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CHINA – MEASURES AFFECTING IMPORTS OF AUTOMOBILE PARTS

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Reports of the Appellate Body

Note:

The Appellate Body is issuing these Reports in the form of a single document constituting three separate Appellate Body Reports: WT/DS339/AB/R; WT/DS340/AB/R; and WT/DS342/AB/R. The cover page, preliminary pages, Sections I through VIII, and the Annex are common to the three Reports. The page header throughout the document bears three document symbols: WT/DS339/AB/R, WT/DS340/AB/R, and WT/DS342/AB/R, with the following exceptions: Section IX on pages EC-103 and EC-104, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS339/AB/R; Section IX on pages US-103 and US-104, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS340/AB/R; and Section IX on pages CDA-103 and CDA-104, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS342/AB/R.

CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
Belgium – Family Allowances (allocations familiales)	GATT Panel Report, *Belgian Family Allowances*, G/32, adopted 7 November 1952, BISD 1S/59
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
Canada – Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
Canada – Gold Coins	GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, unadopted
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, and Add.1 and Add.2, circulated to WTO Members 18 July 2008
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
EC – Computer Equipment	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, DSR 1998:V, 1851
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135

Short Title	Full Case Title and Citation
EEC – Parts and Components	GATT Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, L/6657, adopted 16 May 1990, BISD 37S/132
Greece – Import Taxes	GATT Panel Report, *Special Import Taxes Instituted by Greece*, G/25, adopted 3 November 1952, BISD 1S/48
India – Additional Import Duties	Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Patents (US)	Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States*, WT/DS50/R, adopted 16 January 1998, as modified by Appellate Body Report, WT/DS50/AB/R, DSR 1998:I, 41
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
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, DSR 2002:IX, 3779
US – Corrosion-Resistant Steel Sunset Review	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, DSR 2004:I, 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report, WTDS244/AB/R, DSR 2004:I, 85
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663, and Corr.1
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375

Short Title	Full Case Title and Citation
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	**Description**
Announcement 4	Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles (Public Announcement of the Customs General Administration of the People's Republic of China, No. 4 of 2005), which entered into force on 1 April 2005 (Panel Exhibits JE-28 and CHI-4). The English translation of Announcement 4, as agreed by the parties, is contained in Annex E-3 to the Panel Reports.
appellees	The European Communities, the United States, and Canada
Canada Panel Report	Panel Report, *China – Measures Affecting Imports of Automobile Parts*, Complaint by Canada, WT/DS342/R
CCC	Customs Co-operation Council
CGA	General Administration of Customs
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, WT/L/432
China's Accession Working Party Report	Report of the Working Party Report on the Accession of China, WT/ACC/CHN/49 and Corr.1
China's Schedule of Concessions	Schedule CLII – People's Republic of China (Part I –Schedule of Concessions and Commitments on Goods), attached as Annex 8 to China's Accession Protocol, WT/ACC/CHN/49/Add.1
CKD	completely knocked down
complainants	The European Communities, the United States, and Canada
Decree 125	Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles (Decree of the People's Republic of China General Administration of Customs, National Development and Reform Commission, the Ministry of Finance, and the Ministry of Commerce, No. 125), which entered into force on 1 April 2005 (Panel Exhibits JE-27 and CHI-3). The English translation of Decree 125, as agreed by the parties, is contained in Annex E-2 to the Panel Reports.
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC Panel Report	Panel Report, *China – Measures Affecting Imports of Automobile Parts*, Complaint by the European Communities, WT/DS339/R
GATT 1994	*General Agreement on Tariffs and Trade 1994*

Abbreviation	**Description**
GIR 2(a)	Rule 2(a) of the General Rules for the Interpretation of the Harmonized System, which 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 falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.
1995 HS Committee Decision	Decision of the Harmonized System Committee, HSC 39.235 (HSC/15), Interpretation of General Interpretative Rule 2(a) (Annex IJ/7 to Doc. 39.600 E (HSC/16/Nov. 95)) (Panel Exhibit CHI-29).
Harmonized System	Harmonized Commodity Description and Coding System
Harmonized System Convention	*International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983, 1503 UNTS 167
Measures at Issue	Policy Order 8, Decree 125, and Announcement 4
NDRC	National Development and Reform Commission
Panel Reports	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R
Policy Order 8	Policy on Development of the Automotive Industry (Order of the National Development and Reform Commission (No. 8)), which entered into force on 21 May 2004 (Panel Exhibits JE-18 and CHI-2 (Chapter XI)). The English translation of Policy Order 8, as agreed by the parties, is contained in Annex E-1 to the Panel Reports.
Public Bulletin	*Public Bulletin on On-Road Motor Vehicle Manufacturers and Products*
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SKD	semi-knocked down
TRIMs Agreement	*Agreement on Trade-Related Investment Measures*
TRIPS Agreement	*Agreement on Trade-Related Aspects of Intellectual Property Rights*
US Panel Report	Panel Report, *China – Measures Affecting Imports of Automobile Parts*, Complaint by the United States, WT/DS340/R
Verification Centre	National Professional Centre for Verification of the Character of Complete Vehicles

Abbreviation	**Description**
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WCO	World Customs Organization
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

China – Measures Affecting Imports of Automobile Parts

China, *Appellant*
Canada, *Appellee*
European Communities, *Appellee*
United States, *Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
Brazil, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Thailand, *Third Participant*

AB-2008-10

Present:

Bautista, Presiding Member
Hillman, Member
Sacerdoti, Member

I. Introduction

1. China appeals certain issues of law and legal interpretations developed in the Panel Reports, *China – Measures Affecting Imports of Automobile Parts* (the "Panel Reports").[1] The Panel was established to consider complaints by the European Communities, the United States, and Canada regarding the consistency of certain measures imposed by China on imports of auto parts with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*"); the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"); the Protocol on the Accession of the People's Republic of China ("China's Accession Protocol");[2] and the Report of the Working Party on the Accession of China ("China's Accession Working Party Report").[3]

[1] *Complaint by the European Communities*, WT/DS339/R, 18 July 2008 (the "EC Panel Report"); *Complaint by the United States*, WT/DS340/R, 18 July 2008 (the "US Panel Report"); *Complaint by Canada*, WT/DS342/R, 18 July 2008 (the "Canada Panel Report"). At its meeting held on 26 October 2006, the Dispute Settlement Body established, in accordance with Article 9.1 of the DSU, a single Panel pursuant to the requests of the European Communities in document WT/DS339/8, the United States in document WT/DS340/8, and Canada in document WT/DS342/8. (Panel Reports, para. 1.8) Following a request by the United States, the Panel issued its findings in the form of a single document containing three separate Reports, with common descriptive and analysis sections, but separate conclusions and recommendations for each complaining party. (Panel Reports, paras. 2.7 and 8.1)

[2] WT/L/432.

[3] WT/ACC/CHN/49 and Corr.1.

2. The measures challenged by the European Communities, the United States, and Canada (the "complainants" (before the Panel) or the "appellees" (on appeal)) in this dispute—the measures at issue—consist of three instruments enacted by the Chinese Government that affect auto parts imported into China. These measures are: Policy on Development of the Automotive Industry (Order of the National Development and Reform Commission (No. 8)) ("Policy Order 8")[4], which entered into force on 21 May 2004; Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles (Decree of the People's Republic of China, No. 125) ("Decree 125")[5], which entered into force on 1 April 2005; and Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles (Public Announcement of the Customs General Administration of the People's Republic of China, No. 4 of 2005) ("Announcement 4")[6], which entered into force on 1 April 2005.[7] The measures impose a 25 per cent charge[8] on imported auto parts[9] used in the manufacture of motor vehicles in China, if the imported auto parts are "characterized as complete vehicles" according to specified criteria prescribed under the measures. The amount of the charge is equivalent to the average tariff rate applicable to complete motor vehicles under Schedule CLII - People's Republic of China (Part I – Schedule of Concessions and Commitments on Goods)[10] attached as Annex 8 to China's Accession Protocol ("China's Schedule of Concessions"), and is higher

[4]Panel Exhibits JE-18 and CHI-2 (Chapter XI only). The English translation of Policy Order 8, as agreed by the parties, is contained in Annex E-1 to the Panel Reports.

[5]Panel Exhibits JE-27 and CHI-3. The English translation of Decree 125, as agreed by the parties (see *infra*, footnote 7), is contained in Annex E-2 to the Panel Reports.

[6]Panel Exhibits JE-28 and CHI-4. The English translation of Announcement 4, as agreed by the parties, is contained in Annex E-3 to the Panel Reports.

[7]Panel Reports, para. 2.1. The Panel requested the parties to agree on one common translated version of China's measures. Accordingly, on 2 August 2007, the parties submitted agreed translations of all provisions of China's measures, except for Article 28 of Decree 125. The parties could not agree on a common translation of Article 28. On 15 August 2007, the Panel requested the United Nations Office at Geneva to translate this provision into English, and on 23 August 2007, the Panel forwarded the version translated by the United Nations to the parties for comments. (See Panel Reports, paras. 2.3-2.4) The agreed translations and the version of Article 28 of Decree 125 translated by the United Nations are attached as Annex E to the Panel Reports.

[8]Although China argued before the Panel that the measures "do not themselves impose any duty, fee, or charge, but merely define the circumstances under which China will classify imported merchandise as falling under different tariff provisions", the Panel found that the measures *do* impose both a charge and the administrative procedures attached to the charge. (Panel Reports, paras. 7.18 and 7.19) At the oral hearing in this appeal, China stated that, except with respect to CKD and SKD kits, it was not appealing this finding of the Panel.

[9]The Panel found that the auto parts subject to the measures at issue could be generally categorized into four groups of the Harmonized Commodity Description and Coding System headings at the four-digit level, namely: (i) complete vehicles under headings 87.02, 87.03, and 87.04; (ii) the body and the chassis fitted with engine under headings 87.06 and 87.07; (iii) parts and accessories of motor vehicles under heading 87.08; and (iv) parts and accessories of motor vehicles under chapters other than chapter 87, in particular under headings 84.07, 84.08, 84.09, 84.83, 85.01, 85.03, 85.06, 85.11, 85.12, and 85.39. (See Panel Reports, para. 7.84)

[10]WT/ACC/CHN/49/Add.1.

than the average 10 per cent rate that applies to auto parts.[11] The measures also provide for administrative procedures relating to the imposition of this charge. Further details regarding the content and the operation of the measures at issue are set out in the Panel Reports[12] and Section IV of these Reports.

3. Before the Panel, the complainants claimed that the charge imposed under the measures was an "internal charge" that was inconsistent with Article III:2 of the GATT 1994 because it applied to imported auto parts, but not to like domestic parts[13]; and that, through the measures, China acted inconsistently with Article III:4 of the GATT 1994 by treating imported auto parts less favourably than like domestic auto parts by imposing additional administrative requirements and additional charges on automobile manufacturers that use imported auto parts in excess of specified thresholds.[14] In the alternative, if the measures were considered to impose an ordinary customs duty, the complainants claimed that such duty was in excess of the relevant tariff bindings in China's Schedule of Concessions and was therefore inconsistent with Article II:1(a) and (b) of the GATT 1994.[15] China responded that the charge under the measures was an ordinary customs duty, within the meaning of Article II:1(b), and not an internal measure subject to Article III; and that the measures were not inconsistent with Article II of the GATT 1994 because they give effect to a proper interpretation of "motor vehicles" in China's Schedule of Concessions.[16] China also contended that, in the event that the measures were found to be inconsistent with either Article II or Article III, they were justified under Article XX(d) of the GATT 1994.[17] The complainants argued that the measures were not justified under Article XX(d) of the GATT 1994.[18]

[11]Specifically, the Panel found that China imposes a charge equivalent to the amount of the tariff rate applicable to complete vehicles, which is 25 per cent "on average". The Panel referred to China's Schedule of Concessions for the exact tariff rates applicable to products falling under tariff headings 87.02-87.04 and noted that, although the exact tariff rates under these tariff headings vary slightly, in particular at the eight-digit level, the parties had agreed that 25 per cent is the average tariff rate applicable to motor vehicles at issue in this case. Similarly, the Panel noted that the parties had agreed that the tariff rate applicable to auto parts is 10 per cent "on average". (Panel Reports, para. 7.24 and footnotes 195 and 197 thereto)

[12]Panel Reports, paras. 7.1-7.81.

[13]Panel Reports, paras. 3.1(d), 3.4(a), and 3.7(a).

[14]Panel Reports, paras. 3.1(c), 3.4(b), and 3.7(b).

[15]Panel Reports, paras. 3.2(g), 3.5(h), and 3.8(g).

[16]Panel Reports, para. 4.140.

[17]Panel Reports, para. 3.11.

[18]Panel Reports, paras. 4.409-4.411, 4.583-4.588 and 4.486-4.493.

4. With respect to the treatment of imports of certain unassembled or partially assembled motor vehicles, that is, completely knocked down ("CKD") and semi-knocked down ("SKD") kits[19], the complainants claimed that China's tariff treatment of such kits under the measures was inconsistent with Article II:1(a) and (b) of the GATT 1994.[20] The United States and Canada claimed that the measures were also inconsistent with paragraph 93 of China's Accession Working Party Report.[21]

5. The complainants also challenged the consistency of the measures with China's obligations under Article III:5 of the GATT 1994[22]; Article 2 of the *TRIMs Agreement* and paragraph 1(a) of Annex 1 thereto[23]; and Part I, paragraphs 7.2, and 7.3 of China's Accession Protocol along with paragraph 203 of China's Accession Working Party Report.[24] In addition, the European Communities and the United States claimed that the measures were inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.[25] Finally, the United States argued that the measures were inconsistent with Article XI:1 of the GATT 1994.[26]

6. During the proceedings, the Panel sent two letters to the World Customs Organization (the "WCO") on 7 June 2007 and 16 July 2007, requesting its assistance in matters relating to the Harmonized Commodity Description and Coding System (the "Harmonized System").[27] The WCO

[19]The Panel explained that, although the measures at issue do not define CKD and SKD kits, it would consider CKD and SKD kits under the measures to refer to all or nearly all of the auto parts and components necessary to assemble a complete vehicle, which must be packaged and shipped in a single shipment, and which must go through the assembly process to become a complete vehicle once they have been imported into the importing country. (Panel Reports, paras. 7.644-7.647)

[20]Panel Reports, para. 7.636.

[21]Panel Reports, paras. 3.5(i) and 3.9. Paragraph 93 of China's Accession Working Party Report is reproduced in *infra*, footnote 64 as well as in Section VIII. Canada also argued that the measures nullify or impair benefits, as understood under Article XXIII:1(b) of the GATT 1994. (See Panel Reports, para. 3.9)

[22]Panel Reports, paras. 3.1(e), 3.4(d), and 3.7(c).

[23]Panel Reports, paras. 3.1(a), 3.4(c), and 3.7(d). In addition, the United States claimed that the measures fell within paragraph 2(a) of the Illustrative List in Annex 1 to the *TRIMs Agreement.* (Panel Reports, para. 3.4(c))

[24]Panel Reports, paras. 3.1(b) and (f), 3.4(e) and (f), and 3.7(e) and (f). The European Communities and Canada also invoked paragraph 1.2 of China's Accession Protocol and paragraph 342 of China's Accession Working Party Report. (Panel Reports, paras. 3.1(b) and 3.7(f))

[25]Panel Reports, paras. 3.2(h) and 3.4(g). The European Communities made this claim "[i]n the alternative". (Panel Reports, paras. 3.2(h) and 7.633) The European Communities and the United States requested that the Panel issue the recommendations set out in Article 4.7 of the *SCM Agreement*. (Panel Reports, paras. 3.3 and 3.6)

[26]Panel Reports, para. 3.5(j).

[27]Panel Reports, paras. 2.5 and 2.6.

replied on 20 June 2007 and 30 July 2007 respectively, and the parties were invited to provide comments on these replies.[28]

7. In the Panel Reports, circulated to Members of the World Trade Organization (the "WTO") on 18 July 2008, the Panel found that the measures at issue were internal measures within the scope of Article III[29] and that the measures were inconsistent with Article III:2, first sentence, in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts[30]; and were inconsistent with Article III:4 in that they accord imported auto parts less favourable treatment than like domestic auto parts.[31] The Panel found, in the alternative, that, assuming the measures fell within the scope of the first sentence of Article II:1(b), they imposed duties in excess of the relevant tariff bindings in China's Schedule of Concessions and were thus inconsistent with Article II:1(a) and (b) of the GATT 1994.[32] The Panel also concluded that the measures at issue were not justified under Article XX(d) of the GATT 1994.[33] As regards CKD and SKD kits, the Panel found that the measures were not inconsistent with Article II:1(b) of the GATT 1994[34]; but that they were inconsistent with China's commitment under paragraph 93 of China's Accession Working Party Report.[35] The Panel exercised judicial economy with respect to the claims under the *TRIMs Agreement*, Article III:5 of the GATT 1994, and Articles 3.1(b) and 3.2 of the *SCM Agreement*.[36]

8. On 15 September 2008, China notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal[37] pursuant to Rule 20 of the *Working Procedures for Appellate Review*[38] (the "*Working Procedures*"). On 22 September

[28]Panel Reports, paras. 2.5 and 2.6 and footnotes 12 and 13 thereto. The Panel's letters and the WCO's responses are reproduced in Annex C to the Panel Reports.
[29]Panel Reports, para. 7.212.
[30]Panel Reports, Section VIII:A(a)(i), Section VIII:B(a)(i), and Section VIII:C(a)(i).
[31]Panel Reports, Section VIII:A(a)(ii), Section VIII:B(a)(ii), and Section VIII:C(a)(ii).
[32]Panel Reports, Section VIII:A(b)(i), Section VIII:B(b)(i), and Section VIII:C(b)(i).
[33]Panel Reports, Section VIII:A(a)(iii) and (b)(ii), Section VIII:B(a)(iii) and (b)(ii) and Section VIII:C(a)(iii) and (b)(ii).
[34]Panel Reports, para. 7.736, Section VIII:A(c)(i) and Section VIII:B(c)(i).
[35]Panel Reports, Section VIII:B(c)(ii) and Section VIII:C(c)(i).
[36]Panel Reports, paras. 8.2, 8.5, and 8.8. The Panel did not consider it necessary to rule on the remaining claims under Articles XI:1 and XXIII:1(b) of the GATT 1994, or on China's obligations under its Accession Protocol. (Panel Reports, paras. 7.760-7.764)
[37]WT/DS339/12, WT/DS340/12, WT/DS342/12 (attached as Annex I to these Reports).
[38]WT/AB/WP/5, 4 January 2005.

2008, China filed an appellant's submission.[39] On 10 October 2008, the European Communities, the United States, and Canada each filed an appellee's submission[40], and Argentina, Australia, and Japan each filed a third participant's submission.[41] On the same day, Brazil, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to attend the oral hearing as a third participant.[42]

9. By letter dated 17 September 2008, China requested authorization from the Appellate Body to correct two clerical errors in its Notice of Appeal, pursuant to Rule 18(5) of the *Working Procedures*. On 17 September 2008, the Appellate Body Division hearing the appeal invited the European Communities, the United States, Canada, and the third participants, to comment on China's request. No objections to China's request were received and, on 19 September 2008, the Division authorized China to correct the clerical errors in its Notice of Appeal.

