

[102] China's Appellant Submission, para. 1.

64. In contrast to the page after page of argumentation in China's Appellant submission regarding the Panel's findings on paragraph 93 of the Working Party report, the Panel's findings on this matter are concise, clear, and correct.

65. This issue can best be understood by reviewing three parts of the Panel Report and its Annexes. The first key part of the Panel Report necessary for considering issues relating to paragraph 93 is the portion set out in paragraphs 7.71 to 7.78, in which the Panel examines how CKD or SKD kits are treated under China's measures. In particular, Decree 125 contains two mentions of CKDs/SKDs; the Panel properly examined these two provisions together.

66. The core provision of Decree 125, and indeed of all the measures at issue in this dispute, is Article 21. It provides in full:

> Article 21 Imported automobile parts shall be characterized as complete vehicles if one of the following applies:
>
> (1) imports of CKD or SKD kits for the purpose of assembling vehicles;
>
> (2) within the scope identified in Article 4 of these Rules:
>
> (a) imports of a body (including cabin) assembly and an engine assembly for the purpose of assembling vehicles;
>
> (b) imports of a body (including cabin) assembly or an engine assembly, plus at least three other assemblies (systems), for the purpose of assembling vehicles;
>
> (c) imports of at least five assemblies (systems) other than the body (including cabin) and engine assemblies for the purpose of assembling vehicles; or
>
> (3) the total price of imported parts accounts for at least 60% of the total price of a complete vehicle of that vehicle model. This criterion shall enter into force on July 1, 2006.[103]

With respect to CKD/SKD kits, Article 21(1) requires that they be "characterized as complete vehicles," meaning that they must be subject to a 25 percent rate of duty. Under Article 21(2) and 21(3), less-complete collections of parts (regardless of how, when, from where or by whom imported) are also characterized as complete vehicles.

67. Unlike the less-complete collections of parts (imported at different times and from different sources) subject to Decree 125, a CKD/SKD kit is identifiable upon importation. Accordingly, the burdensome record-keeping requirements imposed by Decree 125 for the purpose of identifying "automobile parts characterized as complete vehicles" is unnecessary for kits. Apparently for this reason, Decree 125 has a special provision governing the procedure for

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[103] Panel Report, Annex E-2 (emphasis added).

importing kits. In particular, Article 2 provides:

> Article 2. These Rules are applicable to the supervision and administration of the importation of automobile parts characterized as complete vehicles, used to produce/assemble vehicles by automobile manufacturers approved by or registered with relevant state authorities.
>
> Automobile manufacturers importing completely knocked-down (CKD) or semi-knocked down (SKD) kits may declare such importation to the Customs in charge of the area where the manufacturer is located and pay duties, and these Rules shall not apply.[104]

Under the second sentence of Article 2 of Decree 125, the importing manufacturer may choose to avoid the burdensome administrative procedures set out elsewhere in the Decree by declaring and paying at its local customs office the duty rate applicable to whole vehicles. As the Panel described the operation of these two articles, "although importers of CKD or SKD kits can opt in accordance with Article 2(2) of Decree 125 to be exempted from 'the administrative procedures' under the measures, their obligation to pay the charge under the measures for CKD and SKD kits arises from Article 21(1) of Decree 125."[105]

68. The second key part of the Panel Report related to the paragraph 93 issue involves the question of whether the Panel was correct in even addressing the paragraph 93 issue, because – as China notes – this was in a sense a "conditional" claim of the United States. As noted in the Panel Report, the U.S. panel request provided:

> In particular, China has acted inconsistently with:
>
> [Article III of the GATT 1994, the TRIMs Agreement, and the SCM Agreement].
> . .
>
> to the extent that the measures impose a charge on or in connection with the importation of auto parts,
>
> [Article II of the GATT 1994]
>
> (9) paragraph 93 of the Working Party Report, by specifically identifying completely knocked down (CKD) and semi-knocked down (SKD) kits for motor

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[104] Panel Report, Annex E-2 (emphasis added).

[105] Panel Report, para. 7.78.

> vehicles and assessing them the tariff for complete vehicles . . . .[106]

69. Thus, the U.S. claim on paragraph 93 of the Working Party Report was conditional on China's charge being on or in connection with the importation of auto parts. Of course, a central argument of the United States and the other two complainants was that the charges under Decree 125 were not customs duties, and instead were subject to Article III:2 of the GATT 1994 as internal charges. However, in the circumstance where an importer brought a CKD/SKD kit into China and, pursuant to Article 2 of Decree 125, upon importation paid the duty rate for complete vehicles, the charges would be "on or in connection with the importation of auto parts."

70. In the first set of Panel questions, the Panel asked the United States to clarify its position on whether its conditional claim would apply, and thus whether the Panel would need to look at the claim under paragraph 93 of the Working Party Report. In particular, Panel Question 80 and the U.S. response provided as follows:

> 80. (Complainants) Would the complainants consider that the payment by the vehicle manufacturer of the 25% charge on CKD and SKD kits at the border, as contemplated in Article 2 of Decree 125, be characterised as a "border measure" or "ordinary customs duty"? If so, would it be appropriate for the Panel to consider this specific case under Article II GATT?
>
> . . .
>
> Response of the United States (WT/DS340)
>
> 350. If the enterprise agrees to pay a 25% charge on an CKD or SKD at the border, the other aspects of China's measures (such as verification of local content) would not apply. In this limited case, the charge would appear to be a customs duty. The issue would therefore be whether it is in accordance with Article II of the GATT 1994 to classify CKD and SKD kits always and automatically as complete vehicles, without regard to whether, for example, only assembly operations were involved in completing the whole vehicle. In addition, the United States contends that such tariff treatment of CKDs/SKDs is inconsistent with China's obligations under paragraph 93 of the Working Party Report.[107]

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[106] United States Request for a Panel, September 15, 2006 (WT/DS340/8); Panel Report, para. 3.4-3.5.

[107] Panel Report, Annex A-1 (Responses and Comments of Parties to Questions from the Panel following the First Substantive Meeting).

Thus, the need to address the U.S. "conditional claim" under paragraph 93 of the Working Party Report was apparent to all involved in this Panel proceeding at a time no later than the time of the parties' responses to the Panel's first set of questions. Moreover, it was clear that this U.S. claim would address those situations where the importer paid the 25 percent rate of duty at the border upon the importation of CKD/SKD kits.

71. The third key element of the Panel Report related to paragraph 93 is the Panel's main discussion of the issue, set out in paragraphs 7.737 to 7.758 of the Report. The Panel started with the text of paragraph 93 of the Working Party Report:

> Certain members of the Working Party expressed particular concerns about tariff treatment in the auto sector. In response to questions about the tariff treatment for kits for motor vehicles, the representative of China confirmed that China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. If China created such tariff lines, the tariff rates would be no more than 10 per cent. The Working Party took note of this commitment. (emphasis added)[108]

72. Although the entire paragraph contains useful context, the key sentence in this paragraph is: "If China created such tariff lines [for kits for motor vehicles], the tariff rates would be no more than 10 per cent." Under the Panel's reasoning, a breach of this commitment requires (i) the imposition of a tariff rate, (ii) that such tariff rate be greater than 10 percent, and (iii) that the condition in the first part of the sentence – "If China created such tariff lines" – was met. China's measures satisfy each of these conditions, and thus are in breach of the commitment.

73. First, in the limited case of an importation under Article 2 of Decree 125, tariffs (as opposed to internal charges) are involved. China in the dispute argued that all of the charges at issue were regular customs duties. And, as noted above, the United States agreed that the charges under the measures would be ordinary customs duties in the specific case where an importer, pursuant to Article 2 of Decree 125, brought a kit into China and paid the 25 percent whole-vehicle rate upon importation.

74. Second, the tariff rate applicable in this situation was greater than 10 percent. Indeed, as the Panel had found in its examination of Articles 2 and 21 of Decree 125, China's measures required a payment of a 25 percent charge for CKD/SKD kits.[109]

75. Third, the Panel found that the condition – that "China created such tariff lines" – was met. And in particular, the Panel found that this condition was met for two different,

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[108] Panel Report, para. 7.742.

[109] Panel Report, Paras. 7.71-7.78.

independent reasons. The reason initially discussed during the proceeding was that China's measures, by specifying that CKD/SKD kits receive the same tariff treatment as whole vehicles, had in effect created a tariff line under China's domestic law for CKD/SKD kits. As the Panel explained:

> As China submits, satisfaction of the condition underlying the commitment in paragraph 93 rests with China as it is up to China to decide whether it wants to create tariff lines for CKD and SKD kits, which did not exist at the time of accession. However, once China has decided to initiate an action by enacting the measures at issue in 2004 and 2005 (3-4 years later from its accession to the WTO in 2001), through which it systematically gives CKD and SKD kits imports certain tariff lines, that very action, in our view, effectively creates tariff lines for CKD and SKD kits. Interpreting otherwise would render meaningless China's commitment contained in paragraph 93 of China's Working Party Report since China will always be able to resort to its domestic legal system to argue that it has never amended its Schedule and thus no tariff lines have been created.[110]

76. The second reason that the Panel found that the condition was met was based in part on evidence that China itself submitted during the proceeding. In particular, China – in attempting to support its arguments on other issues – submitted an exhibit indicating that China in fact had used an explicit CKD tariff line for the classification of a specific CKD kit. This information was subsequently supplemented by the submission of an exhibit showing this 10-digit tariff line within China's 2005 domestic tariff schedule.[111] As a result of this information, the Panel found that "we consider that China has created separate tariff lines for CKD and SKD kits in its tariff schedule at the ten-digit level and thus has met the condition under paragraph 93."[112]

77. In sum, the Panel's reasoning on paragraph 93 was a three step process – a finding that the measures imposed a 25 percent charge on CKD/SKD kits, a finding that the charge was a customs duty when applied upon importation under Article 2 of Decree 125, and a finding that China had met the condition in paragraph 93 of "creating such tariff lines." Each step in the Panel's reasoning is sound and fully based on the evidence before it. China raises numerous arguments in opposition to the Panel's finding of a breach of paragraph 93 of the Working Party Report, but all of those arguments come back to these three basic issues. As explained below, none of those arguments has merit.