10. On 19 September 2008, the Presiding Member of the Division hearing the appeal in this dispute received a letter from the United States requesting, pursuant to Rule 16(2) of the *Working Procedures*, to change the dates scheduled for the oral hearing in this appeal from 27-28 October 2008 to 28-29 October 2008.[43] On the same day, the Division hearing this appeal offered Canada, China, the European Communities and the third participants the opportunity, if they so chose, to comment on the United States' request. None of the participants or third participants objected to this request by the United States.[44] By letter dated 26 September 2008, the Division informed the participants and the third participants that it had decided to change the starting time of the oral hearing in this appeal from the morning to the afternoon of 27 October 2008.

11. On 10 October 2008, the Appellate Body received an unsolicited *amicus curiae* brief. After giving the participants and the third participants an opportunity to express their views, the Division hearing the appeal did not find it necessary to rely on this *amicus curiae* brief in rendering its decision.

[39]Pursuant to Rule 21 of the *Working Procedures*.
[40]Pursuant to Rule 22 of the *Working Procedures*.
[41]Pursuant to Rule 24(1) of the *Working Procedures*.
[42]Pursuant to Rule 24(2) of the *Working Procedures*.
[43]The United States made this request on the grounds that "a key member of the U.S. litigation team is not able to ... be in Geneva until Tuesday, October 28."
[44]On 23 September 2008, Canada informed the Division that it supported the request made by the United States. On 24 September 2008, the European Communities informed the Division that it also supported the United States' request. Neither China nor the third participants made any comment on the request.

12. On 10 October 2008, the United States requested the Appellate Body to issue three separate reports in this appeal, setting out its conclusions and recommendations separately for each Panel Report under appeal. The other participants and the third participants were afforded an opportunity to comment on this request at the oral hearing. They made no objection to the United States' request.

13. The oral hearing in this appeal was held on 27 and 28 October 2008. The participants and two of the third participants—Brazil and Japan—made oral statements. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by China – Appellant*

1. Characterization of the Charge Imposed under the Measures at Issue

14. China requests the Appellate Body to reverse the Panel's finding that the charge imposed on auto parts under the measures at issue is an internal charge subject to the disciplines of Article III:2 of the GATT 1994, and to find, instead, that the charge is an ordinary customs duty within the meaning of the first sentence of Article II:1(b) of the GATT 1994. China contends that, by failing to take into account the context provided by the Harmonized System in interpreting Article II:1(b), the Panel erred in its evaluation of the nature of the charge imposed on parts of motor vehicles under the measures. This, in turn, argues China, led the Panel to err in separating the threshold question of whether the charge imposed under the measures is an ordinary customs duty from the question of whether the Harmonized System allows China to apply Rule 2(a) of the General Rules for the Interpretation of the Harmonized System ("GIR 2(a)")[45] to multiple entries of auto parts that are related through their common assembly.

15. China argues that Article II:1(b) plainly requires a two-step analysis. Customs authorities first determine what the "product" is, and this determination, in turn, indicates which "ordinary customs duty" in the Member's Schedule of Concessions applies to that product. By virtue of Article II:1(b), a Member must exempt that product, on its importation, from ordinary customs duties

[45]The text of 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 falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

in excess of those set forth for that product in the Member's Schedule of Concessions. *Classification* is the process by which customs authorities determine the nature and identity of a particular product. The classification of the product necessarily precedes the determination of which ordinary customs duty applies. However, neither the GATT 1994 nor any other covered agreement prescribes the rules or standards by which Members' customs authorities are to classify products for purposes of Article II:1(b). In particular, the covered agreements do not address whether a completely unassembled article should be classified as parts or as the complete article, nor do they provide guidance on the classification problems that customs authorities routinely face. China contends that, although the Harmonized System is not formally part of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), it is closely linked to it, and provides the rules for the classification of parts and the complete article which are absent from the GATT 1994. China argues that the Harmonized System also provides the decision-making rules for resolving a wide variety of classification issues. By negotiating and scheduling tariff concessions with reference to the Harmonized System, WTO Members understood that national authorities would apply these classification rules to determine the identity of a product, and that this classification would, in turn, determine the applicable rate of duty in the importing Member's Schedule of Concessions.

16. According to China, the Panel could have determined whether the charge is an ordinary customs duty or an internal charge *only* by evaluating whether the charge imposed under the measures is related to a valid classification of the product under the rules of the Harmonized System. The Panel properly recognized that a charge does not need to be collected or assessed at the *moment* of importation in order to constitute an ordinary customs duty. The Panel also correctly understood that the decisive factor for determining whether a charge is an ordinary customs duty is the "condition" or "status" of the product to which the charge applies at the moment it enters the customs territory. Yet, the Panel failed to take into account that it is the Harmonized System which prescribes such condition or status. Without a basis for determining the condition or status of a product at the moment it enters the customs territory, it is, in China's view, impossible to determine whether a particular charge is linked, or related, to the product at that moment and, therefore, equally impossible to determine whether the charge is an ordinary customs duty.

17. China asserts that, if the measures at issue impose a charge based upon a valid method of classifying the product under the Harmonized System, the charge is an ordinary customs duty under Article II:1(b), and not an internal charge subject to Article III:2. Under the Harmonized System, GIR 2(a) specifies that an unassembled or disassembled article is classified as the complete article instead of as its constituent parts. China contends that GIR 2(a) allows national customs authorities to

classify unassembled auto parts as motor vehicles provided that the unassembled parts have the "essential character" of a motor vehicle and enter the customs territory in a *single shipment*—even though assembly will necessarily occur *after* the moment of importation. As explained in further detail in its arguments regarding the Panel's "alternative" findings[46], China considers that the charge under the measures is based on a valid application of GIR 2(a) to *multiple shipments* of parts and components that are demonstrably linked to each other through their common assembly into the same motor vehicle. The measures at issue, therefore, "define a customs procedure that gives effect to a valid method of classification under the rules of the Harmonized System".[47] China submits that the charge imposed using this valid method of classification is an ordinary customs duty, because it is based on a proper determination of the product that is subject to the duty assessment.

18. For these reasons, China requests the Appellate Body to reverse the Panel's finding that the charge under the measures is an internal charge within the meaning of Article III:2 of GATT 1994, as well as all of the Panel's conclusions and recommendations that were based on this finding. If, however, the Appellate Body were to affirm the Panel's finding that the charge is an internal charge, then China submits that the Appellate Body should find that the Panel's alternative reasoning and findings under Article II of the GATT 1994, as well as the alternative conclusions and recommendations, are "moot and of no legal effect".[48]

2. Consistency of the Measures at Issue with Article III:2 of the GATT 1994

19. China agrees with the Panel that a specific 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".[49] China submits that, because the Panel erred in its conclusion that the charge imposed under the measures is an internal charge, the Panel's finding under Article III:2 is also in error and its conclusion that the charge is inconsistent with Article III:2 cannot be sustained. China therefore requests the Appellate Body to reverse this finding, along with the related conclusions and recommendations of the Panel. In response to questioning at the oral hearing, China confirmed

[46]See *infra*, paras. 22-30.
[47]China's appellant's submission, para. 41.
[48]China's appellant's submission, para. 49 and footnote 27 thereto (referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 158; Appellate Body Report, *US – FSC*, para. 132; and Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 211). The specific Panel reasoning, findings, conclusions, and recommendations that China requests be declared moot and of no legal effect are those contained in Section VII:D of the Panel Reports, as well as the alternative findings and conclusions in Section VIII of the Panel Reports. See also China's appellant's submission, footnote 91 to para. 116.
[49]China's appellant's submission, para. 117 (quoting Panel Reports, para. 7.105).

that, if the Appellate Body upholds the characterization of the charge under the measures as an internal charge, it would necessarily have to uphold the Panel's finding that the charge is inconsistent with Article III:2.

3. Consistency of the Measures at Issue with Article III:4 of the GATT 1994

20. China requests the Appellate Body to reverse the Panel's findings and conclusions under Article III:4 of the GATT 1994. China contends that the Panel's finding that the measures fall within the scope of Article III:4 was "premised upon"[50] its finding that the charge imposed under the measures is an internal charge. Because, in China's view, the latter finding is in error, the Panel's findings under Article III:4 must also be reversed.

21. China further submits that the administrative procedures under the measures at issue are customs measures that implement a valid method of classification under the rules of the Harmonized System and, as such, do not fall within the scope of Article III:4. China contests the Panel's finding that the measures influence an automobile manufacturer to choose domestic over imported auto parts and thereby adversely affect the internal use of imported auto parts. Any influence that the measures have on an automobile manufacturer's decision to use domestic over imported auto parts derives solely from the structure of the bound rates in China's Schedule of Concessions, which creates an incentive for automobile manufacturers to assemble vehicles in China from imported parts and components that, in their entirety, do *not* have the "essential character" of a motor vehicle under GIR 2(a). According to China, to the extent that this creates an incentive to use domestic auto parts, such incentive "is inherent in China's permissible duty rates".[51]

4. The Panel's "Alternative" Findings under Article II:1(a) and (b) of the GATT 1994

22. For the reasons set out above, China considers that the Appellate Body should reverse the Panel's finding that the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994. Should the Appellate Body, in such circumstances, examine the alternative findings of the Panel, it should reverse the Panel's finding that the charge is applied inconsistently with Article II:1(a) and (b) of the GATT 1994 and find, instead, that the measures impose ordinary customs duties based upon a valid classification of related shipments of

[50]China's appellant's submission, para. 121.
[51]China's appellant's submission, para. 123.

parts and components as "motor vehicles", and that such duties are not in excess of the relevant tariff bindings under China's Schedule of Concessions.

23. China contends that the Panel erred in finding that China may not apply GIR 2(a) to unassembled auto parts that enter its customs territory in more than one shipment, when the parts are demonstrably related to each other through their common assembly into the same motor vehicle. In China's view, this finding was based on three principal errors committed by the Panel in its interpretation of GIR 2(a): (i) the Panel erred in its identification of the ordinary meaning of GIR 2(a) and, in particular, of the term "as presented" within that rule; (ii) the Panel's interpretation contradicts a decision taken by the Harmonized System Committee in 1995[52] (the "1995 HS Committee Decision") and the WCO's explanation of that Decision in its answers to questions posed by the Panel; and (iii) the Panel misunderstood key aspects of the negotiating history of GIR 2(a).

24. China submits that, within the Harmonized System, GIR 2(a) addresses the relationship between the classification of parts of an article and the article itself. China contends that GIR 2(a) allows customs authorities routinely to classify a collection of parts as equivalent to the complete article, regardless of their state of assembly or disassembly at the border. China points to the "paradigmatic example"[53] of a CKD kit which may, by virtue of GIR 2(a), be classified as a "motor vehicle". Yet, the principle embodied in GIR 2(a) gives rise to a complicated classification problem, namely: if importers are able to structure their imports of unassembled parts in many different ways, how are customs authorities to determine where one collection of unassembled parts ends and another begins? In China's view, GIR 2(a) applies to substance as well as to form. In other words, GIR 2(a) applies regardless of the manner in which an importer chooses to structure its importation of unassembled parts that, in their entirety, have the "essential character" of a motor vehicle, including when those parts enter the customs territory at more than one given time or place.

25. China contests both the Panel's identification of, and reliance on, the ordinary meaning of the term "as presented" in GIR 2(a). The Panel relied on dictionary definitions of "as" and "presented" to attribute an "obvious"[54] temporal meaning to "as presented", namely, the moment when a good is presented to the customs authority. However, recourse to the dictionary shows that "as presented" can

[52]Decision of the Harmonized System Committee, HSC 39.235 (HSC/15), Interpretation of General Interpretative Rule 2(a) (Annex IJ/7 to Doc. 39.600 E (HSC/16/Nov. 95)) (Panel Exhibit CHI-29).
[53]China's appellant's submission, para. 53.
[54]China's appellant's submission, para. 93 (referring to Panel Reports, para. 7.414).

equally mean the "*manner* or *process* by which the importer seeks a formal *action*"[55], suggesting that "as presented" can refer to the manner in which an entry is documented for purposes of customs classification. China adds that, in any event, it is doubtful whether the ordinary meaning of the term "as presented" had much significance in this case because the WCO has determined, and the Panel itself recognized, that GIR 2(a) *can,* at least in some circumstances, apply to multiple shipments of parts. Thus, the relevant question before the Panel was what those circumstances are, and that question had to be answered by reference to the scope and meaning of the 1995 HS Committee Decision.

26. China stresses that this 1995 Decision represents the only time that the HS Committee has interpreted the term "as presented" in GIR 2(a), and that the Decision pertains directly to the question of whether, and in what circumstances, GIR 2(a) may apply to multiple shipments of unassembled parts. Paragraph 10 of that Decision allows national customs authorities discretion to apply GIR 2(a) to multiple shipments in two situations: in the case of split consignments, and with respect to the classification of goods assembled from elements originating in, or arriving from, different countries. However, asserts China, because the Panel wrongly assessed the negotiating history of GIR 2(a) and did not properly take into account the views expressed to it by the WCO, the Panel wrongly concluded that neither of these situations encompasses circumstances in which unassembled articles are imported in multiple shipments.

27. China refers to the Panel's finding that the HS Committee's reference to "split consignments" was limited to the "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."[56] According to China, this finding was directly contradicted by the WCO's response to the Panel's questions on the interpretation of "split consignments", and the view expressed therein that the term "split consignments" could refer to a "range of trading practices"[57], including situations where parts to assemble a complete article arrive separately in multiple shipments from different places. China submits that the Panel's disregard of the guidance provided by the WCO runs counter to

[55]China's appellant's submission, para. 97. (original emphasis) China refers to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 123 and Vol. 2, p. 2341. (China's appellant's submission, footnotes 76 and 77 to para. 96)

[56]China's appellant's submission, para. 68 (quoting Panel Reports, para. 7.436).

[57]China's appellant's submission, paras. 69 and 70 (referring to response of the WCO Secretariat to Question 10 from the Panel, Panel Reports, Annex C-4, p. C-16).

the statement made by the Appellate Body in *EC – Chicken Cuts* to the effect that advice from the WCO *should* inform a panel's consideration of how to interpret a particular GIR.[58]

28. China emphasizes that the Panel "fundamentally misapprehended"[59] the negotiating history of GIR 2(a). For example, it is clear that, when drafting GIR 2(a), it was understood that "split consignments" encompassed articles imported in an unassembled condition "even if forwarded in *several* consignments".[60] The Panel, however, determined that "the drafters of GIR 2(a) did not intend to have the rule applied to the multiple shipment situation."[61] In so finding, the Panel referred to discussions leading to the adoption of GIR 2(a) as evidence that the scope of GIR 2(a) was intended to be limited in two ways: first, GIR 2(a) was not intended to apply to the importation of parts and components for industrial assembly; and, secondly, the drafters of GIR 2(a) primarily intended it to apply to goods that the importer would have imported in an assembled condition but for packing and transportation difficulties related to those goods in their assembled state. China stresses, however, that, although such limitations were *discussed* within the Nomenclature Committee of the Customs Co-operation Council (the "CCC") when GIR 2(a) was being drafted in 1963, they were ultimately *not* included in the text of that Rule, precisely because the drafters *did* intend GIR 2(a) to apply to goods imported for industrial assembly, including in multiple shipments. Thus, concludes China, the premise of the Panel's interpretation of the limited scope of GIR 2(a) was not only without a basis in the negotiating history of GIR 2(a), but is, in fact, directly contradicted by that negotiating history.

29. Finally, China claims that the Panel improperly intruded upon the jurisdiction of the WCO and violated Articles 3.2 and 11 of the DSU by purporting to resolve a known question of interpretation within the Harmonized System, which is not a WTO covered agreement. Even the Panel, with its narrow understanding of the term "split consignments", recognized that there are some circumstances in which GIR 2(a) applies to multiple shipments. When the WCO informs a panel that the WCO is aware of an interpretative issue within the Harmonized System, that the HS Committee has considered this issue in the past, and that the HS Committee has decided to leave the resolution of this issue to the discretion of national authorities, a panel should not take it upon itself to offer its own resolution of this issue, or its own interpretation of the WCO's past decisions. To do so, in China's

[58]China's appellant's submission, para. 75 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 234 and footnotes 442 and 443 thereto).

[59]China's appellant's submission, para. 81.

[60]China's appellant's submission, para. 83 (quoting Customs Co-operation Council, Nomenclature Committee, 9th Session, Brussels (19 July 1962), Document No. 9550E, "Articles (Machinery, Apparatus, etc.) Imported Unassembled or Disassembled" (Panel Exhibit CDA-18, p. 2)). (emphasis added by China)

[61]China's appellant's submission, para. 87 (quoting Panel Reports, para. 7.441).

view, amounts to "determin[ing] rights and obligations outside the covered agreements", which is not the function of a panel under Articles 3.2 and 11 of the DSU.

30. China distinguishes this situation from one in which the interpretation of a Member's Schedule requires consideration of the Harmonized System as context, or one where a panel is incapable of resolving the matter before it. Furthermore, China considers that the principle of *in dubio mitius*[62] supports an interpretation of the terms "motor vehicles" in China's Schedule and "as presented" in GIR 2(a), that would preserve China's right to define the boundaries between what constitutes complete vehicles and what constitutes parts, and to exercise the discretion to make classification decisions left to HS contracting parties by the HS Committee.

5. The Panel's Findings with respect to Paragraph 93 of China's Accession Working Party Report

(a) Applicability of the Measures at Issue to Imports of CKD and SKD Kits

31. China asserts that the Appellate Body "must reverse"[63] the Panel's findings under paragraph 93[64] of China's Accession Working Party Report because they were premised upon an erroneous interpretation of the measures at issue. The Panel interpreted the measures to apply to importers who, under Article 2(2) of Decree 125, import CKD and SKD kits under China's regular customs procedures. China contends that imports under its regular customs procedures cannot be viewed as subject to the measures at issue and that the ordinary meaning of the measures plainly establishes that they do not apply in these circumstances. China considers that the Panel's findings on the meaning of Article 2(2) are subject to appellate review under Article 17.6 of the DSU "as a matter of legal interpretation".[65]

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[62]China's appellant's submission, para. 111 (referring to Appellate Body Report, *EC – Hormones*, footnote 154 to para. 165).

[63]China's appellant's submission, para. 126.

[64]Paragraph 93 of China's Accession Working Party Report provides:

> 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.

[65]China's appellant's submission, para. 140 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105).