78. Prior to addressing China's substantive arguments on the paragraph 93 claim, the United States notes that it does not accept China's characterization of the manner in which the Appellate

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[110] Panel Report, para. 7.756.

[111] Panel Report, paras. 7.750-7.751.

[112] Panel Report, para. 7.752.

Body should review a panel's findings on the meaning of a Member's municipal law.[113] China seems to argue that a Panel's construction of municipal law is a pure issue of international law, to be reviewed *de novo* by the Appellate Body just like a Panel's finding on the interpretation of one of the covered agreements. If this is China's position, the United States does not agree.

79. Under Article 11 of the DSU, a panel is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The meaning and operation of the measure at issue is one of the facts to be assessed in the course of proceeding, just as any other relevant facts at issue. Having determined the facts, the panel must then proceed to employ those facts in addressing the legal issues of the applicability of and conformity with the covered agreements (including any necessary interpretations of covered agreements). Indeed, it is well established that a Panel's construction of municipal law is a *factual* determination. As the Panel explained, for example, in *US – Section 301*,

> Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India - Patents (US)* , interpret US law "as such", the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect.[114]

80. Because constructions of municipal law are factual determinations in WTO dispute settlement, the Appellate Body will not make *de novo* interpretations of municipal law where a Panel has failed to make initial findings. For example, in *US – Corrosion-Resistant Steel Sunset Review (AB)*, the Appellate Body explained why it was unable to complete the analysis by conducting a *de novo* review of municipal law:

> 189. For the same reasons that the Panel did not examine the nature and meaning of Sections II.A.3 and 4 of the Sunset Policy Bulletin, it did not examine the nature and meaning of the "good cause" standard [in Section II.C of the Sunset Policy Bulletin] and how the standard relates to those provisions. <u>Again, the Panel made no factual findings. Here too, the facts needed to assess the meaning of the "good cause" standard [in the Sunset Policy Bulletin] and, thereby, the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin are not</u>

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[113] Appellant Submission, paras. 140-141.

[114] *US – Section 301*, para. 7.18. *See also, e.g., US – Hot-Rolled Steel (Panel)*, para 7.143; *US – 1916 Act (Japan) (Panel)*, para. 6.47.

> uncontested facts.
>
> 190. In sum, in view of the lack of relevant factual findings by the Panel or uncontested facts on the Panel record, we are unable to rule on Japan's claim that Sections II.A.3 and 4 of the Sunset Policy Bulletin are, as such, inconsistent with Article 11.3 of the Anti-Dumping Agreement.[115]

As this excerpt makes clear, the Appellate Body considered as "factual findings" the questions of municipal law that were at issue in the dispute.

81. Furthermore, in an appeal where the appellant (like China in this appeal) argued that the Panel had no basis for its findings on the construction of municipal law, the Appellate Body found that the issue was more appropriately raised as a question of an objective assessment of the facts under Article 11 of the DSU. The Appellate Body explained:

> 273. In any event, we are of the view that this aspect of Mexico's appeal should have been more appropriately brought under Article 11 of the DSU. Mexico's argument is premised on the Panel's purported failure to read the challenged provisions of the FTA [that is, the Mexican municipal law at issue] in the light of another FTA provision that Mexico brought to the attention of the Panel. Mexico alleges that the Panel "disregarded" this evidence and "made unsubstantiated findings" on the mandatory nature of the challenged provisions of the FTA "virtually without undertaking any relevant analysis". Mexico's claim of error, therefore, rests on the Panel's failure to conduct its analysis in a proper and impartial manner: Mexico does not contest, on the merits, the Panel's decision rejecting the supposed import of Article 2 for the interpretation of the other provisions of the FTA.
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> 274. In this light, Mexico's claim on appeal appears to be a traditional Article 11 claim challenging the Panel's failure to accord sufficient weight to evidence submitted by one of the parties.[116]

In addition to explaining that DSU Article 11 was the appropriate basis for Mexico's claim, the Appellate Body in the above excerpt describes provisions of municipal law as "evidence," again reinforcing that questions on the construction of municipal law are factual findings to be made by panels.

82. China's apparent assertion that questions of municipal law should be reviewed *de novo* by

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[115] *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras 189-190 (emphasis added).

[116] *Mexico – Rice (AB)*, paras. 273-274.

the Appellate Body is based on a three-sentence excerpt from the Appellate Body report in *US – Section 211 (AB).*[117] The meaning of those sentences, however, is uncertain. In particular, the Appellate Body wrote that a "Panel's Assessment of municipal law as to its consistency with WTO obligations is subject to Appellate Review." This statement could simply mean that an application of a WTO provision to a particular set of facts (that is, facts pertaining to municipal law) is a mixed question of law and fact subject to appellate review. If so, the statement is unsurprising and consistent with the practice in WTO dispute settlement proceedings. However, if as China implies, the statement means that findings on the meaning of municipal law are to be examined *de novo* by the Appellate Body, it would be inconsistent with the basic principle that constructions of municipal law are questions of fact in the context of WTO dispute settlement. Moreover, if this were intended, nothing in the Appellate Body report explains the basis for such a finding. In short, this single Appellate Body report cannot serve as a basis for a finding that the Appellate Body should conduct *de novo* reviews of municipal law.

83. To be clear, the United States does not contend that a panel's construction of municipal law is beyond the scope of appellate review. Rather, the United States submits that, upon review by the Appellate Body, such panel findings must be accorded the same deference as other types of factual findings made by panels in WTO dispute settlement proceedings.

1. China is Incorrect in Asserting that the Panel's Interpretation of the Measures Is Inconsistent with Their Ordinary Meaning

84. As noted, the Panel found that under Article 2 of Decree 125, importers of CKD/SKD kits can opt to be exempted from the administrative procedures under the measures, but that Article 2 does not free importers of CKD/SKD kits of their obligation to pay a 25 percent charge.[118] China argues that this interpretation is incorrect based on the following, sweeping ground: "By their plain terms, the challenged measures do not apply to importers who import CKD/SKD kits under China's regular customs procedures." It is China's proposed reading, however, that ignores the plain language of Decree 125.

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[117] Appellant Submission, para. 140, quoting Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, para 105 ("Our rulings in these previous appeals are clear: the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.").

[118] Panel Report, para. 7.78.

85. Notably, <u>nowhere in Decree 125</u> is there even the phrase "regular customs procedures." Thus, China's purported "plain" meaning of Decree 125 is not even contained in the text of the decree. What China claims is a "plain" meaning instead is a proposed interpretation of Decree 125.

86. When one does examine the language actually used in Article 2 of Decree 125, it does not support China's interpretation. Article 2 provides a specific procedure for the payment of the 25 percent charge that can be used in place of the more burdensome procedural requirements elsewhere in the decree. The procedure set out in Article 2 is that the "Automobile manufacturers importing completely knocked-down (CKD) or semi-knocked down (SKD) kits may declare such importation to the Customs in charge of the area where the manufacturer is located and pay duties."[119] This is a specific procedure applicable to specific types of importers, requiring payment at a specific customs office (the office where the manufacturer is located), and – in the context of the decree as a whole – requires the payment of duties at the whole vehicle rate.

87. Although China makes the assertion, it has provided no basis for believing that this specific procedure described in Article 2 was intended to be "regular customs procedures." In fact, if that was the intent of the measure, Decree 125 could simply have stated that importers may use regular customs procedures for CKD/SKD kits. Furthermore, as the Panel emphasized in its reasoning, if (as China asserts) importers of CKD/SKD kits could simply use "regular customs procedures", there would be no purpose in listing CKD/SKD kits in Article 21 of Decree 125 as one of the classes of auto parts that were deemed to have the character of a complete vehicle.[120]

88. More broadly, China's proposed interpretation is based on the flawed premise that Decree 125 somehow leaves a set of "regular customs procedures" intact with respect to importations of auto parts by auto manufacturers. To the contrary, China's measures impose an intricate, new

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[119] Panel Report Annex E-2, Decree 125, Article 2

[120] Panel Report, para. 7.76 ("According to China, Article 21 defines the collections of parts and components that have the essential character of a motor vehicle, which includes CKD/SKD kits. However, in our view, if Article 2(2) were to be understood as automatically excluding CKD or SKD kits from the measures, it would make Article 21(1) of Decree 125 inutile, which categorizes CKD or SKD kits as auto parts characterized as complete vehicles under the measures. In other words, it would make meaningless the only logical explanation for the raison d'être of Article 21(1), which is to apply the measures to CKD or SKD kits imports if they were to be imported without recourse to the exceptional option under Article 2(2). Article 21 of Decree 125 is a provision setting forth the thresholds for auto parts that should be characterized as complete vehicles under the measures and no language in this provision shows any other meaning.")

regime for the importation of auto parts, which has radically modified any prior "regular customs procedures." The right of auto manufacturers to follow the simple procedure of declaring auto parts based on the condition as they arrive at the border is only available if Decree 125 specifically allows it. For example, even importations of parts not characterized as "complete vehicles" are subject to burdensome reporting and verification requirements.[121] Thus, the requirements applicable even to auto parts not characterized as complete vehicles are not the same as the "regular customs procedures" in place prior to the adoption of China's measures.