32. China stresses that Decree 125 applies to and concerns the classification of auto parts as motor vehicles *following* vehicle assembly. This is made clear, in particular, by the title of Decree 125 and by Article 2(1). Both use the term "automobile parts characterized as complete vehicles", which is defined in Article 5 of the Decree to mean that the imported auto parts should be characterized as complete vehicles *at the stage when complete vehicles are assembled*. In contrast, Article 2(2) authorizes automobile manufacturers importing CKD or SKD kits to declare such importation and pay duties, and provides that, in such circumstances, "these Rules shall not apply". When the two paragraphs of Article 2 are read together, it is clear that they define the circumstances in which the rules set forth in Decree 125 are applicable (in respect of auto parts that have the "essential character" of a motor vehicle following vehicle assembly) and the circumstances in which they "shall not apply" (when CKD and SKD kits are imported under China's regular customs procedures and duties are paid upon importation). The fact that the remainder of Decree 125 consistently refers only to "automobile parts characterized as complete vehicles" confirms that it applies only to the treatment of auto parts at the stage when complete vehicles are assembled, and not to their treatment when imported pursuant to China's regular customs procedures. Moreover, the Appellate Body itself has found that the words "shall not apply" have a clear exclusionary meaning, at least in the context of Article 64.2 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "*TRIPS Agreement*").[66] The ordinary meaning of Decree 125, submits China, is that the measures, including the charge imposed thereunder, do not apply to importers who import CKD and SKD kits and pay duties under China's regular customs procedures.

33. China argues that, notwithstanding this ordinary meaning, the Panel erroneously concluded that importers who import CKD and SKD kits under the measures are "in principle" subject to the charge by falling within the scope of the substantive criteria in Article 21(1) of Decree 125. According to the Panel, Article 2(2) exempts importers of such kits only from the administrative procedures, but not the substantive criteria, under Decree 125. China considers this interpretation to be "entirely without basis"[67], in particular, given that there is no textual distinction drawn in Decree 125 between "administrative procedures", on the one hand, and "substantive criteria" and "charge", on the other hand, or even any reference to the term "administrative procedures". Rather, the unambiguous meaning of "these Rules shall not apply" in Article 2(2) is simply that the *entirety* of

[66]China's appellant's submission, para. 147 (referring to Appellate Body Report, *India – Patents (US)*, para. 42).

[67]China's appellant's submission, para. 151.

Decree 125—including the substantive criteria and the charge—is inapplicable to importers who import CKD and SKD kits and pay duties under China's regular customs procedures.

34. China also alleges internal incoherence in the Panel's interpretation of Decree 125. First, elsewhere in its Reports, the Panel appeared to accept that the measures did not apply, at all, to importers of CKD or SKD kits exercising the option provided in Article 2(2) of Decree 125 to import under China's regular customs procedures.[68] Secondly, China contends that the Panel's finding, that the measures impose a border "charge" on importers of CKD and SKD kits who exercise the option under Article 2(2) and import under China's regular customs procedures, cannot be reconciled with the Panel's finding that the charge imposed by the measures is an "internal charge" falling under Article III of the GATT 1994. In reaching that finding, the Panel specifically found that there is only *one charge* under the measures, and that such charge is triggered *after the assembly of imported parts* into vehicles within China.

(b) *Prima Facie* Case

35. China claims that the Panel acted contrary to Article 11 of the DSU by ruling on a claim that neither the United States nor Canada had advanced and for which they failed to make out a *prima facie* case of inconsistency. Specifically, China argues that neither the United States nor Canada even alleged that the measures at issue apply to importers of CKD and SKD kits under China's regular customs procedures.

36. China points out that the Appellate Body has established that the burden of introducing evidence as to the scope and meaning of municipal law is on the party asserting that another party's municipal law is, as such, inconsistent with relevant treaty obligations[69]; that a *prima facie* case must be based on evidence and legal argument put forward by the complaining party in relation to each element of the claim[70]; and that a panel acts in violation of Article 11 of the DSU if it rules on a claim in the absence of such evidence and legal arguments.[71] According to China, at no stage of the proceedings was there any dispute among the parties about the interpretation of Article 2(2) of Decree 125 and its relationship to imports of CKD and SKD kits under China's regular customs

[68]China's appellant's submission, para. 155 (referring to Panel Reports, para. 7.75).
[69]China's appellant's submission, para. 161 (referring to Appellate Body Report, *US – Carbon Steel*, para. 157).
[70]China's appellant's submission, para. 162 (referring to Appellate Body Report, *US – Gambling*, para. 140).
[71]China's appellant's submission, para. 162 (referring to Appellate Body Report, *US – Gambling*, paras. 139 and 281).

procedures. In finding that the charge is imposed under the measures, the Panel relied on its own understanding of the scope of the exemption provided under Article 2(2) to make findings and develop a "unilateral and unsubstantiated"[72] interpretation. The Panel found that the measures at issue impose an internal charge and *simultaneously* impose ordinary customs duties on a class of imports that the United States and Canada had not even alleged to be within the scope of the measures. If, however, the Panel had begun its analysis of paragraph 93 of China's Accession Working Party Report properly, by examining whether the United States and Canada had presented evidence and legal argument to demonstrate that the measures impose an ordinary customs duty on imports of CKD and SKD kits, the Panel would have found that the complainants had not established a *prima facie* case that the measures impose *both* an internal charge and an ordinary customs duty. China considers that, by relieving the United States and Canada of their obligations in this regard, the Panel violated Article 11 of the DSU.

(c) The Consistency of the Measures at Issue with Paragraph 93

37. Should the Appellate Body accept China's argument that the Panel's findings in respect of paragraph 93 of China's Accession Working Party Report must be reversed because they were predicated on an erroneous legal interpretation of Article 2(2) of Decree 125, then the Appellate Body need not examine those findings further. If, however, the Appellate Body disagrees, then China argues, in the alternative, that the Panel's finding that the measures violate China's commitment under paragraph 93 should be reversed. China challenges both grounds on which the Panel found that the condition in paragraph 93 had been satisfied, namely: that the measures *de facto* created tariff lines; and that China had created separate ten-digit tariff lines in its customs nomenclature for CKD and SKD kits.

(i) *The "De Facto" Creation of Tariff Lines*

38. China requests the Appellate Body to reverse the Panel's finding that the measures at issue "in effect" created tariff lines for CKD and SKD kits and, in consequence, to also reverse the Panel's finding that China violated its commitment under paragraph 93 to levy a tariff of no more than 10 per cent if such tariff lines were created. China believes that, in reaching this finding, the Panel ignored the words actually used in paragraph 93, and effectively read the term "tariff lines" out of that provision.

[72]China's appellant's submission, para. 166.

39. China notes that the Panel interpreted the term "tariff line" in paragraph 93 to mean "a horizontal line in a tariff schedule that provides a specific heading number, regardless of the number of digits … and a specific tariff rate for the product described under that heading".[73] The Panel also interpreted China's commitment under paragraph 93 to be conditioned on a future event, that is, the creation of tariff lines for CKD and SKD kits. However, even though none of the complainants argued that the measures *actually* created tariff lines, the Panel erroneously accepted the United States' argument that tariff lines for CKD and SKD kits could be deemed to have been, or "*de facto*", created given that, under the measures, China effectively classifies such kits under specific tariff lines for motor vehicles and applies the corresponding tariff rate of 25 per cent. According to China, this is an impermissible interpretation by the Panel. Paragraph 93 specifically refers to "tariff lines" to define the circumstances under which the commitment is triggered and, if the drafters had intended for China's commitment to be triggered by the creation of tariff lines "in effect", as opposed to through the formal creation of tariff lines, they would simply have written this into paragraph 93.

40. China further asserts that the Panel's interpretation produces absurd results when viewed against the other findings made by the Panel. The Panel found that the *status quo* prior to the introduction of the measures was that China had, before and after its accession to the WTO, properly classified and assessed CKD and SKD kits as motor vehicles, and that it could continue to do so provided that it did not exercise its discretion to create separate tariff lines for CKD and SKD kits. Yet, the Panel went on to find that *any action* implementing such classification of these kits as motor vehicles and assessing a 25 per cent tariff would trigger the commitment under paragraph 93 to levy a tariff of no more than 10 per cent. In so finding, the Panel necessarily implied that China could classify and assess CKD and SKD kits as motor vehicles as it had done both prior to and subsequent to its accession, as long as China never acknowledged that this is what it was doing.

(ii) *The Creation of Tariff Lines at the Ten-Digit Level*

41. China requests the Appellate Body to reverse the Panel's finding that China created tariff lines for CKD and SKD kits in China's national customs tariff at the ten-digit level. China argues that, in reaching this finding: the Panel erred in its interpretation of "tariff lines" under paragraph 93 and in applying that interpretation to tariff headings at the ten-digit level for CKD and SKD kits; ignored the context provided by paragraph 89 of China's Accession Working Party Report; afforded internally incoherent treatment to the evidence before it, thereby also breaching Article 11 of the DSU; and pronounced on measures that were outside its terms of reference.

[73]China's appellant's submission, para. 170 (quoting Panel Reports, para. 7.749).

42. China argues that the Panel's interpretation of "tariff lines" in paragraph 93 to include headings at the ten-digit level is flawed in two ways. First, such an interpretation cannot be reconciled with the Panel's own reasoning, namely, that the term "tariff lines" in paragraph 93 must refer to something that did not exist at the time of China's accession. Because there was undisputed evidence before the Panel that the ten-digit codes that the Panel found had been "created", in fact, existed at the time of accession, the Panel should have examined this evidence as part of the circumstances surrounding the conclusion of China's Accession Protocol, in accordance with Article 32 of the *Vienna Convention on the Law of Treaties*[74] (the "*Vienna Convention*"). Had it done so, the Panel would have found that the term "tariff lines" in paragraph 93 could not encompass China's pre-existing ten-digit codes, that were maintained for the purpose of compiling import statistics for CKD and SKD kits.

43. Secondly, according to China, the Panel erred in failing to take account of the relevant context in which the term "tariff lines" occurs. Because the subject matter of paragraph 93 is the tariff treatment of imports of CKD and SKD kits, a "tariff line", within the meaning of that provision, must mean an entry in China's tariff nomenclature that affects the *tariff rate* applicable to such imports. The Panel, however, interpreted "tariff lines" in a way that ignores whether a particular horizontal line in a tariff schedule has any bearing upon the tariff rate to which a product is subject and, in doing so, ignored the context provided by paragraph 89 of China's Accession Working Party Report and by the Harmonized System. The contracting parties to the *International Convention on the Harmonized Commodity Description and Coding System* (the "*Harmonized System Convention*")[75] may, and do create codes in their national customs nomenclatures beyond the six-digit level prescribed by the Harmonized System, including for reasons that are entirely unrelated to the tariff treatment of a particular product. Paragraph 89 of China's Accession Working Party Report makes clear that China establishes tariff rates at the eight-digit level, and describes the internal regulatory process that China must use in order to change or establish separate tariff rates for a particular product. As explained to the Panel at the interim review stage, China has long maintained ten-digit codes for CKD and SKD kits under its eight-digit subheadings for various types of motor vehicles, for the purpose of compiling statistics. These ten-digit statistical annotations are not "tariff lines" within the meaning of paragraph 93 because they have no bearing on the tariff rate to which CKD and SKD kits are subject. China adds that it is "puzzled"[76] by the Panel's statement that its arguments regarding the ten-digit

[74]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[75]*International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983, 1503 UNTS 167.

[76]China's appellant's submission, para. 198.

codes should have been presented at an earlier stage of the proceedings. China points out that the United States and Canada, rather than China, bore the burden of establishing the meaning of "tariff lines" in paragraph 93, and that it was *China* that first brought the existence of the ten-digit statistical annotations (both before and after accession) to the Panel's attention by submitting import declaration forms from 2001 and 2004.

44. China observes that it is also possible to view the errors committed by the Panel as a failure by the Panel to comply with its duties under Article 11 of the DSU. In finding that China created tariff lines, the Panel relied upon two pieces of evidence unrelated to the measures at issue, namely, an excerpt from China's 2005 Customs Tariff[77] and a 2004 import declaration form[78], both of which contained statistical codes for CKD and SKD kits at the ten-digit level. The Panel ignored, however, other evidence that was squarely before it, namely, a 2001 import declaration form[79], which also contained a ten-digit code for a CKD kit and, therefore, plainly established that such ten-digit codes existed prior to China's accession to the WTO. China contends that this treatment of the evidence is "internally incoherent" and constitutes a failure of the Panel to make an objective assessment of the facts, as required under Article 11 of the DSU. [80]

(iii) *The Panel's Terms of Reference*

45. Finally, China contends that the Appellate Body should reverse the Panel's findings regarding CKD and SKD kits because the ten-digit numerical codes that the Panel found to have created tariff lines were not, China asserts, within the terms of reference of the Panel, pursuant to Article 6.2 of the DSU. China submits that, before the Panel, the United States and Canada were required to support their assertion that China had violated paragraph 93 by identifying in their panel requests the specific measure by which China "created" tariff lines for CKD and SKD kits. Yet, neither the United States' nor Canada's panel request refers to any measure by which China created such tariff lines, or to the existence of ten-digit codes in China's nomenclature. Accepting, *arguendo*, the proposition that the ten-digit codes and the 25 per cent duty that they impose constitute tariff lines, the Panel could not rely on them because they were not identified in the panel requests as a measure at issue in this dispute.

[77]Panel Exhibit CDA-48.
[78]Panel Exhibit CHI-48.
[79]Panel Exhibit CHI-47.
[80]China's appellant's submission, para. 189 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 294 and 295).

B. *Arguments of the European Communities – Appellee*

1. Characterization of the Charge Imposed under the Measures at Issue

46. The European Communities submits that the Appellate Body should uphold the Panel's characterization of the charge imposed under the measures at issue as an internal charge and find that the Panel did not err by interpreting the term "ordinary customs duties" in Article II:1(b) of the GATT 1994 without regard to the classification rules of the Harmonized System. The European Communities adds that, even if the Appellate Body were to accept China's argument that the Harmonized System is context for interpreting the meaning of "ordinary customs duties", China's appeal must fail because China has not explained how its "narrow"[81] appeal would affect the various other elements and reasoning set out by the Panel in its interpretation of Articles III:2 and II:1(b) and its ultimate finding characterizing the charge as falling under Article III:2.

47. The European Communities considers that the Panel undertook a thorough, and correct, interpretation of "ordinary customs duties", and rightly identified the key temporal element that such duties accrue at the moment of importation. China's argument that the charge is an ordinary customs duty because it is related to a valid method of classification under the Harmonized System is, according to the European Communities, erroneous for a number of reasons. First, China "deliberately confuses"[82] the issue of whether the charge falls under Article II:1(b) or Article III:2, which is a threshold issue, with the subsequent issue of how a certain product must be categorized for purposes of tariff classification. As the GATT panel in *EEC – Parts and Components* emphasized, this threshold issue is "of fundamental importance"[83] because the GATT 1994 regulates ordinary customs duties and internal charges differently. Only after the threshold issue has been resolved by characterizing the charge as an ordinary customs duty does the issue of tariff classification become relevant, and then, as the Appellate Body recognized in *EC – Chicken Cuts,* "the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules."[84] The European Communities stresses that classification issues and the rules of the Harmonized System are of no relevance to the threshold issue of whether a charge falls under Article II:1(b) or Article III:2.

[81]European Communities' appellee's submission, para. 16.
[82]European Communities' appellee's submission, para. 47.
[83]European Communities' appellee's submission, para. 48 (quoting GATT Panel Report, *EEC – Parts and Components*, para. 5.4).
[84]European Communities' appellee's submission, para. 49 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 199).

Therefore, according to the European Communities, China's argument that the classification rules of the Harmonized System cannot be separated from the question of whether the challenged measures impose ordinary customs duties not only blurs the fundamentally important threshold issue of which legal regime applies to a certain charge, it also "defies logic".[85]

48. Secondly, the European Communities concludes that China's argument would, if accepted, lead to manifestly absurd results. China's approach would allow countries to impose internally discriminatory taxes provided that such taxes were applied to validly classified products; and, conversely, would preclude a charge from being characterized as an ordinary customs duty if it is related to an *invalid* classification of the product under the rules of the Harmonized System. In the European Communities' view, this approach to interpreting Article II:1(b) would add to or diminish Members' rights and obligations and would not be consistent with Article 3.2 of the DSU. For these reasons, the European Communities submits, the Panel did not err in interpreting "ordinary customs duties" without recourse to the rules of classification under the Harmonized System.

2. Consistency of the Measures at Issue with Article III:2 of the GATT 1994

49. The European Communities requests the Appellate Body to uphold the Panel's finding that the charge imposed under the measures at issue is an internal charge that is inconsistent with Article III:2 of the GATT 1994. The European Communities highlights that China has not appealed the Panel's finding regarding the qualification of the charge as an internal charge on the basis of its evaluation of the actual features of the measures, and does not challenge the content of the Panel's Article III:2 analysis. China's claim that the Panel erred in finding that the measures impose an internal charge contrary to Article III:2 is based solely on its claim that the Panel failed to take the Harmonized System into account in determining the threshold issue and must, according to the European Communities, fail for the same reasons.

3. Consistency of the Measures at Issue with Article III:4 of the GATT 1994

50. The European Communities requests the Appellate Body to uphold the Panel's finding that Article III:4 of the GATT 1994 applies to the measures at issue. The European Communities points out that one of China's two arguments regarding the Panel's finding under Article III:4 is based on its challenge of the Panel's finding that the charge is an internal measure. For the reasons stated above, the European Communities submits that the Panel's finding was correct, and that, therefore, China's

[85]European Communities' appellee's submission, para. 50 (referring to China's appellant's submission, para. 32).

argument should be dismissed. The European Communities also characterizes as "plainly illogical"[86] China's second argument, that the administrative procedures under the measures do not create an incentive for using domestic over imported auto parts, and that any "influence" that the measures may have on automobile manufacturers is attributable instead to the structure of the tariff rates bound in China's Schedule of Concessions. The tariff differential in China's Schedule between the rates for complete vehicles and for auto parts would give an incentive to import auto parts rather than complete vehicles. By contrast, the European Communities submits, the measures at issue provide an incentive for domestic automobile manufacturers to buy like domestic auto parts rather than imported auto parts.

4. The Panel's "Alternative" Findings under Article II:1(a) and (b) of the GATT 1994

51. The European Communities submits that the Appellate Body should dismiss China's appeal of the Panel's alternative findings under Article II:1(a) and (b) of the GATT 1994. The European Communities observes that China's appeal is narrowly focused on the Panel's interpretation of GIR 2(a), which the Panel considered only as part of the contextual analysis of the term "motor vehicles" in China's Schedule of Concessions. It is unclear how China's appeal would affect the other elements of the Panel's interpretative analysis and other grounds relied on by the Panel in its ultimate conclusion under Article II:1(b). The European Communities adds that China's appeal cannot, in any event, succeed, because China has not appealed the Panel's finding that the measures do not meet the "essential character" criterion in GIR 2(a), which was a critical element of its Article II:1(b) analysis. At the oral hearing in this appeal, the European Communities submitted that, if the Appellate Body upholds the Panel's resolution of the threshold issue, then the Appellate Body should not accept China's request to declare the Panel's alternative findings to be moot and of no legal effect. The European Communities nonetheless invited the Appellate Body to help secure a positive solution to this dispute by addressing some of the troubling elements of the arguments made by China under Article II, so as to leave no doubt about the serious systemic implications of China's position, nor as to the inconsistency of the measures at issue with WTO law from all possible angles.