89. Likewise, Decree 125 modifies any prior "regular customs procedures" applicable to CKD/SKD kits. As a result of the adoption of Decree 125, an importer of a CKD/SKD kit must follow one of two paths set out in the Decree: to pay the 25 percent charge upon importation as a customs duty, or to subject the kit to the detailed internal requirements set out in the Decree. Contrary to China's argument, there is no longer any "regular customs procedure" to apply.

90. As noted, China's proposed interpretation of the treatment under Decree 125 of CKD/SKD kits is based solely on the second sentence of Article 2. China, however, wrongly asserts that this sentence presents a stand-alone, self-contained rule, and improperly construes this sentence without considering the context of Decree 125 as a whole. The second sentence of Article 2 of Decree 125 provides:

> Automobile manufacturers importing completely knocked-down (CKD) or semi-knocked down (SKD) kits may declare such importation to the Customs in charge of the area where the manufacturer is located and pay duties, and these Rules shall not apply.

Contrary to China's assertions, this language is not "unambiguous".[122] Indeed the sentence loops back on itself – it is logically inconsistent for a sentence to both set conditions on importation, and then to say that the Rules (of which the sentence and its conditions for importation are an element) do not apply to such importations.

91. As the Panel has done, the only logical way to construe the sentence is in the context of Decree 125 as a whole. The first sentence of Article 2, combined with Article 21(1), make clear that importations of CKDs/SKDs are within the scope of the measure. The first sentence of Article 2 provides that

> These Rules are applicable to the supervision and administration of the importation of automobile parts characterized as complete vehicles, used to

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[121] Panel Report Annex E-2, Decree 125, Article 7 (requiring a self-evaluation followed by a government verification of parts not characterized as complete vehicles).

[122] China's Appellant Submission, para. 145.

> produce/assemble vehicles by automobile manufacturers approved by or registered with relevant state authorities.[123]

And, Article 21(1) provides that "automobile parts characterized as complete vehicles" includes "(1) imports of CKD or SKD kits for the purpose of assembling vehicles".[124] Thus, Decree 125 – on its face – does in fact apply to imports of CKD/SKD kits.

92. Furthermore, Article 2, second sentence must be read in the context of Decree 125 as a whole. In particular, the goal of the measures is to maintain a 25 percent charge on auto parts used for manufacturing purposes in cases where China deems those auto parts as having the character of a complete vehicle. The measures could not achieve this goal with respect to the auto parts contained in CKD/SKD kits if manufacturers could entirely exempt their CKD/SKD imports from the scope of the measure by paying some other rate of duty upon importation.

93. For these reasons, China's interpretation – that the phrase "These Rules do not apply" in Article 2, Sentence 2 carves out CKDs/SKDs entirely from the scope of the measures – is untenable. Rather, the only plausible way to read the sentence is as the Panel has done: namely, that importers of CKD/SKD kits have the option of paying upon importation the 25 percent charge required under the measures instead of subjecting the kits to the burdensome administrative requirements under the Decree (and, to that extent, "these rules do not apply"). This reading resolves the ambiguity caused by the self-referential nature of the second sentence of Article 2. Moreover, the reading is consistent with the context and overall purpose of the measures in imposing a 25 percent charge on imported parts deemed by China to have the character of a complete vehicle.

94. Finally, China argues that the Panel's interpretation of Decree 125 as applied to CKD/SKD kits is inconsistent with the Panel's finding that "a charge cannot be at the same time an 'ordinary customs duty' under Article II:1(b) of the GATT 1994 and an 'internal tax or other internal charge' under Article III:2 of the GATT."[125] But there is, in fact, no inconsistency. The charge imposed under China's measure, as applicable to any particular entry, will <u>not</u> be both an "ordinary customs duty" and an internal charge. Rather, in cases where the importer pays the 25 percent duty upon importation pursuant to Article 2 of Decree 125, the charge can be characterized as a customs duty. In a different situation, where for some reason an importer did not avail itself of the Article 2 procedure and instead subjected the kit to all of the internal procedural requirements, the charge would be an internal charge under Article III:2. In no situation would the <u>same charge</u> be both an ordinary customs duty and an internal charge.

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[123] Panel Report, Annex E-2, Decree 125, Article 2.

[124] Panel Report, Annex E-2, Decree 125, Article 21.

[125] China's Appellant Submission, para. 158 (citing Panel Report, para. 7.105).

2. China has no Basis for Arguing that the United States Did Not Make a Prima Facie Case and "Did Not Advance" its Claim under Paragraph 93 of the Working Party Report

95. China's assertions regarding a supposed failure of the United States to present its paragraph 93 claim are contradicted by the record in this dispute. In particular, the United States explicitly set out its interpretation of the Article 2 procedure for the payment of the 25 percent charge on CKD/SKD kits, and explicitly explained how the measures were inconsistent with the paragraph 93 obligation.

96. With regard to the operation of Paragraph 2 of Decree 125, the United States explained that:

> If the enterprise agrees to pay a 25% charge on an CKD or SKD at the border, the other aspects of China's measures (such as verification of local content) would not apply. In this limited case, the charge would appear to be a customs duty. . . . In addition, the United States contends that such tariff treatment of CKDs/SKDs is inconsistent with China's obligations under paragraph 93 of the Working Party Report.[126]

This excerpt shows that the United States explicitly alleged that the Article 2 procedure for CKD/SKD kits is inconsistent with China's paragraph 93 obligations, and explicitly stated its understanding of the operation of Article 2. In particular, the United States explained that "if the enterprise agrees to pay a 25% charge on an CKD or SKD at the border, the other aspects of China's measures (such as verification of local content) would not apply." This in fact was the interpretation adopted by the Panel, after considering all of the arguments presented by the parties during the panel proceeding. Thus, China has no basis for asserting that the United States did not adequately present the aspect of its paragraph 93 claim that turns on the interpretation of Article 2 of Decree 125.

97. The United States also explained how China's measures were inconsistent with China's obligations under paragraph 93 of the Working Party Report:

> The United States is not aware of any tariff lines in China's tariff schedule for CKD or SKD kits. However, China' s measures – by treating CKD and SKD kits as "deemed whole vehicles" subject to a 25% whole vehicle rate – have accomplished the same result as a new tariff line that specifically mentions CKDs

[126] Panel Report, Annex A-1, Responses of the United States to Questions from the Panel following the First Substantive Meeting, para. 48.

> and SKDs. Thus, the de facto result of China's measure is as if China created a new tariff line for CKDs and SKDs.[127]

This is the same line of reasoning used by the Panel in finding that that the condition set out in paragraph 93 – namely, that "China created such tariff lines" – was met.[128] Accordingly, the record directly contradicts China's claim that the United States did not make a *prima facie* case and did not advance its paragraph 93 claim.

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[127] Panel Report, Annex A-1, Responses of the United States to Questions from the Panel following the First Substantive Meeting, para. 30.

[128] The United States also presented an alternative interpretation of the paragraph 93 obligation – in essence, that the phrase "if China created such tariff lines" explained the context, and was not intended to be a condition of the obligation:

> The United States submits that the final sentence of paragraph 93, in the context of the rest of the paragraph, imposes an obligation on China to provide a tariff treatment of no greater than 10 percent on CKDs and SKDs. The paragraph starts out by noting that certain members of the Working Party expressed particular concerns about the "tariff treatment" of kits. In fact, the paragraph twice uses the term "tariff treatment." The use of the term "tariff treatment" highlights that the working party's concern was the rate of duty applied by China (that is, 25 percent for whole vehicles versus 10 percent for parts), and that the concern was not the classification of CKDs or SKDs. In this context, the only reasonable interpretation of the clause "If China created such tariff lines" is that the clause simply reflects an understanding on the part of the negotiators that CKDs and SKDs were at that time being entered as parts (not whole vehicles), and that the working party was concerned that China would change the tariff treatment by creating a new CKD/SKD line with a whole-vehicle rate. Conversely, it would not be reasonable to read the sentence as allowing China to provide any tariff treatment it wished, so long as China creates no new tariff heading for CKDs and SKDs. Such a reading would amount to no commitment at all – as illustrated by the current measures of China – since China could change tariff treatment by classifying the CKDs/SKDs as whole vehicles, and thus this reading would not meet the negotiators stated intention of addressing concerns with the tariff treatment (as opposed to classification) of CKDs and SKDs.

Panel Report, Annex A-1, Responses of the United States to Questions from the Panel following the First Substantive Meeting, para. 31.

3. The Panel Correctly Found that China's Measures Satisfied the Condition ("If China Created Such Tariff Lines") in Paragraph 93

98. Paragraph 93 of the Working Party Report provides: "If China created such tariff lines [for CKD/SKD kits], the tariff rates would be no more than 10 per cent."[129] The Panel correctly found that China's measures met the "[i]f China created such tariff lines" condition set out in paragraph 93. The Panel's reasoning – which is set out in paragraphs 7.754 to 7.757 of the Report – properly took account of the context of the language within paragraph 93 as a whole, applied the language in paragraph 93 to the facts and circumstances of this particular dispute, and fully explained the rationale for its finding. China presents two reasons why it believes the Panel's interpretation is incorrect; neither argument is persuasive.

99. First, China argues that the term "tariff line" in paragraph 93 can only mean a provision for CKD/SKDs contained within the bounds of China's published tariff schedule.[130] The Panel, however, fully considered this argument during the proceeding and convincingly rejected it.