52. As a preliminary matter, the European Communities considers it important to set out the factual context of the automotive industry, and to debunk the "fallacious picture of the industry"[87] put forward by China, that automobile manufacturers systematically import motor vehicles in an

[86]European Communities' appellee's submission, para. 105.
[87]European Communities' appellee's submission, para. 22.

unassembled or disassembled state for assembly in China in order to circumvent the higher duties on motor vehicles.[88] Vehicle production is a complex process, involving considerable logistical sophistication, long supply chains, and the integration of complex technologies across many countries and production facilities. Thousands of different parts in a single vehicle come from all over the world, and a considerable proportion of parts and components are the same in, or are interchangeable between, several vehicle models. Manufacturers do not order all the auto parts necessary to assemble a specific motor vehicle. Instead, they order parts in bulk to cover their various needs, and the number of parts required for manufacture, repair, and after-sales service fluctuates according to market conditions. Manufacturers in China import auto parts in bulk because those parts are not always available in China, at least not always in the quality or quantity required to produce motor vehicles in today's automotive industry. The European Communities stresses that the Panel made a number of findings regarding "the commercial realities of the modern automobile and auto parts industries"[89], and that China ignores these findings in order to construct the "multiple shipments theory" upon which its appeal is based.

53. Regarding the Panel's interpretation of GIR 2(a), the European Communities observes that, although China provides an alternative definition of the term "as presented", China does not directly disagree with the Panel's reading of that term. Indeed, the European Communities asserts, China's arguments essentially ignore the literal meaning of the key words "as presented" in GIR 2(a), as well as in GIR 1, which is the most important interpretative rule of the Harmonized System. GIR 1 provides that classification shall be determined according to the terms of the heading and relevant Section or Chapter Notes of the Harmonized System.[90] The European Communities understands China to argue, first, that there is no material difference between the importation of a CKD kit and "multiple shipments" of auto parts—other than how an importer decides to structure its importation of unassembled auto parts; and secondly, that, because GIR 2(a) applies to the importation of a CKD kit, it must also apply to the "multiple shipment" situation. However, according to the European Communities, the two situations are fundamentally different, and China's position is at odds with the

[88]European Communities' appellee's submission, paras. 20 and 27.
[89]European Communities' appellee's submission, para. 24 (quoting Panel Reports, para. 7.362).
[90]As set out in para. 7.385 of the Panel Reports, GIR 1 provides:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only: for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and provided such headings or Notes do not otherwise require, according to the following provisions.

Panel's finding, based on its interpretation of GIR 2(a) and the Appellate Body Report in *EC – Chicken Cuts*, that "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."[91] The European Communities adds that, even if importers could and would try to use the "multiple shipment" practices that China claims it is trying to combat with the measures at issue, the Panel correctly found that GIR 2(a) cannot be given the "radical"[92] interpretation put forth by China.

54. Turning to China's arguments relating to the 1995 HS Committee Decision and the negotiating history of GIR 2(a), the European Communities recalls that the Panel properly found that the 1995 Decision is not binding, even on the contracting parties to the *Harmonized System Convention*. Paragraph 10 of that Decision refers to two situations: "split consignments" and "the classification of goods assembled from elements originating in or arriving from different countries". According to the European Communities, whilst before the Panel China focused on the second of these situations as justifying the application of GIR 2(a) to the "multiple shipment" situation, on appeal it seems to consider that the "split consignment" scenario is also relevant.

55. The European Communities submits that the Panel was correct in finding that the "split consignment" situation is not the same as the "multiple shipment" situation under the measures. China's arguments to the contrary are based on its reading of the WCO Secretariat's response to a particular question posed by the Panel. According to the European Communities, however, the ordinary meaning of "as presented" and of "split consignments", as well as the WCO's responses to other questions of the Panel, indicate that the WCO Secretariat was unsure as to the meaning of paragraph 10 of the 1995 HS Committee Decision. Further, the European Communities is of the view that China misinterprets the WCO's response by failing to consider that the Panel's question was formulated in a way that clearly presupposed either a *complete* article disassembled before shipment, or a *collection* of parts that would form a complete article after assembly. These scenarios assume, like GIR 2(a), that the unassembled or disassembled article has the "essential character" of the relevant product. According to the European Communities, this has nothing to do with the measures at issue and China's "multiple shipment" theory, where there is no article or set of disassembled parts in the first place that has the essential character of a motor vehicle, but simply different parts imported at different times, in different shipments, from different exporters, and from different countries. The

[91]European Communities' appellee's submission, para. 70 (quoting Panel Reports, para. 7.415).
[92]European Communities' appellee's submission, para. 73.

European Communities contests, for similar reasons, that the negotiating history of GIR 2(a), and the HS Nomenclature Committee's reference to "several consignments", support the view that the phrase "split consignments" was meant to encompass multiple shipments of parts destined for assembly into complete motor vehicles after importation. In the European Communities' view, China reads these words out of context, and ignores that they are preceded by the phrase "[t]he importation of machines in an unassembled state"[93], which suggests, again, an assumption that the parts in the shipment are "a machine" in an unassembled state.

56. The European Communities does not believe that the negotiating history of GIR 2(a) contradicts the conclusions that the Panel drew from it or supports the notion that GIR 2(a) applies to the multiple shipment situation. In the view of the European Communities, the discussions amongst the negotiators were premised on the assumption that there must be an *article* that is shipped in an unassembled or disassembled condition, and that the article must have the *essential character* of the relevant product—as evidenced, for example, by the explicit reference to CKD vehicles in the course of the discussion. That the references to "goods imported for industrial assembly" do not concern China's multiple shipment situation is further demonstrated, according to the European Communities, by the fact that the WCO Secretariat explicitly informed the Panel that this part of paragraph 10 of the 1995 HS Committee Decision relates to rules of origin.

57. Finally, the European Communities requests that the Appellate Body dismiss China's claims under Articles 3.2 and 11 of the DSU. The interpretation of GIR 2(a) advanced by China is not a "known interpretative issue"[94] within the Harmonized System. Indeed, for the European Communities, it is "completely *alien*"[95] to the Harmonized System. The European Communities adds that China has not convincingly explained why the Appellate Body should reverse the conclusions of the Panel merely on the grounds that the rules of another international organization provide members of that organization with discretion to decide issues relating to tariff classification; nor has China explained why the exercise of such discretion would not be constrained by its obligations as a WTO Member.

[93]European Communities' appellee's submission, para. 84 (quoting Customs Co-operation Council, Nomenclature Committee, 9th Session, Brussels (19 July 1962), Document No. 9550E, "Articles (Machinery, Apparatus, etc.) Imported Unassembled or Disassembled" (Panel Exhibit CDA-18), p. 2).

[94]European Communities' appellee's submission, para. 100 (referring to China's appellant's submission, paras. 100-113).

[95]European Communities' appellee's submission, para. 100. (original emphasis)

C. *Arguments of the United States – Appellee*

1. Characterization of the Charge Imposed under the Measures at Issue

58. The United States requests the Appellate Body to reject China's appeal and uphold the Panel's characterization of the charge as an internal charge and not an ordinary customs duty. The United States refers to the characteristics of the measures at issue relied on by the Panel in characterizing the charge as an internal charge; the Panel's interpretation of "internal charge" in Article III:2; and the Panel's interpretation of "ordinary customs duties" in Article II:1(b). China's appeal makes no mention of the first two of these analyses, and makes only passing reference to the terms of Article II:1(b) in asserting that the Panel erred in interpreting this provision without regard to the alleged "context" provided by the rules of the Harmonized System. Because China's arguments seek to have this dispute resolved solely on the basis of a theoretical analysis of an interpretative rule of the Harmonized System, the United States submits that these arguments are inconsistent with Article 3.2 of the DSU and its requirement to use the customary rules of interpretation of public international law—as reflected in Articles 31 and 32 of the *Vienna Convention*—in resolving WTO disputes.

59. The United States considers that the Panel correctly determined that, although the rules of the Harmonized System may have a role to play in interpreting China's Schedule of Concessions, they do not have a role in interpreting the scope of Article II:1(b) or Article III:2 of the GATT 1994, either as context under Article 31, or as supplementary means of interpretation under Article 32 of the *Vienna Convention*. China does not clarify for which specific term in Article II:1(b) it claims GIR 2(a) provides context. In the United States' view, China's arguments seem, in essence, not to rely upon the Harmonized System as context, but, instead, to amount to an argument that GIR 2(a) itself determines whether a charge is an ordinary customs duty within the meaning of Article II:1(b). For the United States, such an approach ignores the customary rules of treaty interpretation.

60. The United States points to three "critical flaws"[96] in China's argument that the rules of the Harmonized System provide context for resolving the threshold question of whether the measures at issue fall under Article II:1(b) or Article III:2 of the GATT 1994. First, China mischaracterizes the Panel's reference to the "condition" or "status" of a product at the moment it enters the customs territory. By subsequently referring to a statement of the Appellate Body in *EC – Chicken Cuts*[97], the Panel made clear that its reference to the "condition" of a product was a reference to an examination

[96]United States' appellee's submission, para. 21.
[97]United States' appellee's submission, para. 23 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 246).

of the objective characteristics of a product at the time of importation. Classification of a product cannot determine its objective characteristics; rather, it is those objective characteristics that are the starting point for the proper classification of the product. Secondly, according to the United States, China's approach would have required the Panel to begin its analysis at the end by, in effect, beginning with the presumption that the measures impose an ordinary customs duty, even though this was the very question that the Panel had to answer. By structuring its threshold analysis as it did, however, the Panel correctly followed the approach of previous panels, including the GATT panel in *EEC – Parts and Components*. Its approach was also in line with previous statements of the Appellate Body to the effect that a panel that ignores the fundamental structure and logic of a provision in deciding the proper sequence of steps in its analysis risks reaching flawed results.[98] Finally, the United States rejects China's argument that the charge is an ordinary customs duty since it is based on a valid method of customs classification. The United States characterizes this argument as illogical, because it suggests that the determinative factor in whether a charge is an ordinary customs duty is whether the method used under the challenged measures to categorize a product for purposes of applying a charge would be a permissible method of classification under the Harmonized System.

2. Consistency of the Measures at Issue with Article III:2 of the GATT 1994

61. The United States submits that the Appellate Body should reject China's claims of error regarding the Panel's finding under Article III:2 of the GATT 1994. The United States emphasizes that China has not appealed any of the findings of the Panel with respect to the operation and interpretation of Article III:2, or the operation of the measures at issue. Rather, China's request for the reversal of the Article III:2 findings rests on its argument that the Panel erred in concluding that the charge imposed under the measures is not an ordinary customs duty, along with the Panel's finding that a charge cannot at the same time be an ordinary customs duty and an internal charge. Accordingly, for the same reasons put forward in support of the Panel's finding that the measures at issue do not impose an ordinary customs duty, the United States considers that China's appeal with respect to the Panel's determination that the charge under the measures is an internal charge inconsistent with Article III:2, should be rejected.

[98]United States' appellee's submission, para. 28 (referring to Appellate Body Report, *Canada – Autos,* para. 151; Appellate Body Report, *US – Shrimp*, para. 119; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports,* para. 127).

3. Consistency of the Measures at Issue with Article III:4 of the GATT 1994

62. The United States notes that China's claim that the Panel's finding under Article III:4 of the GATT 1994 should be reversed is based on two grounds. The first argument is that, since the Panel mischaracterized the charge as an internal charge, its findings under Article III:4 must be reversed. For the same reasons put forward in support of the Panel's finding that the charge under the measures is an internal charge and not an ordinary customs duty, the United States requests the Appellate Body to dismiss this aspect of China's appeal. The United States also rejects China's second argument, that any influence the measures may have on an automobile manufacturer's decision to use domestic over imported auto parts is simply the result of the structure of China's Schedule of Concessions. The United States agrees with the Panel that, while China's Schedule provides an incentive to import auto parts rather than motor vehicles, the question before it was whether the measures create an incentive to use domestic auto parts over imported auto parts. The Panel correctly held that they did, and that such incentive affected the internal sale, offering for sale, purchase, transportation, distribution, or use of imported products within the meaning of Article III:4. Thus, the United States submits that the Appellate Body should dismiss China's appeal of the Panel's findings under Article III:4.

4. The Panel's "Alternative" Findings under Article II:1(a) and (b) of the GATT 1994

63. The United States first expresses its view that, should the Appellate Body uphold the Panel's finding that the charge imposed under the measures is an internal charge, it need not examine China's appeal with respect to the Panel's "alternative" findings. At the oral hearing in this appeal, the United States pointed out that the Panel's alternative findings were conditioned on an assumption that the charge is an ordinary customs duty; if the Appellate Body were to find that such assumption is false, then the Panel's alternative findings would no longer remain in place. However, the Panel also made a number of significant findings regarding Article II:1(b) in its analysis of the threshold issue, and those would remain in place. The United States also notes that China does not appeal the finding of the Panel that the substantive criteria under Articles 21 and 22 of Decree 125 do not meet the "essential character" test in GIR 2(a).[99] The United States considers that this finding provides an independent basis for the Panel's ultimate conclusion that the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994. In any event, the United States contends that the Panel properly understood the term "as presented" in GIR 2(a) and correctly found that the term "motor

[99]Panel Reports, Section VII:D.3.

vehicles" in China's Schedule of Concessions cannot include auto parts imported in multiple shipments based on their subsequent assembly into a motor vehicle.

64. The United States asserts that the Panel correctly found that the plain meaning of the term "as presented" in GIR 2(a) denotes a temporal meaning, namely, the moment when a good is presented to the customs authorities. Notwithstanding other dictionary meanings presented by China, the definition selected by the Panel made the most sense, according to the United States, particularly in the light of the history of how the phrase was inserted into GIR 2(a), as well as the Appellate Body Report in *EC – Chicken Cuts*. Furthermore, although China asserts that the Panel's own findings indicate that GIR 2(a) can apply to multiple shipments, at least in some instances, the United States does not understand the Panel to have made such a finding. Instead, the Panel examined whether GIR 2(a) includes the situation where parts are imported in multiple shipments *and* are presented to customs authorities *separately*, and found that it did not, because the scope of GIR 2(a) is limited to the specific moment when the goods are presented to customs authorities for classification.

65. As regards the Panel's treatment of the 1995 HS Committee Decision, the United States points out that the Panel properly found that this Decision is not binding on the contracting parties to the *Harmonized System Convention*, and that decisions that have *not* been codified into legal texts of the Harmonized System or its Explanatory Notes do not have the same evidentiary weight as the General Interpretative Rules, or other decisions that *have* been so codified. With respect to "split consignments", the United States recalls that as regards the first situation in paragraph 10 of the 1995 HS Committee Decision, before the Panel, the parties expressed a common understanding of this term as referring to a situation where a carrier breaks a consignment into multiple consignments for reasons such as the need to balance loads, cost savings in shipment, or the nature of the goods shipped, and that the Panel noted that this common understanding was consistent with the ordinary meaning of "consignments" being "split". The WCO Secretariat's response regarding "split consignments" did not, as China suggests, directly contradict the Panel's findings.[100] Rather, the response makes clear that it reflects the personal view of an official rather than a definitive statement of the WCO Secretariat, and was premised on the hypothetical of a complete article (rather than multiple shipments of parts). In any event, the WCO's response provides no definitive guidance on the meaning of split consignments in the 1995 HS Committee Decision. Similarly, the 1963 discussions within the CCC cited by China do not contradict the Panel's findings, because the reference to "several consignments" is consistent with the Panel's conclusion that split consignments

[100]Response of the WCO Secretariat to Question 10 from the Panel, Panel Reports, Annex C-4, p. C-16.

may be forwarded in multiple shipments. Thus, there is no basis for the Appellate Body to reverse the Panel's determination that the multiple shipments of auto parts that are considered as complete vehicles under China's measures are not comparable to split consignments.

66. The United States argues that the Panel correctly determined that China failed to demonstrate that the second situation referred to in paragraph 10 of the 1995 HS Committee Decision, namely, "goods assembled from elements originating in or arriving from different countries", refers to the kinds of multiple shipments of auto parts covered by the measures at issue. The relevant historical documents referred to by the Panel, which include paragraph 10 of the 1995 HS Committee Decision, were several steps removed from the Panel's task of interpreting the meaning of "motor vehicles" in China's Schedule, and there is no indication that the Panel relied heavily on the 1995 HS Committee Decision or on the statements made in 1963 by the Secretariat of the CCC. The United States also supports the Panel's finding, based on its assessment of Explanatory Note (V) to GIR 2(a) and the WCO Secretariat's responses to certain questions posed by the Panel, that the second situation referred to in paragraph 10 of the 1995 HS Committee Decision did not concern the multiple shipments of parts but, rather, referred to rules of origin issues, something which is outside the scope of the Harmonized System nomenclature.

67. Finally, the United States rejects China's argument that the Panel acted inconsistently with Articles 3.2 and 11 of the DSU by purporting to resolve a known interpretative issue within the meaning of the Harmonized System. The Panel was not determining rights and obligations outside the covered agreements. Instead, it looked to the Harmonized System as context relevant to its interpretation of the meaning of "motor vehicles" in China's Schedule and, in doing so, acted consistently with Articles 3.2 and 11 of the DSU.

5. The Panel's Findings with respect to Paragraph 93 of China's Accession Working Party Report

68. The United States requests the Appellate Body to uphold the Panel's conclusion regarding paragraph 93 of China's Accession Working Party Report and China's treatment of CKD and SKD kits. The Panel's conclusion was based on three key findings, all of which, in the United States' view, are correct: (i) that the measures imposed a 25 per cent charge on CKD and SKD kits; (ii) that the charge was an ordinary customs duty when applied upon importation under Article 2(2) of Decree 125; and (iii) that China had met the condition in paragraph 93 of creating separate tariff lines.

(a) Applicability of the Measures at Issue to Imports of CKD and SKD Kits

69. The United States submits that the Panel did not err in interpreting Article 2(2) of Decree 125 as allowing importers of CKD and SKD kits to opt out of the administrative procedures under the measures, but not the charge imposed thereunder. In this regard, the United States considers that the Appellate Body should not review a panel's findings on the construction of a Member's municipal law *de novo*. For the United States, such findings are factual determinations beyond the scope of appellate review. As such, panel findings on the meaning of municipal law should be challenged under Article 11 of the DSU as a failure by the panel to make an objective assessment of the facts, and the Appellate Body should accord such findings the same deference as other types of factual findings by panels.

70. In any event, the United States considers that the Panel did interpret Article 2(2) of Decree 125 correctly. In the United States' view, read in its entirety, Decree 125 replaces China's regular customs procedures and imposes an intricate new regime that applies to the importation of all auto parts into China. The phrase "these Rules shall not apply" in Article 2(2) does not carve out CKD and SKD kits entirely from the scope of the measures. Article 2(2) only provides the specific procedure available to CKD and SKD kit importers for the payment of the charge under the measures. Reading Article 2(2) in isolation leads to ambiguity, because, by both setting the conditions for importation—that is, through declaration and payment of duties—and then saying that the rules do not apply to such importations, the provision "loops back on itself".[101] Rather, the United States submits that, as the Panel held, Article 2(2) must be read together with Article 21(1) to mean that importers of CKD and SKD kits can exempt themselves from the administrative procedures under the measures and pay the charge at the border. For the United States, any other reading would be inconsistent with the objective of the measures to levy a 25 per cent charge on all imported auto parts that are deemed to have the character of a complete vehicle. Lastly, the United States disputes China's assertion that there is an incoherence between the Panel's finding that a charge cannot at the same time be both an ordinary customs duty and an internal charge, and its finding that Decree 125 imposes an internal charge on imports of auto parts in general, but an ordinary customs duty on imports of CKD and SKD kits. The United States contends that two different situations need to be distinguished. When an importer pays the 25 per cent charge upon importation pursuant to Article 2(2), the charge can be characterized as a customs duty, but in all other situations where Article 2(2) and the option to pay

[101]United States' appellee's submission, para. 90.

upon importation are not used, the charge would be an internal charge. This means, according to the United States, that the Panel did not find that a charge imposed on a *single* entry could be *both* an ordinary customs duty and an internal charge.

(b) *Prima Facie* Case

71. The United States submits that, contrary to China's assertions, it made out a *prima facie* case under paragraph 93 of China's Accession Working Party Report. With respect to the operation of Article 2(2) of Decree 125, the United States specifically set out its understanding that, "[i]f the enterprise agrees to pay a 25% charge on [a] CKD or SKD [kit] at the border, the other aspects of China's measures (such as verification of local content) would not apply"[102], and alleged that this Article 2 procedure for paying a 25 per cent charge at the border is inconsistent with China's paragraph 93 obligations. The United States also explained how the measures *de facto* created a tariff line, and this line of reasoning was employed by the Panel to find that China "created tariff lines" in violation of paragraph 93 of its Accession Working Party Report.[103]

(c) The Consistency of the Measures at Issue with Paragraph 93

72. The United States requests the Appellate Body to uphold the Panel's conclusion that China's measures are inconsistent with its commitment under paragraph 93 of China's Accession Working Party Report. The United States points out that each of the Panel's findings—that the measures at issue should be deemed to have satisfied the condition in paragraph 93, and that China's 2005 Customs Tariff[104] satisfied the condition—are separate findings that independently support this conclusion.

(i) *The "De Facto" Creation of Tariff Lines*

73. The United States argues that the Panel correctly found that China's measures satisfied the condition in paragraph 93 of China's Accession Working Party Report, namely, "[i]f China created such tariff lines." The Panel properly took account of the context of paragraph 93 as a whole, applied it to the facts and circumstances of this dispute, and fully explained the rationale of its finding that the measures should be deemed to create tariff lines. The United States disagrees with China that the

[102]United States' appellee's submission, para. 96 (quoting United States' response to Panel Question 80, Panel Reports, Annex A-1, p. A-79)
[103]United States' appellee's submission, para. 97 (referring to the United States' response to Panel Question 61, Panel Reports, Annex A-1, p. A-58).
[104]Panel Exhibit CDA-48.

term "tariff line" can only mean a line contained within China's national customs tariff; instead, the Panel correctly recognized that paragraph 93 reflects the fact that the negotiators were concerned with the tariff *treatment* of CKD and SKD kits, and not with the specific line under which these kits are classified. In the United States' view, accepting China's interpretation "would empty paragraph 93 of any meaning in terms of limiting the tariff rate"[105] on CKD and SKD kits to no more than 10 per cent.

74. The United States also rejects China's contention that the Panel's interpretation leads to absurd results. The United States submits that CKD and SKD kits were treated on an ad hoc basis in the period prior to China's WTO accession, and that the rates imposed on these kits were substantially lower than the rate for complete vehicles.[106] Thus, the "confirmation" in paragraph 93 represents an acknowledgment that China did not have a consistent tariff treatment for CKD and SKD kits, and, in particular, that there was no specific tariff line that would provide such consistent tariff treatment. In these circumstances, the United States explains, the commitment in the last sentence of paragraph 93 was that, if China did establish tariff lines that would result in a consistent tariff treatment, the rate would be no more than 10 per cent.

(ii) *The Creation of Tariff Lines at the Ten-Digit Level*

75. While the United States acknowledges that, unlike Canada, it did not advance an argument regarding ten-digit codes before the Panel, the United States nonetheless submits that the Panel's finding that the measures created tariff lines through ten-digit codes should be upheld.

76. The United States contests China's assertion that, since all parties agreed that China had no tariff lines for CKD and SKD kits at the time of its accession to the WTO, and the tariff line identified by the Panel in the 2005 Customs Tariff may have dated back to the time of its accession, the parties implicitly have agreed that the line in the 2005 Customs Tariff is not a "tariff line" within the meaning of paragraph 93 of China's Accession Working Party Report. Whether or not there was some unknown and unapplied ten-digit nomenclature in 2001, the line in the 2005 Customs Tariff meets the condition in paragraph 93. The United States also points out that nothing in the Panel record establishes that the tariff line for CKD and SKD kits in China's 2005 Customs Tariff existed in 2001,

[105]United States' appellee's submission, para. 100.
[106]United States' appellee's submission, para. 101 (referring to, *inter alia*, the United States' response to Panel Question 254, Panel Reports, Annex A-2, p. A-309).

because a comparable national customs tariff for 2001 is not on the record, and the two Panel exhibits relied upon by China[107] involve different tariff numbers and different product descriptions.

77. The United States also argues that the Panel did not ignore the context provided by paragraph 89 of China's Accession Working Party Report. According to the United States, paragraph 89 does not assist China on this issue, because it refers to eight-digit "tariff headings" rather than "tariff lines". This difference does not imply that a ten-digit nomenclature cannot constitute a "tariff line". To the contrary, because the term "tariff lines" in paragraph 93 is broader, it may in fact support just such a finding. The United States also claims that China has not rebutted the Panel's "commonsense"[108] finding that a ten-digit line, just like an eight-digit line, can serve to establish a violation by China of its commitment under paragraph 93 of China's Accession Working Party Report.

(iii) *The Panel's Terms of Reference*

78. Finally, the United States argues that, in asserting that the Panel erred in ruling on a measure that was outside its terms of reference, China confuses the specific measures at issue with the facts used to establish that the measures are in breach of a WTO obligation. In this dispute, China's 2005 Customs Tariff was not a specific measure at issue, and the Panel properly made no findings on whether the ten-digit tariff line was consistent with paragraph 93 of China's Accession Working Party Report. Instead, according to the United States, the Panel used the ten-digit line as evidence to establish that the measures at issue are inconsistent with paragraph 93. The United States adds that, even though the relevant technical evidence was presented at a late stage of the proceeding, it was nevertheless properly before the Panel, and the Panel explained in detail why its decision to accept the relevant exhibit was consistent with the Panel's Working Procedures.

D. *Arguments of Canada – Appellee*

1. Characterization of the Charge Imposed under the Measures at Issue

79. Canada requests the Appellate Body to uphold the Panel's finding that the charge under the measures is an internal charge imposed on auto parts based on their end use after they have been imported into China. The Panel conducted a proper analysis of the threshold issue of whether the

[107]China submitted a 2001 (pre-WTO accession) import declaration form for a CKD kit (Panel Exhibit CHI-47) and a 2004 import declaration form for a CKD kit for a different vehicle model (Panel Exhibit CHI-48). Each form contains a ten-digit code.

[108]United States' appellee's submission, para. 105.

charge under the measures is an ordinary customs duty under Article II:1(b) or an internal charge under Article III:2 of the GATT 1994, and did so in accordance with the interpretative rules in Articles 31 and 32 of the *Vienna Convention*. Canada adds that it is unclear whether or how China's narrow appeal of one aspect of the Panel's findings—that is, the alleged failure of the Panel to take account of the rules of the Harmonized System as relevant context for interpreting Article II:1(b)—would, even if successful, suffice as a basis for overturning the Panel's overall conclusion that the charge under the measures at issue is an internal charge that is inconsistent with Article III:2.

80. Canada stresses, first, that the Panel applied the correct interpretative approach to ascertaining the meaning of the first sentence of Article II:1(b), and correctly determined that the term, "on their importation", when considered in context and in the light of the object and purpose of the GATT 1994, establishes a strict and precise temporal element: that is, in order to be an "ordinary customs duty", a charge must be based on the physical "status" or "condition" of the product at the specific moment of importation. In Canada's view, China's emphasis on the proper tariff classification of the "product" referred to in Article II:1(b) confuses the threshold issue, under which GATT 1994 provision the charge falls, with the distinct issue of whether the charge under the measures is consistent with China's Schedule, *if* it is found to be an ordinary customs duty. Canada submits that the characterization of the measure must logically precede a determination of the conformity of that measure with a WTO obligation and that such a sequence of analysis is fully supported by GATT and WTO jurisprudence.[109] According to Canada, China's argument puts "the cart before the horse"[110], because it assumes that, so long as the product is properly classified under the Harmonized System, and in particular under GIR 2(a), this means that the charge is an ordinary customs duty. This argument "misses the point"[111], since classification of a product, although relevant to the question of *which* ordinary duty applies, has no bearing on *whether* a charge is an ordinary customs duty.

81. Because the reference to the "product" is not relevant to the threshold issue of whether a charge falls under either Article II:1(b) or Article III:2, it necessarily follows, according to Canada, that GIR 2(a) is equally irrelevant to that issue, even if it may be relevant to determining the "state" or "condition" of a product. The Panel rejected China's argument that an ordinary customs duty need not be based on the "status" or "condition" of the product at the border, but also includes charges imposed

[109]Canada's appellee's submission, paras. 50 and 51 (referring to GATT Panel Report, *EEC – Parts and Components*, para. 5.4; GATT Panel Report, *Greece – Import Taxes*, para. 5; GATT Panel Report (unadopted), *Canada – Gold Coins*, para. 49; Panel Report, *Argentina – Hides and Leather*, para. 11.139; and Appellate Body Report, *Canada – Autos*, paras. 151 and 152).

[110]Canada's appellee's submission, para. 48.

[111]Canada's appellee's submission, para. 49.

"conditional upon" importation or "by reason of importation". The Panel found instead that, by virtue of the term "on their importation", the first sentence of Article II:1(b) has a strict and precise temporal element. Canada emphasizes that China has not appealed that finding and cannot indirectly do so by simply "repackaging"[112] arguments that were rejected by the Panel. Accordingly, there is no basis for accepting the proposition that the rules of the Harmonized System are relevant context to the interpretation of "ordinary customs duties" in Article II:1(b).

82. Canada points out that, even though the rules of the Harmonized System are not relevant to the threshold issue, the Panel nevertheless acknowledged them, and correctly found that they could not be determinative of the threshold issue. The Panel viewed the Harmonized System as relevant only to the issue of product classification. The Panel observed, in this respect, that the term "as presented" limits the application of GIR 2(a) to the specific moment at which goods are presented to a customs authority, and that this was consistent with the Appellate Body's statement in *EC – Chicken Cuts* that tariff classification has to be based on the objective characteristics of a product when presented at the border.[113] In Canada's view, this demonstrates that the Panel did understand the limited relevance of the rules of the Harmonized System in determining the meaning of the term "ordinary customs duties" and considered that, if anything, these rules confirmed the Panel's own interpretation of this term. Finally, Canada submits that, even if the Appellate Body were to find that the Panel did not adequately take into account the context of the Harmonized System, this would in no way undermine the Panel's finding on the meaning and scope of the term "ordinary customs duties".

2. Consistency of the Measures at Issue with Article III:2 of the GATT 1994

83. Canada submits that the Panel properly found that the charge under the measures at issue is inconsistent with Article III:2 of the GATT 1994. According to Canada, China's appeal of the Panel's finding under Article III:2 is based solely on China's allegation that the Panel erred in the threshold question of the characterization of the charge. As explained above, Canada considers that the Panel's treatment of the threshold issue was correct and, consequently, China's appeal of the Panel's finding that the charge is inconsistent with Article III:2 should be dismissed.

[112]Canada's appellee's submission, para. 54.
[113]Canada's appellee's submission, para. 63 (referring to Panel Reports, para. 7.187, in turn quoting Appellate Body Report, *EC – Chicken Cuts*, para. 246).

3. Consistency of the Measures at Issue with Article III:4 of the GATT 1994

84. Canada submits that, even if the Appellate Body were to agree with China that the charge under the measures is an ordinary customs duty, the Panel's finding of inconsistency with Article III:4 of the GATT 1994 should be upheld since, contrary to China's arguments on appeal, this finding was not based on the Panel's characterization of the charge as an internal charge. Rather, the Panel's conclusion under Article III:4 was based on findings (not appealed by China) that other elements of the measures, including the administrative procedures, which are distinct from the charge, accord less favourable treatment to imported auto parts than to like domestic auto parts. In particular, the Panel found that the measures create a disincentive for automobile manufacturers to use imported auto parts through administrative procedures that impose lengthy delays, and by virtue of the criteria set out in the measures at issue for ascribing the "essential character" of a "motor vehicle" to imported auto parts. For these reasons, Canada argues that the Appellate Body should dismiss China's appeal of the Panel's finding in respect of Article III:4.

4. The Panel's "Alternative" Findings under Article II:1(a) and (b) of the GATT 1994

85. Canada suggests that, if the Appellate Body affirms the Panel's finding on the threshold issue, the Appellate Body should decline China's request to declare the Panel's alternative findings under Article II:1(b) to be "moot and of no legal effect". The reasons given by the Panel for deciding to make alternative findings demonstrate that, even if the charges under the measures are not ordinary customs duties, certain elements of the measures, such as the "essential character" criteria contained therein, could under a different measure be applied to auto parts when they arrive at the border. Canada distinguishes these circumstances from those in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, where the Appellate Body declared that panel's alternative findings to be moot and of no legal effect.[114] Canada believes that there is significant value in maintaining the Panel's alternative findings under Article II:1(b) even if the Appellate Body upholds the Panel's finding that the charge under the measures at issue is an internal charge subject to Article III:2, because those Article II findings may help to prevent or resolve any disagreement as to the measures that China might take to comply.

[114]Canada's appellee's submission, para. 73 (referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 158).

86. Canada emphasizes the narrow scope of China's appeal of the Panel's alternative findings. China appears to be simply re-arguing the case that it presented to the Panel, based on the same evidence, and asking the Appellate Body to reach a different conclusion than did the Panel. Moreover, China has not appealed the Panel's findings that the criteria in Articles 21 and 22 of Decree 125 for characterizing auto parts as complete vehicles necessarily violate Article II:1(b) even when applied to parts in a single shipment. Nor has China appealed the Panel's findings on the meaning of the term "on their importation" in Article II:1(b). Canada adds that, in any event, the Panel properly took account of the Harmonized System as context for its interpretation of Article II and was correct in its examination of the interpretative issues relating to the Harmonized System put forward by China.

87. Canada submits that the Appellate Body should accord deference to the weight and appreciation that the Panel gave to the evidence concerning the non-binding 1995 HS Committee Decision, which China relied upon as evidence supporting its interpretation of GIR 2(a). In Canada's view, a panel's interpretation of laws or rules at the international level—outside the *WTO Agreement*—is equivalent to a panel's interpretation of municipal law, and the same standard of review should be applied in both instances. It follows, in Canada's estimation, that the Appellate Body should reject China's request to overturn the Panel's findings of fact and interpretation of the rules of the Harmonized System that supported its findings under Article II:1(b), because China has not challenged the findings under Article 11 of the DSU nor established any other basis for the Appellate Body to interfere with the Panel's exercise of its discretion to make such findings.

88. Even if the Appellate Body were to review the Panel's alternative findings, Canada submits that they should be upheld, without any need to enter into the substance of China's arguments concerning its alleged discretion under the Harmonized System. This is because: (i) even assuming that China enjoys a discretion by virtue of the rules of the Harmonized System, such discretion may not be relied upon to excuse a violation of Article II:1(b) of the GATT 1994; and (ii) the Panel found that even when applied to a single shipment of parts, the criteria in Articles 21 and 22 of Decree 125 necessarily violate Article II:1(b), and China has not appealed that finding. Canada adds that China's appeal also ignores an important basis for the Panel's findings and a key rule of the Harmonized System, namely, GIR 1, which provides, in effect, that a good should be classified under the subheading that describes it.

89. Canada considers that the Panel correctly interpreted GIR 2(a); properly understood the non-binding nature of the 1995 HS Committee Decision; and found that these elements did not support China's position that it could classify multiple shipments of parts as complete vehicles. Canada agrees with the ordinary meaning of the term "as presented" in GIR 2(a) identified by the Panel, because it is in line with statements of the Appellate Body in *EC – Chicken Cuts* and the understanding of the WCO Secretariat as expressed in its responses to questions of the Panel. China's alternative definition of the term is inadmissible because it was not before the Panel and is, in any event, outweighed by the other evidence that was before the Panel.

90. Canada submits that the Panel correctly found that the two situations referred to in paragraph 10 of the 1995 HS Committee Decision are not relevant to a consideration of the measures at issue in this case. With respect to the split consignment situation, Canada submits that there are four reasons why it is not relevant. First, there is no reference in the Explanatory Notes to GIR 2(a) to split consignments, and the Nomenclature Committee that developed GIR 2(a) considered and rejected the inclusion of the concept of "split shipments" in GIR 2(a). Secondly, the practice relating to split consignments, on which paragraph 10 is based, relates to a few products, mainly machinery, and not to motor vehicles or their parts. Thirdly, the negotiating history makes clear that parts used for manufacturing purposes, *and shipped separately*, were not intended to be covered by GIR 2(a). The Panel correctly found that GIR 2(a) was intended to apply to a shipment of parts imported together in one shipment for industrial assembly—for example, a CKD kit—but *not* to parts and components imported in multiple shipments for assembly. Fourthly, China presented no evidence that the reference to split consignments in the 1995 HS Committee Decision was relied upon by China or any other WTO Member, at the time of China's accession or subsequently, in order to classify and assess tariffs on multiple shipments in a way comparable to the measures at issue. With respect to the classification of "goods assembled from elements originating in or arriving from different countries", which is the second situation referred to in paragraph 10 of the 1995 HS Committee Decision, Canada submits that the Panel correctly found that this did not inform the interpretation of the term "as presented" in GIR 2(a) but, rather, referred to rules of origin issues.