> 7.756 In this connection, we note China's argument that it has not created tariff lines for CKD and SKD kits because it has not amended its Schedule as required under China's domestic law to create new tariff lines. What is at issue in the present dispute is however China's commitment under the WTO Agreement, not whether China has satisfied its domestic procedures for creating new tariff lines. As China submits, satisfaction of the condition underlying the commitment in paragraph 93 rests with China as it is up to China to decide whether it wants to create tariff lines for CKD and SKD kits, which did not exist at the time of accession. However, once China has decided to initiate an action by enacting the measures at issue in 2004 and 2005 (3-4 years later from its accession to the WTO in 2001), through which it systematically gives CKD and SKD kits imports certain tariff lines, that very action, in our view, effectively creates tariff lines for CKD and SKD kits. <u>Interpreting otherwise would render meaningless China's commitment contained in paragraph 93 of China's Working Party Report since China will always be able to resort to its domestic legal system to argue that it has never amended its Schedule and thus no tariff lines have been created.</u> Given that the manner in which to create new tariff lines is something entirely within the discretion of China under its domestic legal system, we consider that the substantive effect of China's measures must be taken into account in assessing the realization of the condition underlying China's commitment in paragraph 93. Therefore, we are not persuaded by China's argument in this respect.[131]

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[129] Panel Report, para. 7.742.

[130] China's Appellant Submission, paras. 172-176.

[131] Panel Report, para. 7.756 (emphasis added, footnotes omitted).

100. This reasoning properly respects the context of paragraph 93 as a whole, which makes clear that the Working Party was concerned with tariff treatment (that is, the duty rate applied to CKD/SKD kits), rather than the specific tariff line under which the kits were classified:

> Certain members of the Working Party expressed particular concerns about tariff treatment in the auto sector. In response to questions about the tariff treatment for kits for motor vehicles, the representative of China confirmed that China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. If China created such tariff lines, the tariff rates would be no more than 10 per cent. The Working Party took note of this commitment. (emphasis added)[132]

In contrast, as the Panel explained, China's proposed interpretation would empty paragraph 93 of any meaning in terms of limiting the tariff rate on SKD/CKD kits to a tariff rate of no more than 10 percent.

101. China's second argument is that the Panel's interpretation leads to "absurd results." In particular, China argues that the Panel's interpretation would prevent China from applying its "consistent treatment" of applying the whole vehicle rate to imports of CKD/SKD kits.[133] This second argument, however, is based on a distortion of the facts as contained in the record in this dispute. As the United States explained throughout its submissions, prior to China's WTO accession, China would negotiate with the major auto manufacturers on the tariff rate to be applied to CKD/SKDs kits; the rates were *ad hoc* and would differ in different cases; and the rate for CKD/SKD kits could be substantially lower than the rate for imported whole vehicles.[134] Although China seemed to contest these facts during the meetings of the Panel, China finally acknowledged in its Comments on the Complainants' Answers to the Second Set of Panel Questions that CKD/SKD kits were *not* always assessed at the applicable tariff rates for motor vehicles and that manufacturers could receive *ad hoc* tariff treatment for kit imports:

> China explained in response to a question from the Panel that, prior to its accession to the WTO, China maintained policies that allowed a limited number of auto manufacturers to obtain temporary reductions in the duty rates for motor vehicles that would ordinarily apply to the importation of CKD/SKD kits. These

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[132] Panel Report, para. 7.742.

[133] China's Appellant Submission, paras. 177-180.

[134] First U.S. Submission, para. 27 and note 34; U.S. Answers to First Set of Panel Questions, Response to Panel Question 74; Rebuttal Submission of the United States (Attachment): U.S. Comments on Responses of China to the Panel's Questions to the Parties, Comment on China's Response to Question 2; U.S. Response to Second Set of Panel Questions, Response to Panel Question 254.

> reduced rates for a limited number of auto manufacturers were not the rates for parts, and were not based on a classification of CKD/SKD kits as parts. After the expiration of these reductions in the applicable duty rate, these manufacturers would revert to paying the applicable motor vehicle rate for CKD/SKD imports, in accordance with the ordinary classification of CKD/SKD kits.[135]

In this context – where China would provide *ad hoc* tariff treatment to kit imports – the discussion of tariff lines and tariff treatment in paragraph 93 of the Working Party Report makes complete sense. The second sentence of paragraph 93 states: "In response to questions about the tariff treatment for kits for motor vehicles, the representative of China confirmed that China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles."[136] In context, China's "confirmation" represented an acknowledgment that China did not have a consistent tariff treatment for CKD/SKD kits, and in particular that there was no specific tariff line that would provide such a consistent tariff treatment. In the following sentence, the parties went on to agree that in the event China did establish a tariff line that would result in a consistent tariff treatment, the rate for that tariff line would be no more than 10 percent.