91. Finally, Canada rejects China's contention that the Panel acted inconsistently with Articles 3.2 and 11 of the DSU by purporting to resolve a known interpretative issue within the Harmonized System, allegedly by "interpreting a non-WTO agreement in a manner that conflicts with the interpretation of that agreement adopted by the international organization responsible for its

administration".[115] Canada submits that the Panel, in fact, complied with its duties under Article 11 of the DSU by addressing GIR 2(a), the 1995 HS Committee Decision, and other WCO documents which were put before it by China, and which were central to China's arguments. In addition, the Panel was not providing an interpretation of the provisions of another international agreement. Rather, in line with the approach outlined by the Appellate Body in *EC – Chicken Cuts,* the Panel properly took into account the Harmonized System as context in interpreting China's WTO Schedule of Concessions. Canada adds that, from a systemic point of view, panels would be deprived of their ability to resolve disputes under Article II:1 of the GATT if the Appellate Body were to find, as China requests, that panels may not make their own assessment of the weight to be accorded to competing views and evidence in respect of the classification of products under the Harmonized System.

5. The Panel's Findings with respect to Paragraph 93 of China's Accession Working Party Report

(a) Applicability of the Measures at Issue to Imports of CKD and SKD Kits

92. Canada believes that the Panel correctly interpreted the measures at issue and found that Article 2(2) of Decree 125 does not exempt imports of CKD and SKD kits from the application of the charge under the measures at issue. Canada considers that the Panel correctly relied on two key provisions of Decree 125: Article 2(2) and Article 21(1). Overall, Decree 125 draws a distinction between CKD and SKD kits, which are identifiable as complete vehicles at the border, and the less complete collections of parts listed in Article 21(2) and (3) of Decree 125, which are more difficult to identify as being complete vehicles. For Canada, it accords with the internal logic of the measures at issue that importers of CKD and SKD kits may identify such kits as complete vehicles on their importation and, thereby, be relieved of the administrative procedures under the measures.

93. Canada submits that Article 2(2) must be read in the context of other provisions of Decree 125, which clarify that imports of CKD and SKD kits are within the scope of application of the measures. Article 2(2) merely provides a choice to importers of CKD and SKD kits to declare the imports without going through the administrative procedures. In any event, and irrespective of whether or not these procedures are utilized, CKD and SKD kits are still characterized as complete vehicles and subject to the 25 per cent charge. At the oral hearing in this appeal, Canada argued that Policy Order 8 also makes clear that Article 2(2) of Decree 125 does not exempt imports of CKD and SKD kits from the charge imposed under the measures. Chapter XI of Policy Order 8 modifies the

[115]Canada's appellee's submission, para. 118 (quoting China's appellant's submission, para. 113).

normal customs procedures for imported auto parts characterized as complete vehicles, and specifically refers to CKD and SKD kits. There is no exception in Chapter XI for such kits, and Decree 125 is an elaboration of Policy Order 8. Thus, according to Canada, when Policy Order 8 and Decree 125 are read together, it is clear that the charge imposed thereunder applies to automobile manufacturers that import CKD and SKD kits under Article 2(2) of Decree 125.

(b) *Prima Facie* Case

94. Canada asserts that it did make out a *prima facie* case that the measures applied to imports of CKD and SKD kits under Article 2(2) of Decree 125. Before the Panel, Canada took issue with China's statement that, when CKD and SKD kits enter China under Article 2(2), they do so under China's normal customs procedures. Canada expressed its understanding that "Article 2(2) of Decree 125 applies ordinary customs duties to 'true' CKDs/SKDs."[116]

(c) The Consistency of the Measures at Issue with Paragraph 93

(i) *The "De Facto" Creation of Tariff Lines*

95. In Canada's view, the Panel was correct in finding a violation of the commitment under paragraph 93 of China's Accession Working Party Report. Canada contends that China triggered its obligation, under paragraph 93, to charge no more than 10 per cent on imports of CKD and SKD kits, because the measures at issue mandate Chinese customs authorities to classify CKD and SKD kits under the tariff lines for motor vehicles, and that this obligation could be triggered without China having created explicit tariff lines in its national customs tariff. Canada submits that the Panel's finding is not contrary to the ordinary meaning of "tariff lines" in paragraph 93, because the measures effectively determine both the classification of and tariff rates for CKD and SKD kits, thus "creating a tariff line by any other name".[117] To read the obligation as suggesting that China's commitment could be triggered only by the formal creation of a tariff line would allow China to avoid its obligations by enacting measures that mandate tariff treatment that is not in accordance with its Schedule, but that do not create formal tariff lines.

[116]Canada's appellee's submission, para. 135 (quoting Canada's response to Panel Question 192). See also Canada's appellee's submission, para. 139.

[117]Canada's appellee's submission, para. 155.

(ii) *The Creation of Tariff Lines at the Ten-Digit Level*

96. Canada requests the Appellate Body to uphold the Panel's finding regarding ten-digit tariff lines. Canada agrees with the meaning of the term "tariff line" provided by the Panel, namely, a horizontal line in a tariff schedule with a specific tariff rate and a specific heading number, *regardless of the number of digits.* In Canada's view, if China wishes to accord the term "tariff line" a special meaning—that is, confined to tariff headings at the eight-digit level—then, under Article 31(4) of the *Vienna Convention*, China has the burden of establishing that special meaning, which it has not done. China's interpretation of its obligation under paragraph 93 would render meaningless the commitment contained therein, because China could avoid it by simply not amending its national customs tariff at the eight-digit level. As for the new argument raised by China on appeal, namely, that the Panel ignored the context provided by paragraph 89 of China's Accession Working Party Report, Canada notes that China never raised this argument before the Panel and, in any event, it does not assist China: there is no reference to "tariff *lines*" in paragraph 89, much less any indication that tariff lines are restricted to eight digits. For Canada, the reference in paragraph 89 to eight-digit "tariff *headings*" is perfectly consistent with the conventional understanding that tariff lines may be created at the ten-digit level, below an eight-digit tariff heading.

97. Canada also rejects China's reference to an alleged pre-accession practice of classifying CKD and SKD kits at the ten-digit level. First, China's arguments are premised on an assertion of fact that it did not raise before the Panel—namely, that it had classified CKD and SKD kits as motor vehicles at the ten-digit level—and which is inconsistent with the Panel's (factual) finding that separate tariff lines for these kits did not exist when China acceded to the WTO. Even if it were true that China had a tariff line at the ten-digit level at the time of accession, this would only be one circumstance under Article 32 of the *Vienna Convention* surrounding the conclusion of paragraph 93 of China's Accession Working Party Report. Canada argues that there are other circumstances—such as the practice of other WTO Members classifying at the ten-digit level and assessing a lower duty on such kits based on that classification, as well as China's incoherent tariff assessment of CKD and SKD kits prior to its accession—which "point to an opposite result".[118] Canada adds that, because the Panel did not find any ambiguity, obscurity, or absurdity in the term "tariff lines", using Article 31 to elucidate its ordinary meaning, recourse to supplementary means of interpretation under Article 32 was, in any case, unnecessary.

[118]Canada's appellee's submission, para. 152.

(iii) *The Panel's Terms of Reference*

98. Finally, Canada considers China's argument that the ten-digit tariff lines for CKD and SKD kits were outside the Panel's terms of reference to be confusing. If it is China's argument that Canada should have identified in its panel request the measures which create the tariff line, then Canada did identify the measures at issue, which result in the imposition of a 25 per cent charge on imports of CKD and SKD kits. If, on the other hand, it is China's argument that Canada was required to list the tariff lines themselves as the measures at issue, then such an argument is flawed because it conflates the evidence in support of a claim of inconsistency of the measures—that is the ten-digit tariff lines—with the measures themselves. China's tariff lines are not the measures at issue; rather, Canada argues that, as the Panel found, China has created a tariff line for CKD and SKD kits by introducing the measures at issue.

E. *Arguments of the Third Participants*

1. Argentina

99. Argentina submits that the Panel did not err in characterizing the charge under the measures at issue as an internal charge within the meaning of Article III:2 of the GATT 1994. The imposition of the charge is triggered by internal factors, that is, the assembly, fitting, equipping, and manufacture of imported auto parts into a complete vehicle, all of which occur after importation. Argentina supports the Panel's finding that factors such as the description of the charge under domestic law as an "ordinary customs duty", the fact that the good is not in free circulation, and the policy purpose of the charge, are not decisive for purposes of the threshold determination; nor is the place or moment of its collection, as is made clear by the *Ad* Note to Article III.

100. Even if, in the alternative, the charge imposed under the measures were an ordinary customs duty, Argentina agrees with the Panel's alternative finding that the charge would violate Article II:1(b) because it would be in excess of China's commitments in its Schedule of Concessions. Argentina considers that the Harmonized System and the General Interpretative Rules are "essential to the interpretation of a Member's Schedule of Concessions"[119], but submits that GIR 2(a) can apply only if GIR 1 fails to give guidance as to the appropriate classification of a product. Argentina agrees with the appellees that the term "as presented" in GIR 2(a) requires goods to be classified according to their "objective characteristics" at the moment they arrive at the border. The term "as presented" cannot

[119]Argentina's third participant's submission, para. 33 (quoting Appellate Body Report, *EC – Computer Equipment*, para. 89).

cover situations where products from different origins are presented to customs at different times. Only on an exceptional basis—for example, due to the complexity of shipping certain articles, such as a heavy duty crane—could customs officials accord the tariff treatment of the complete article to parts, because it is impossible to deliver all the parts at once. According to Argentina, GIR 2(a) covers situations where the goods presented are incomplete or unfinished, but have the "essential character" of the complete and finished goods. It does not, however, apply to the measures at issue in this dispute.

2. Australia

101. Australia asserts that the Appellate Body should uphold the Panel's findings that the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994. Australia considers that the Panel appropriately examined the threshold question of whether the charge is an ordinary customs duty under Article II:1(b), or an internal charge under Article III:2. Whilst Australia considers that the Harmonized System provides relevant context for interpreting WTO Members' Schedules of Concessions, it is irrelevant for the determination of this threshold question, and cannot displace the express terms of the GATT 1994.

102. Australia submits that China's appeal of the Panel's alternative findings—that the charge imposed under the measures at issue is inconsistent with Article II:1(a) and (b) of the GATT 1994—must also fail. Even for purposes of interpreting the term "motor vehicles" in China's Schedule of Concessions, the Harmonized System cannot displace the express provisions of the GATT 1994. Article II:1(b), in particular, establishes that the "terms, conditions and qualifications" included in WTO Schedules of Concessions are the "outer limit"[120] of the treatment as regards ordinary customs duties that may be levied on imports. Further, GIR 2(a) does not offer guidance on the key aspect of the charge imposed by the challenged measures, that is, the fact that it accrues after the point of importation and is levied on products manufactured within China. Australia therefore agrees with the Panel's finding that the charge imposed under the measures is, in the alternative, inconsistent with Articles II:1(a) and (b) of the GATT 1994.

[120]Australia's third participant's submission, para. 6.

3. Japan

103. Japan considers that China has formulated a "remarkable appeal"[121] by arguing, in essence, that all of the Panel's findings on the relevant Articles of the GATT 1994 constitute legal error because the Panel has not followed an interpretation of the rules of the Harmonized System issued by the WCO. Japan submits that China's appeal must fail because the questions raised in this dispute are not a matter of WCO rules, and because, in any event, China misrepresents the scope and content of the WCO rules and statements on which it relies.

104. Japan submits that China's appeal is predominantly concerned with the alleged failure of the Panel to consider properly classification rules under the Harmonized System. It is not the role of WTO panels or the Appellate Body to interpret or apply international instruments other than the WTO covered agreements. Japan asserts that, at most, the rules of the Harmonized System provide context for the interpretation of WTO Members' scheduled commitments on agricultural products, as recognized by the Appellate Body in *EC – Chicken Cuts*.[122] The Appellate Body has not suggested, however, that these rules provide context for the interpretation of Article III of the GATT 1994.

105. Japan observes that China's appeal is premised on rules of the Harmonized System that China considers confer discretion on HS contracting parties to treat parts imported through multiple shipments as a whole vehicle based on assemblies occurring after importation. Even assuming this were accurate, Japan considers it "doubtful" that the Harmonized System could assist a panel or the Appellate Body in establishing a "demarcation line"[123] between "internal charges" under Article III:2 and "ordinary customs duties" under Article II:1(b) of the GATT 1994, because WCO rules are not concerned with internal taxes and their relationship to customs duties. Japan also agrees with the Panel's careful interpretation of Article II:1(b) and Article III, notably, its conclusion that the term "ordinary customs duty" in Article II:1(b) read within its context, as compared to "internal charge", contains a strict and precise temporal element. Japan also shares the concern expressed by the Panel that, if assembly of goods after importation could provide a basis for tariff classification, this would undermine the boundary between Article II and Article III of the GATT 1994, as well as the security and predictability of WTO tariff concessions.

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[121]Japan's third participant's submission, para. 17.
[122]Japan's third participant's submission, para. 25 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 199).
[123]Japan's third participant's submission, para. 27.

106. Japan submits that, even assuming that WCO rules were relevant, China's interpretation of GIR 2(a) is "implausible".[124] Specific statements made by the WCO Secretariat to the Panel, along with documents of the Harmonized System submitted by China, illustrate that GIR 2(a) does not apply to the issues that were before the Panel in this dispute. The responses of the WCO Secretariat to the questions from the Panel also demonstrate that the rules of the Harmonized System are silent on the meaning of the term "as presented" in GIR 2(a). Japan does not see how the alternative definition put forward by China would affect the Panel's interpretation that "as presented" refers to the "specific moment when goods are presented"[125] to the customs authorities for classification. Moreover, as regards the two situations referred to in the 1995 HS Committee Decision, the term "split consignments" is not defined under the rules of the Harmonized System; and the reference to "goods assembled from elements originating in or arriving from different countries" is a reference to rules of origin and does not, as China contends, cover the multiple shipment situation under the measures at issue. This means, according to Japan, that it is quite possible that the WCO statements relied upon by China are consistent with the temporal limitation that the Panel found to exist both in Article II:1(b) of the GATT 1994 and in the term "as presented" in GIR 2(a).

107. Finally, even assuming the Harmonized System confers a discretion on contracting parties to the *Harmonized System Convention* to classify products from multiple shipments as a whole product, this discretion must be exercised in a manner consistent with WTO Members' obligations under the *WTO Agreement*. Japan also agrees, in this regard, with the Panel's statement that "[a]ny discretion a WTO Member may have on trade-related matters must be exercised in a manner not only consistent with its obligations under the WTO Agreement, but also supportive of the overall objects and purposes of the WTO Agreement".[126]

III. Issues Raised in This Appeal

108. The following issues are raised in this appeal:

(a) Whether the Panel erred in finding that the charge imposed under the measures at issue is not an ordinary customs duty within the meaning of Article II:1(b), and in finding instead that the charge is an internal charge within the meaning of Article III:2 of the GATT 1994;

[124]Japan's third participant's submission, para. 32.
[125]Japan's third participant's submission, para. 38 (quoting Panel Reports, para. 7.415).
[126]Japan's third participant's submission, para. 28 (quoting Panel Reports, para. 7.461).

(b) Whether the Panel erred in finding:

(i) that the charge imposed under the measures at issue is inconsistent with Article III:2, first sentence, of the GATT 1994; and

(ii) that the measures at issue are inconsistent with Article III:4 of the GATT 1994;

(c) If the Appellate Body reverses the Panel's finding that the charge imposed under the measures at issue is an internal charge and, instead, finds that the charge is an ordinary customs duty within the meaning of Article II:1(b), then whether the Panel erred in its "alternative" finding that the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994;

(d) Whether the Panel erred in finding that the measures at issue are inconsistent with the conditional commitment made by China in paragraph 93 of its Accession Working Party Report ("China's Accession Working Party Report") and, more specifically:

(i) whether the Panel erred in construing the measures at issue as imposing a charge on completely knocked down ("CKD") and semi-knocked down ("SKD") kits imported under Article 2(2) of Decree 125;

(ii) whether the Panel ruled on a claim for which neither Canada nor the United States had made out a *prima facie* case and, thereby, acted inconsistently with Article 11 of the DSU; and

(iii) in the alternative, whether the Panel erred in finding that China had fulfilled the condition underlying the commitment in paragraph 93 of China's Accession Working Party Report to apply tariff rates of no more than 10 per cent to imports of CKD and SKD kits and, in particular:

- whether the Panel erred in deeming tariff lines for CKD and SKD kits to have been created through the enactment of the measures at issue; and

- whether the Panel erred in finding that China created separate tariff lines for CKD and SKD kits at the ten-digit level.

IV. Background and Overview of the Measures at Issue

A. *Introduction*

109. This dispute concerns measures taken by China that: (i) impose a "charge" (referred to in the measures as a "tariff" or "duty")[127] on imported auto parts "characterized as complete motor vehicles" based on specific criteria in the measures; and (ii) prescribe administrative procedures associated with that charge.[128] These measures—the measures at issue in this dispute—comprise three legal instruments enacted by China, namely: Policy on Development of the Automotive Industry (Order of the National Development and Reform Commission (No. 8)) ("Policy Order 8"); Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles (Decree of the People's Republic of China, No. 125) ("Decree 125"); and Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles (Public Announcement of the Customs General Administration of the People's Republic of China, No. 4 of 2005) ("Announcement 4").[129]

110. Policy Order 8[130] entered into force on 21 May 2004 and provides the legal basis for the introduction of Decree 125 and Announcement 4, both of which entered into force on 1 April 2005.[131] Policy Order 8 directs the General Administration of Customs (the "CGA"), jointly with other relevant governmental departments[132], to promulgate specific management rules for the import of

[127]We use the term "charge" for ease of reference and uniformity with the Panel. While acknowledging that the measures do not explicitly refer to a "charge", but instead refer to a "tariff" or "duty", the Panel explained that it would use this term since the nature of this charge was a key issue in dispute. (See Panel Reports, footnote 188 to para. 7.19) The legal nature of the charge under the measures is also one of the issues raised in this appeal, and, like the Panel, we use the term without prejudice to the substantive issue of whether the charge imposed under the measures at issue falls within the scope of Article II or Article III of the GATT 1994. The Panel found that the legal obligation to pay the charge originates in the measures themselves, even though other domestic laws or regulations in China may also be relevant to the imposition and collection of that charge. (Panel Reports, para. 7.19)

[128]Panel Reports, para. 7.67.

[129]See Panel Reports, para. 2.1. The agreed English translations of the measures at issue are attached as Annex E to the Panel Reports.

[130]See Panel Reports, paras. 7.3-7.12.