102. In this context, there is nothing "absurd" in the Panel's interpretation that paragraph 93 prohibits China from adopting a measure that has the effect of creating a tariff line that would result in the consistent tariff treatment of more than 10 percent for imported kits. In contrast, China's proposed interpretation – that China is free to adopt measures imposing a 25 percent duty on CKD/SKD kits as long as those measures are not labeled "tariff lines" – is inconsistent with the context and purpose of paragraph 93 when read as a whole.

4. China's Arguments Regarding the 10-Digit Tariff Lines are Without Merit

103. As noted above, in addition to finding that China's measures in dispute satisfied the condition ("If China created such tariff lines") in paragraph 93, the Panel made a separate, independent finding that China's 2005 domestic tariff schedule satisfied the condition in paragraph 93. This was an argument raised in the final submission of Canada, and not advanced by the United States. Nonetheless, should the Appellate Body have reason to consider this finding of the Panel, the United States observes that China's arguments on these issue are without merit.

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[135] Comments of China on Complainants' Answers to Questions Following the Second Substantive Meeting (August 9, 2007), Question 254, page 14. China's limitation to a "limited number of automobile manufacturers" is hardly a limitation at all, since there exists only a small number of global automobile manufacturers.

[136] Panel Report, para. 7.742.

104. First, China argues that since all parties agreed that China had no tariff lines for SKD/CKD kits at the time of accession, and since the 2005 tariff line identified by the Panel may have dated back to the time of accession, the parties implicitly have agreed that the 2005 tariff line is not a "tariff line" for the purpose of paragraph 93.[137] This argument is both meritless, and without factual support. As explained above, in the pre-accession period China had no tariff lines providing a consistent tariff treatment for CKD/SKD kits, and kits received *ad hoc* tariff treatment. Whether or not there was some unkown and un-applied 10-digit nomeclature in 2001 (the year of accession), the adoption of a 10-digit nomenclature in 2005 that provided a 25 percent rate of duty for kits would meet the paragraph 93 condition. Moreover, contrary to China's assertions, the record does not establish that the tariff line for CKD/SKD kits that the Panel identified in China's 2005 domestic tariff schedule existed in 2001. A comparable schedule for 2001 is not on the record in the dispute. Furthermore, the two different exhibits cited by China (CHI-47, from 2001, and CHI-48, from 2005) involve different tariff numbers and different descriptions of the products.

105. Second, China argues that in construing the Working Party Report, the Panel improperly ignored the context provided by paragraph 89 of that Report.[138] Paragraph 89, however, does not advance China's argument. Paragraph 89 addresses "8-digit tariff headings." The paragraph at issue in this dispute, however, uses the broader term "tariff lines." The fact that the Working Party Report described 8-digit tariff nomenclature as "tariff headings" does not somehow imply that 10-digit nomenclature cannot be "tariff lines." To the contrary, the use in paragraph 93 of the broader term "tariff line" could be read to support the Panel's finding that that 10-digit nomenclature can be used to meet the paragraph 93 condition. Furthermore, China has no answer to the Panel's commonsense finding that a 10-digit line, just like an 8-digit line, can serve to establish a consistent, greater than 10 percent tariff treatment of CKD/SKD kits in violation of China's paragraph 93 commitments.

106. Third, China argues that the 10-digit tariff line in its 2005 tariff schedule was outside the Panel's terms of reference.[139] This argument, however, confuses two different concepts: (i) the "specific measures at issue"[140] in the dispute, and (2) the facts used to establish that a measure at issue is in breach of a WTO obligation. In this dispute, China's 2005 tariff schedule was not a specific measure at issue, and the Panel properly made no findings with regard to whether the 2005 schedule was consistent with paragraph 93 of the Working Party Report.[141] Rather, in this

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[137] Appellant Submission, paras. 183-190.

[138] China's Appellant Submission, para. 191-199.

[139] China's Appellant Submission, paras. 200-213.

[140] Dispute Settlement Understanding, Article 6.2.

[141] The United States would agree with China that "the complainants could have challenged China's ten-digit statistical annotations for CKD/SKD kits and their associated tariff

dispute the 10-digit lines in the 2005 tariff schedule were used as facts in establishing that the measures in issue were in breach of paragraph 93. Furthermore, although these facts were presented at a late stage of the proceeding, the Panel explained in detail why their submission was consistent with the Working Procedures.[142] China does not contest that finding. Accordingly, the 10-digit lines were properly before the Panel as pertinent factual information, and there is no basis for China's argument concerning the Panel's terms of reference.

III. CONCLUSION

107. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reject each of China's requests in this appeal.

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rates as a violation of paragraph 93, whether or not China had ever adopted the measures that the complainants actually challenged in this dispute." Appellant Submission, para. 210 (emphasis omitted). Indeed, the 10-digit lines in China's 2005 schedule would appear to be in breach of the paragraph 93 commitment. The fact, however, that these lines may be independent breaches of China's obligations does not foreclose their use as facts in establishing that different measures breach the WTO Agreement.

[142] Panel Report, paras. 6.14-6.23.