[131]Panel Reports, paras. 7-13-7.17. The Panel also noted China's explanation that there is no legal hierarchy between the measures, at least not in the sense that one prevails over the others in case of conflict between them. (See Panel Reports, para. 7.17)

[132]The Panel also noted that the relevant government departments responsible for the administration of the procedures under the measures include: (1) the CGA; (2) the National Development and Reform Commission (the "NDRC"); (3) the Ministry of Commerce; (4) the Ministry of Finance; (5) the Leading Panel for the administration of the importation of automobile parts characterized as complete vehicles, which is represented by the CGA, the NDRC, the Ministry of Commerce and the Ministry of Finance; and (6) the Verification Centre. (Panel Reports, footnote 211 to para. 7.39)

whole vehicles and auto parts.[133] These rules were implemented through Decree 125—which establishes procedures for the supervision and administration of auto parts that are imported and then assembled into certain models of automobiles, and specifies criteria for characterizing such auto parts as complete vehicles—and Announcement 4, which provides further details on the procedural requirements and criteria referred to in Decree 125.[134]

111. The measures at issue set up a regulatory regime and impose a charge with respect to imported[135] auto parts used in the production or assembly[136] of certain models of motor vehicles that are sold in the Chinese domestic market. The measures at issue prescribe thresholds regarding the type or value of imported auto parts used to assemble specific vehicle models. If the imported parts used in a given vehicle model meet or exceed these thresholds, then *all* of the imported parts used to assemble that model are "characterized as complete vehicles" and subject to the charge under the measures at issue. The charge is imposed following assembly of the vehicles, and the measures set out a number of procedural and administrative steps designed to determine whether the charge applies, and ensure tracking and reporting of the imported auto parts, along with payment of the charge, in respect of the relevant auto parts. The amount of the charge imposed corresponds to the tariff rate applicable to complete vehicles, that is, 25 per cent on average. Imported auto parts that are not "characterized as complete vehicles" under the measures at issue are subject to duties at the tariff rates for auto parts in China's Schedule of Concessions[137], that is, 10 per cent on average. The measures at issue are more fully explained below, and in detail in paragraphs 7.1 through 7.81 of the Panel Reports.

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[133]Panel Reports, paras. 7.10 and 7.11 (referring to, *inter alia,* Article 60 of Chapter XI of Policy Order 8).

[134]Panel Reports, paras. 7.13-7.17.

[135]The Panel noted that the word "imported", as used in the measures at issue, is synonymous with "foreign", and does not necessarily correspond to or bear upon the meaning of "imported" under the covered agreements. (Panel Reports, footnote 194 to para. 7.23)

[136]The Panel noted that the original Chinese text of the measures at issue contains the two words "shengchan" (生产) and "zuzhuang" (组装), which are properly translated into "to produce" for "shengchan", and "to assemble" for "zuzhuang". In referring to the measures at issue, we use the verbs "to assemble" and "to produce" interchangeably, and without prejudice to any views of the parties, at least as expressed before the Panel, as to the significance of the terms used in the Chinese original text. (See Panel Reports, footnote 191 to para. 7.20 and footnote 212 to para. 7.39) The Chinese original texts of Policy Order 8, Decree 125 and Announcement 4 were submitted to the Panel as Exhibits JE-18, JE-27 and JE-28, respectively.

[137]Schedule CLII – People's Republic of China (Part I –Schedule of Concessions and Commitments on Goods), attached as Annex 8 to China's Accession Protocol, WT/ACC/CHN/49/Add.1. The Panel set out a summary version of the relevant parts of China's Schedule of Concessions at paragraphs 7.373 and 7.374 of the Panel Reports.

112. China's Schedule of Concessions provides separate tariff headings for complete motor vehicles (headings 87.02, 87.03 and 87.04), certain intermediate categories of auto parts (chassis fitted with engines under tariff heading 87.06, and bodies for motor vehicles under tariff heading 87.07), and parts and components of motor vehicles (parts and accessories of motor vehicles under tariff heading 87.08, and parts that fall under a variety of headings in other chapters, such as engines, which fall within chapter 84). It is not disputed that the bound tariff rates in China's Schedule of Concessions are higher for complete motor vehicles (25 per cent on average) than for other auto parts and components (10 per cent on average).[138]

113. Before the Panel, the complainants argued that the measures at issue encourage the use of domestic parts in auto part and vehicle manufacturing in China, through the use of (volume or value) "domestic content" thresholds specified in the measures.[139] China, on the other hand, explained that the measures ensure "substance over form" in the administration of China's national customs law in that they allow customs authorities to classify, as complete motor vehicles, groups of auto parts and components that have the essential character of a complete vehicle, irrespective of how an importer chooses to structure the importation of these parts. China contended that the measures thereby prevent the "circumvention" of China's tariff headings for motor vehicles.[140] In the course of its analysis under Article XX(d) of the GATT 1994, the Panel rejected China's arguments relating to tariff "circumvention"[141], and made certain observations regarding the operation of the automotive industry in general. The Panel explained that the evidence before it suggested an increasing standardization of auto parts, such that many parts can be used interchangeably among different vehicle models. According to the Panel, manufacturers may realize economies of scale by manufacturing "families" of vehicle models, which share platforms, parts, and components, reaching up to 60 or 70 per cent of common parts. The Panel recognized, nonetheless, that some auto parts, which have a specific function or performance, have more limited interchangeability.[142]

[138]The Panel referred to these tariff rates as 25 per cent and 10 per cent "on average" as there were some differences in the tariff rates specified in China's Schedule of Concessions for the relevant products. (See Panel Reports, paras. 7.373 and 7.374 and footnotes thereto)

[139]Panel Reports, paras. 4.13, 4.39, and 4.96.

[140]Panel Reports, paras. 4.137-4.139, 4.186-4.189, and 4.534-4.545.

[141]Panel Reports, para. 7.346. China has not appealed the Panel's finding under Article XX(d).

[142]Panel Reports, para. 7.362. The Panel proceeded to find, in the context of its Article XX(d) analysis, that "notwithstanding some variance in the degree of interchangeability, auto parts have been sufficiently standardized so that identifying a specific vehicle model into which certain auto parts will be incorporated would prove unnecessarily trade restrictive." (Panel Reports, para. 7.362)

B. *The Measures at Issue*

114. When an automobile manufacturer within China wants to begin production of a new vehicle model[143] that will incorporate imported parts and be sold in the Chinese domestic market[144], it must, as a first step, and prior to commencing production, conduct a "self-evaluation" of whether the imported auto parts to be used in that particular model have the "essential character" of and thus qualify as complete vehicles.[145] The measures set out, in Articles 21 and 22 of Decree 125, the criteria that determine when imported parts used in a particular vehicle model must be deemed to have the "essential character" of complete vehicles and are thus subject to the 25 per cent charge. These criteria are expressed in terms of particular combinations or configurations of imported auto parts or the value of imported parts used in the production of a particular vehicle model. The use in the production of a vehicle model of specified combinations of "major parts" or "assemblies"[146] that are imported requires characterization of *all* parts imported for use in that vehicle model as complete vehicles. Various combinations of assemblies will meet the criteria, for example: a vehicle body (including cabin) assembly and an engine assembly; or five or more assemblies other than the vehicle body (including cabin) and engine assemblies.[147] The use, in a specific vehicle model, of imported parts with a total price that accounts for at least 60 per cent of the total price of the complete vehicle[148]

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[143]The measures at issue also apply to manufacturers that were already producing vehicle models at the time of entry into force of the measures. See Article 19 of Decree 125 and Article 10 of Announcement 4.

[144]The Panel referred to China's explanation that automobile manufacturers operating in the processing trade, including those located in special customs zones such as a "bonded-zone", "export processing zone" or "other special zones supervised by the customs under Article 30 of Decree 125" are outside the scope of Decree 125 *unless* they sell such motor vehicles into the domestic Chinese market. (Panel Reports, para. 7.40 and footnote 213 thereto)

[145]Panel Reports, paras. 7.40-7.47. See also Article 7 of Decree 125 and Article 6 of Announcement 4.

[146]An "assembly" is defined in Article 4 of Decree 125 to include the vehicle body (including cabin) assembly, the engine assembly, the transmission assembly, the driving axle assembly, the driven axle assembly, the frame assembly, the steering system, and the braking system. The Panel found that an "assembly" corresponds roughly to the major parts of a vehicle. (Panel Reports, paras. 7.88 and 7.89).

[147]The following combinations of "assemblies" are specified under Article 21(2) of Decree 125: (i) imports of a vehicle body (including cabin) assembly and an engine assembly for the purpose of assembling vehicles; (ii) imports of a vehicle body (including cabin) assembly or an engine assembly, plus at least three other assemblies, for the purpose of assembling vehicles; and (iii) imports of at least five assemblies other than the body (including cabin) and engine assemblies for the purpose of assembling vehicles. (See Panel Reports, para. 7.32) In turn, the determination of whether auto parts used to produce an assembly will be deemed an "imported assembly" and therefore count towards the thresholds in Article 21(2) is made based on criteria specified in Article 22 of Decree 125. These criteria include: (i) a complete set of parts imported to assemble the assembly; (ii) "key parts" or "sub-assemblies" that reach or exceed specified quantities referred to in Annexes 1 and 2 to Decree 125; and (iii) the total price of the imported parts accounts for at least 60 per cent of the total price of that assembly. (See Panel Reports, para. 7.33)

[148]The entry into force of the "value" criterion specified in Article 21(3) was delayed until 1 July 2008. According to China, this was "primarily because of the administrative complexity of implementing this particular criterion". (Panel Reports, footnote 202 to para. 7.32)

also requires characterization of *all* imported parts for use in that vehicle model as complete vehicles. Imports of CKD and SKD kits[149] are also characterized as complete vehicles.

115. The results of the self-evaluation must be submitted to both the NDRC and to the Ministry of Commerce. If the automobile manufacturer makes a positive "self-evaluation", that is, determines that the imported parts to be used in its proposed vehicle model meet the criteria, then the next step is to apply to the NDRC for the vehicle model to be listed on the *Public Bulletin on On-Road Motor Vehicle Manufacturers and Products* (the "Public Bulletin"), which is required in order to produce and sell automobiles in China, and to apply to the Ministry of Commerce for an import licence for the parts to be used in the vehicle model.[150]

116. If the automobile manufacturer's self-evaluation is negative, the Verification Centre will conduct a simplified or on-site review of whether the auto parts to be used in the proposed vehicle model meet the criteria set out in the measures at issue.[151] In such circumstances, in order to be listed on the Public Bulletin, the automobile manufacturer must submit the results of its self-evaluation, as well as the review opinion by the Verification Centre confirming the negative result. Thereafter, the manufacturer is not subject to the various procedures outlined below.

117. Once the automobile manufacturer's vehicle model is listed in the Public Bulletin, the manufacturer must then apply to the CGA to register the vehicle model.[152] The CGA distributes the application to the relevant government departments, including the district customs office in charge of

[149]Although CKD and SKD kits are specifically mentioned in Article 21(1) of Decree 125, they are not defined under the measures at issue. The Panel found that, for purposes of this dispute, CKD and SKD kits refer to all or nearly all of the auto parts and components necessary to assemble a complete vehicle, which must be packaged and shipped in a single shipment, and which must go through the assembly process to become a complete vehicle once they have been imported into the importing country. (See Panel Reports, paras. 7.644-7.647).

[150]Listing on the Public Bulletin is required for automobile manufacturers to produce and sell motor vehicles in China; an automatic import licence is also required so that the authorities can monitor the importation of motor vehicle products. (See Panel Reports, footnote 217 to para 7.45) For those vehicle models assembled with imported auto parts characterized as complete vehicles, the NDRC will mark "Characterized as Complete Vehicles" in the Public Bulletin and the Ministry of Commerce will mark the same on the Automatic Importation Licence. (Panel Reports, para. 7.46)

[151]Panel Reports, para. 7.44. If the review indicates that the imported parts should be characterized as complete vehicles, the automobile manufacturer must file a supplementary registration. If not, registration under the next step of the measures is not necessary. (Panel Reports, para. 7.48)

[152]Panel Reports, para. 7.48-7.50; and Articles 7-12 of Decree 125. Various documents must accompany the registration application, including an annual production plan for the vehicle model to be registered and a complete list of all the domestic and foreign suppliers that supply auto parts to be used in the production of that vehicle model. (Panel Reports, para. 7.50, referring to Article 11 of Decree 125).

the area where the manufacturer is located and, provided that the application is complete, the automobile manufacturer and its vehicle models are registered by the district customs authority. At this stage, the automobile manufacturer must provide to the district customs office a duty bond (the "duty bond").[153] The amount of the duty bond is calculated on the basis of the projected quantity and value of the auto parts that will be imported each month and, in practice, the amount corresponds to the applicable tariff rate for auto parts (10 per cent on average) applied to the projected monthly importations of auto parts.[154]

118. The automobile manufacturer may then begin to import parts to be used in the production of its new vehicle model. When the auto parts characterized as complete vehicles for use in a registered vehicle model are imported into China, they must be imported under an import licence that specifies that they are "characterized as complete vehicles", separately declared at the local district customs office[155], and other relevant documentation must be provided.[156] The auto parts are imported "under bond", which means that they are subject to a financial guarantee (the duty bond), as well as to ongoing tracking and reporting requirements imposed on the manufacturer importing those parts.[157]

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[153]Panel Reports, paras. 7.51-7.52; and Article 12 of Decree 125. Third party auto suppliers and auto part manufacturers are not covered by this requirement, as they are subject to normal customs procedures and thus pay the import duty at the tariff rate applicable to auto parts at the time of importation. (Panel Reports, para. 7.51)

[154]China also explained that, in general, there is no necessary concordance between a bonding rate and the rate of duty at which the imported good will be assessed. (Panel Reports, para. 7.52) The bonds remain in place while the registered vehicle model continues to be manufactured, but their amount may be subject to adjustment if the manufacturer's importation plans or numbers of registered vehicle models change. (Article 12 of Decree 125)

[155]Article 15 of Decree 125. At the oral hearing on appeal, China explained that, for purposes of the measures, auto parts characterized as complete vehicles must be declared separately, regardless of how they are shipped into China. In other words, a separate customs declaration form must be filed and submitted for such parts, even if they arrive along with other parts that are not characterized as complete vehicles, for example because the latter were intended to be sold as spare parts rather than for assembly into a registered vehicle model. This declaration of the importation of auto parts is to be distinguished from the declaration of duty payable to customs authorities after imported auto parts have been assembled into a complete vehicle. (See *infra*, para. 120)

[156]Panel Reports, para. 7.53 and Article 14 of Decree 125.

[157]See Panel Reports, paras. 7.53-7.55; and generally Articles 13-16 and 27 of Decree 125. The Panel noted China's explanation that, in the context of the measures, the "bonding" requirements (referred to in Articles 16 and 27 of Decree 125) relate to the requirement imposed on automobile manufacturers to provide bonds for imported auto parts (and not to physical control of the imported auto parts themselves) as well as to registration (under the measures); the keeping of records of the imported parts and components accounting for their assembly into registered vehicle models; and the establishment and upkeep of an electronic account. This electronic account, called the "Q-account", connects the automobile manufacturer to the relevant customs office via the Internet. Each entry of bonded auto parts for the registered vehicle model is recorded in the Q-account which is adjusted as parts and components that entered in bond are assembled into registered vehicle models and once the charge is paid. (Panel Reports, para. 7.55)

The parts are not, however, subject to any ongoing physical confinement or any other restriction by customs authorities on their use in the internal market.[158]

119. Once production of the relevant vehicle model begins, and within 10 days of production of the "first batch" of such vehicles, the automobile manufacturer must submit a verification application to the CGA, which instructs the Verification Centre to conduct a verification and issue a Verification Report.[159] Verification is conducted by a "Special Verification Team" of three or five automobile experts and involves inspection of the physical vehicle(s) as well as documentary evidence.[160] The Verification Centre is to conduct the verification and issue a report within one month, although in practice this process may take from 30 days to a few years.[161] The manufacturer may produce and sell the vehicle model in question while the Verification Report is pending.

120. By the tenth working day of the month following issuance of the Verification Report[162], the automobile manufacturer must make a declaration of duty payable, and submit additional documentation, to the district customs office, in respect of all relevant complete vehicles assembled from when production of the vehicle model began through to the end of the month in which the Verification Report was issued.[163] The district customs office then[164] proceeds to classify the auto parts as complete vehicles and to collect the "duty" and import VAT for all imported auto parts used in assembling those complete vehicles.[165] It is this "duty" that constitutes the "charge" under the measures. Thereafter, the automobile manufacturer must, by the tenth working day of each month, make a declaration of "duty", and submit accompanying documentation[166] in respect of the complete vehicles of relevant vehicle models that were assembled by that manufacturer in the preceding month,

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[158]Panel Reports, para. 7.209.

[159]Panel Reports, paras. 7.56-7.58. See also Articles 17-26 of Decree 125 and Articles 6-12 of Announcement 4.

[160]Panel Report, footnote 205 to para. 7.34. See also Articles 3-5 and 12 of Announcement 4.

[161]Panel Reports, para. 7.66. At the oral hearing in this appeal, China confirmed that before the Verification Report is issued, and prior to the first payment under Article 31 of Decree 125 for auto parts meeting the criteria, vehicle models that have been registered as auto parts characterized as complete vehicles can nevertheless be sold in China.

[162]See Article 31 of Decree 125.

[163]Pursuant to Article 34 of Decree 125, the manufacturer must submit: (i) the Verification Report; (ii) the quantity of the complete vehicles of relevant vehicle models that were assembled by the manufacturer; (iii) the list of imported auto parts used in the assembling of such complete vehicles; and (iv) other documents deemed necessary by the customs authorities. (Panel Reports, para. 7.60)

[164]The Panel concluded that classification and collection occur after declaration. (Panel Reports, para. 7.61)

[165]Panel Reports, para. 7.59-7.61; Articles 27-35 of Decree 125.

[166]*Supra*, footnote 163.

whereupon the district customs office will classify all the parts used in the production of these vehicles as "complete vehicles" and collect the "duty". This process continues unless and until a re-verification is requested.

121. When the imported parts used in the production of a specific vehicle model meet the criteria under the measures at issue, then the 25 per cent charge and the requirements under the measures apply in respect of *all* imported parts assembled into the relevant vehicle model.[167] It is immaterial whether the auto parts that are "characterized as complete vehicles" were imported in multiple shipments[168]—that is at various times, in various shipments, from various suppliers and/or from various countries—or in a single shipment.[169] It is also immaterial whether the automobile manufacturer imported the parts itself or obtained the imported parts in the domestic market through a third party supplier such as an auto part manufacturer or other auto part supplier. However, if the automobile manufacturer purchases imported parts from such an independent third party supplier, the automobile manufacturer may deduct from the 25 per cent charge that is due the value of any customs duties that the third party supplier paid on the importation of those parts, provided that the automobile manufacturer can furnish proof of the payment of such import duties.[170] If optional parts that are imported are installed on a relevant vehicle model, the manufacturer must report those optional parts to the Verification Centre, make declarations at the time of the actual installation of the optional parts and pay the 25 per cent charge on such optional parts.[171]

122. There are certain qualifications and exceptions to the operation of the measures at issue described above. We mention four below.

123. First, an automobile manufacturer may apply for re-verification of a vehicle model if changes in the configuration or combinations of imported parts used in the production of a particular vehicle model may result in a change in whether that vehicle model meets the "essential character" criteria in Articles 21 and 22 of Decree 125, and a Re-Verification Report will be issued by the Verification Centre.[172] If the re-verification indicates that the thresholds are no longer met, the relevant vehicle

[167]In other words, as all participants confirmed at the oral hearing, the charge applies to *all* imported parts assembled into the complete vehicles, even parts that were not considered in determining whether the relevant vehicle model met the thresholds set out in Articles 21 and 22 of Decree 125.
[168]Panel Reports, paras. 7.35 and 7.69 and footnote 236 thereto.
[169]Panel Reports, para. 7.35.
[170]Panel Reports, paras. 7.36-7.38; Article 29 of Decree 125.
[171]Panel Reports, para. 7.58; Article 20 of Decree 125.
[172]Panel Reports, para. 7.57; Article 20 of Decree 125.

model and any imported parts used to produce it will no longer be administered under the measures at issue. If the re-verification indicates that the thresholds are met, then the imported parts and relevant vehicle model will be administered according to the operation of the measures outlined above, except that it is the Re-Verification Report that must be submitted to customs authorities at the time of the post-assembly "duty" declaration.

124. Secondly, if imported auto parts that were, at the time of importation, declared as complete vehicles are not used in the production of the relevant vehicle model within one year, the automobile manufacturer must declare duty payment within 30 days of the expiry of the one-year period, and the customs authorities will collect the 10 per cent duty applicable to the imported auto parts.[173]

125. Thirdly, when domestic automobile manufacturers or domestic auto part manufacturers "substantially process" imported auto parts (excluding assemblies and sub-assemblies)[174], the resulting auto parts manufactured by such domestic manufacturers are treated as domestic auto parts and are therefore not counted toward the thresholds and are not subject to the charge.

126. Fourthly, under Article 2(2) of Decree 125, automobile manufacturers importing CKD and SKD kits may declare these kits to the customs in charge of the area where the manufacturer is located and pay duties at the time of importation. Although this provision affords an exemption from at least some aspects of the measures, the precise scope of that exemption is disputed in this appeal. Further details regarding the treatment of CKD and SKD kits under the measures at issue can be found in Section VIII of these Reports, which examines China's appeal of the Panel's finding that the measures at issue are inconsistent with the commitment in paragraph 93 of China's Accession Working Party Report.

[173]See Article 29, second paragraph, of Decree 125, and United States' response to Panel Question 17, Panel Reports, Annex A-1, p. A-26.

[174]Panel Reports, paras. 7.80 and 7.81; and Article 24 of Decree 125. Article 24 does not apply to the processing of imported assemblies and sub-assemblies themselves, but rather to imported parts incorporated into assemblies and sub-assemblies. (See also Articles 16-18 of Announcement 4). Whether "substantial processing" has occurred is determined by reference to criteria set out in China's *Regulation on Rules of Origin for Imported and Exported Goods*.

V. Characterization of the Charge Imposed under the Measures at Issue

127. Before the Panel, the complainants challenged the consistency of the measures at issue with various provisions of the GATT 1994, the *TRIMs Agreement*, the *SCM Agreement*, China's Accession Protocol and China's Accession Working Party Report.[175] The Panel decided to begin its analysis with the claims under Article III of the GATT 1994.[176] Before proceeding to examine the substance of these Article III claims, the Panel stated that it would "preliminarily determine" whether, as contended by the complainants, the charge imposed on automobile manufacturers under the measures at issue constitutes an "internal charge" under Article III:2, or, as contended by China, an "ordinary customs duty" under Article II:1(b).[177] The Panel observed 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".[178]

A. *The Panel's Findings on the Preliminary Issue of Whether the Charge Imposed Under the Measures at Issue is an Internal Charge or an Ordinary Customs Duty*

128. The Panel saw its task of resolving this threshold issue as necessarily involving interpretation of both the terms "internal charges" in Article III:2 and "ordinary customs duties" in Article II:1(b). Beginning with the former, the Panel looked at its ordinary meaning[179], the immediate context provided by the term "imported into the territory" in Article III:2[180] and the context provided by the *Ad* Note to Article III.[181] The Panel also referred to GATT and WTO jurisprudence which it considered to be supportive of its interpretation.[182] Turning to the term "ordinary customs duties" in Article II:1(b), the Panel examined its ordinary meaning[183], the immediate context supplied by the term "on their importation" in the first sentence of Article II:1(b)[184], and the context provided by the

[175]Panel Reports, paras. 7.96-7.101. Specifically, the complainants made claims under Article II:1(a) and (b), Article III:2, 4 and 5, Article XI:1 and Article XXIII:1(b) of the GATT 1994; Article 2 of the *TRIMs Agreement* and paragraphs 1(a) and 2(a) of Annex 1 thereto; Articles 3.1(b) and 3.2 of the *SCM Agreement*; Part I, paragraphs 1.2, 7.2, and 7.3 of China's Accession Protocol; and paragraphs 93, 203 and 342 of China's Accession Working Party Report. (*Supra*, paras. 3-5)

[176]Panel Reports, para. 7.100.

[177]Panel Reports, para. 7.105.

[178]Panel Reports, para. 7.105.

[179]Panel Reports, paras. 7.127 and 7.128.

[180]Panel Reports, para. 7.129.

[181]Panel Reports, para. 7.133.

[182]Panel Reports, paras. 7.130-7.132 (referring to GATT Panel Report, *Belgium – Family Allowances (allocations familiales)*, para. 2; GATT Panel Report, *Canada – Gold Coins* (unadopted), para. 50; and Panel Report, *Argentina – Hides and Leather*, para. 11.145)

[183]Panel Reports, paras. 7.139-7.142.

[184]Panel Reports, paras. 7.154-7.166.

phrase "on or in connection with the importation"—relating to "other duties or charges"—in the second sentence of Article II:1(b).[185] The Panel also opined that China had not established any relevant subsequent practice, within the meaning of Article 31(3)(b) of the *Vienna Convention*, that would support its interpretation of the term "ordinary customs duties".[186]

129. The Panel then juxtaposed its interpretations of the relevant terms in Articles II:1(b) and III:2, respectively, as follows:

> [T]he 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. 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 ... It is at this moment, and this moment only, that the obligation to pay such charge 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.[187] (original emphasis; footnotes omitted)

> In contrast to ordinary customs duties, the obligation to pay internal charges does not accrue because of the importation of the product at the very moment it enters the territory of another Member but because of the internal factors (e.g., because the product was re-sold internally or because the product was used internally), which occurs once the product has been *imported* into the territory of another member. The status of the *imported* good, which does not necessarily correspond to its status at the moment of *importation*, seems to be the relevant basis to assess this internal charge.[188] (original emphasis)

130. The Panel determined that its interpretations of "ordinary customs duties" and "internal charges" were consistent with each other, as well as with the approach of the GATT panel in *EEC – Parts and Components*.[189] As a last step, the Panel observed that, to achieve the object and purpose of

[185]Panel Reports, paras. 7.175-7.178.
[186]Panel Reports, para. 7.182.
[187]Panel Reports, para. 7.184.
[188]Panel Reports, para. 7.185.
[189]Panel Reports, paras. 7.184 and 7.185.

Articles II and III of the GATT 1994 and the *WTO Agreement,* Members must respect the boundaries between Article II and Article III.[190]

131. The Panel then summarized its understanding of "ordinary customs duties" and "internal charges" as follows:

> [I]f the obligation to pay a charge does not accrue based on the product at the moment of its importation, it cannot be an "ordinary customs duty" within the meaning of Article II:1(b), first sentence of the GATT 1994: it is, instead, an "internal charge" under Article III:2 of the GATT 1994, which obligation to pay accrues based on internal factors.[191]

132. Next, the Panel identified certain characteristics of the charge imposed under the measures at issue as having particular significance for legal characterization purposes. The Panel highlighted that the obligation to pay the charge accrues internally after the auto parts have been assembled into motor vehicles within China.[192] The Panel also attached importance to the fact that the charge is imposed on automobile manufacturers rather than on importers in general, and to the fact that the imposition of the charge on specific imported parts is based upon what *other* imported or domestic parts are used together with those imported parts in assembling a vehicle model, rather than upon the specific parts at the moment of importation.[193] In addition, the Panel considered significant the fact that identical imported parts imported at the same time in the same container or vessel can be subject to different charge rates depending on whether or not the vehicle model into which they are later assembled meets the criteria set out in the measures.[194]

133. Based on these characteristics of the measures at issue, the Panel concluded that the charge imposed on automobile manufacturers is an internal charge within the meaning of Article III:2 of the GATT 1994.[195] The Panel excluded from the scope of this finding the "charge" imposed on CKD and

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[190]Panel Reports, paras. 7.198-7.202. For the Panel, Article II reflects the objective of preserving the value of negotiated tariff concessions that are bound in a Member's Schedule of Concessions, while Article III aims to avoid protectionism in the application of internal taxes and regulatory measures. The Panel considered that the disciplines in these provisions also promote an overall objective of the *WTO Agreement*, namely, ensuring "the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." (Panel Reports, para. 7.201 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 243))

[191]Panel Reports, para. 7.204.

[192]Panel Reports, para. 7.205.

[193]Panel Reports, para. 7.207.

[194]Panel Reports, para. 7.207.

[195]Panel Reports, para. 7.212.

SKD kits imported under Article 2(2) of Decree 125, which it considered to be an ordinary customs duty.[196]

B. *China's Appeal*

134. China appeals the Panel's characterization of the charge imposed under the measures at issue. In China's view, the Panel reached its finding on the basis of an erroneous interpretation of the first sentence of Article II:1(b) of the GATT 1994, which failed to take into account the context provided by the rules of the Harmonized Commodity Description and Coding System (the "Harmonized System"). China asserts, in particular, that Rule 2(a) of the General Rules for the Interpretation of the Harmonized System ("GIR 2(a)")[197] enables national customs authorities to classify unassembled auto parts as a complete motor vehicle, including in the situation where auto parts that are related through their subsequent common assembly arrive in multiple shipments.

135. China points out that Article II:1(b) requires customs authorities to determine, first, what the "product" is and, secondly, to apply the corresponding ordinary customs duty to that product. China emphasizes that, because the Harmonized System provides the rules by which Members determine the "condition" or "status" of a product at the moment of importation, these classification rules cannot be separated from the question of whether the measures at issue in this dispute impose ordinary customs duties. In China's view, this means that the Panel erred in separating the threshold question of whether the charge imposed under the measures is an ordinary customs duty from the question of whether the Harmonized System allows China to apply GIR 2(a) to multiple entries of auto parts, and in its evaluation of the nature of the charge imposed on imported auto parts under the measures at issue. China considers that only by evaluating whether the charge imposed under the measures at issue is related to a valid classification of the products under the Harmonized System could the Panel properly have determined whether the charge is an ordinary customs duty or an internal charge.

[196]Panel Reports, footnote 431 to para. 7.212; see also para. 7.636. *Infra*, Section VIII.
[197]The text of 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 falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

136. Canada, the European Communities and the United States (the "appellees") all consider that the Panel correctly dealt with the issue of the characterization of the charge imposed under the measures at issue as a threshold issue; properly interpreted the scope of Article II:1(b), first sentence, and Article III:2 of the GATT 1994; and rightly characterized the charge imposed under the measures at issue as an internal charge. The appellees suggest that accepting China's approach would "blur"[198] or "confuse"[199] the threshold issue of which provision of the GATT 1994 applies to the charge imposed under the measures with the distinct issue of whether the measures are consistent with that provision, and would imply putting the "cart before the horse"[200], that is, presuming that the charge is an ordinary customs duty when this is the very question that needs to be analyzed.[201] The European Communities and Canada add that, even if the Appellate Body were to consider that the Panel should have taken some account of the rules of the Harmonized System in its interpretation of the first sentence of Article II:1(b), this would not imply that the Panel's interpretation of the term "ordinary customs duties" was wrong, nor would it require reversal of the Panel's ultimate finding that the charge imposed under the measures at issue is an internal charge falling within the scope of Article III:2.

137. We are of the view that China's appeal calls for us to assess the Panel's resolution of the threshold issue, including: (i) certain aspects of the analytical approach that the Panel adopted; (ii) the Panel's interpretation of the term "ordinary customs duties" in Article II:1(b) and of the term "internal charges" in Article III:2 of the GATT 1994; and (iii) the Panel's evaluation of the charge under the measures at issue in this dispute in the light of those interpretations.

1. The Panel's Analytical Approach

138. As indicated, the Panel explained that, before it could examine the substance of the claims under Article III:2 or the alternative claims under Article II:1(b), "as panels before us have similarly decided, we must first decide which of these two provisions is applicable to the charge under the measures."[202] The Panel also expressed the view that, in resolving this issue as a first step in its analysis, it would be fulfilling its duty under Article 11 of the DSU to determine the applicability of the provisions invoked by the complainants as the basis for their claims with respect to the measures

[198]European Communities' appellee's submission, para. 50.
[199]Canada's appellee's submission, paras. 44, 46, and 65.
[200]Canada's appellee's submission, para. 48.
[201]United States' appellee's submission, para. 25.
[202]Panel Reports, para. 7.105 (referring in footnote 269 to GATT Panel Report, *EEC – Parts and Components*, para. 5.4; GATT Panel Report, *Greece – Import Taxes*, para. 5; GATT Panel Report, *Canada – Gold Coins* (unadopted), para. 49; and Panel Report, *Argentina – Hides and Leather*, para. 11.139).

at issue.[203] The Panel then set out the analytical approach that it intended to use in deciding the threshold question of whether the charge imposed under the measures at issue constituted an "internal charge" under Article III:2 or an "ordinary customs duty" under Article II:1(b). In the Panel's view, in order to answer this question it sufficed "to examine the elements that differentiate these two kind of charges" and "then apply these elements to the specific aspects of the charge under the measures to determine under which provision it should fall."[204]

139. In its appeal, China challenges the Panel's decision to analyze the threshold issue separately from the issue of the consistency of the measures with Article II:1(b) of the GATT 1994. Yet, as the Appellate Body has previously observed, the "fundamental structure and logic" of a covered agreement may require panels to determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure with the substantive obligations imposed under that provision or covered agreement.[205] We consider this to be just such a case, particularly in the light of the Panel's observation—with which China expressly agrees—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".[206] If, as the Panel considered, the charge imposed on automobile manufacturers could fall within the scope of either the first sentence of Article II:1(b) *or* Article III:2, then the Panel had to begin its analysis by ascertaining *which* of these provisions applied in the circumstances of this dispute.

140. In explaining its approach to the threshold issue, the Panel noted that "the parties do not dispute that the charge imposed under the measures is *not* covered by the term 'all other duties and charges of any kind imposed on or in connection with the importation' within the meaning of Article II:1(b), second sentence, of the GATT 1994". The Panel also remarked that it did not need to "delineate 'ordinary customs duties' under the first sentence of Article II:1(b) of the GATT 1994 from 'all other duties and charges of any kind' under the second sentence" of Article II:1(b).[207] We understand the Panel to have meant by this that it did not need to define *exhaustively* all of the contours of that line. In fact, the Panel did consider the second sentence of Article II:1(b), albeit in

[203]Panel Reports, footnote 270 to para. 7.105.
[204]Panel Reports, footnote 270 to para. 7.105.
[205]Appellate Body Report, *Canada – Autos*, para. 151 (quoting Appellate Body Report, *US – Shrimp*, para. 119). See also Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.
[206]China's appellant's submission, para. 117 (quoting Panel Reports, para. 7.105).
[207]Panel Reports, footnote 270 to para. 7.105. The Panel explained that it did not need to do so because "the parties do not dispute that the charge imposed under the measures is *not* covered by the term 'all other duties and charges of any kind imposed on or in connection with the importation' within the meaning of Article II:1(b), second sentence, of the GATT 1994". (original emphasis)

discussing the "context" that it provided for the term "ordinary customs duties" within the first sentence of Article II:1(b).[208]

141. It seems to us that an examination of whether a particular charge is an internal charge or a border measure involves consideration of all *three* types of charges, that is: ordinary customs duties under the first sentence of Article II:1(b); other duties and charges under the second sentence of Article II:1(b)[209]; and internal charges and taxes under Article III:2.[210] This should assist a panel in understanding the relationship among these fundamental GATT provisions. In this case the Panel could have undertaken a more complete analysis of the architecture of Article III:2 and *both sentences* of Article II:1(b) of the GATT 1994. However, its resolution of the threshold question was not affected by the fact that the Panel did not do so. We note that China has recorded "0" in the "Other Duties and Charges" column of its Schedule of Concessions in respect of the products at issue in this dispute.[211]

142. Having thus considered the Panel's analytical approach, we are of the view that the Panel did not err in considering the threshold issue separately from and prior to its analysis of the consistency of the charge imposed under the measures at issue with China's obligations under the GATT 1994.

2. The Panel's Interpretation of the Terms "Ordinary Customs Duties" in Article II:1(b) and "Internal Charges" in Article III:2 of the GATT 1994

143. Although the Panel began its analysis of the threshold issue with Article III:2, we shall look first to Article II:1(b), because China's appeal focuses on the Panel's allegedly erroneous interpretation of this provision. We recall the Panel's explanation, noted above, that the first sentence of Article II:1(b) contains a "strict and precise temporal element" and that, if the obligation to pay a

[208]Panel Reports, paras. 7.175 and 7.178.

[209]We are also mindful that such duties and charges are permitted only when their nature and level are recorded in a Member's Schedule, they do not exceed the level recorded in such Schedule, and they existed on the relevant date specified in the *Understanding on Article II:1(b) of the General Agreement on Tariffs and Trade 1994*.

[210]We note, in this connection, that the Appellate Body recently observed in paragraph 157 of its Report in *India – Additional Import Duties* that:

> [w]hile both sentences of Article II:1(b) relate to duties or charges applied "on the importation" of certain products, the second sentence of Article II:1(b) also uniquely covers charges imposed "in connection with the importation" of such products.

[211]China made a commitment in paragraph 96 of its Accession Working Party Report, "to bind at zero other duties and charges in its Schedule of Concessions and Commitments".

charge does not accrue based on the product at the moment of its importation, such charge cannot be an "ordinary customs duty".[212]

144. China asserts that, in its interpretation of Article II:1(b), first sentence, the Panel failed to take into account the context provided by the rules of the Harmonized System. In China's view, the Panel could have determined whether the charge is an ordinary customs duty *only* by evaluating whether the charge imposed under the measures is related to a valid classification of the product under the rules of the Harmonized System.

145. Under Article 3.2 of the DSU, panels are bound to interpret provisions of the covered agreements in accordance with the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the *Vienna Convention*. We understand China to argue that the Panel's alleged interpretative error lay in its failure to take proper account of the term "product" in Article II:1(b), along with the rules of the Harmonized System, in interpreting the term "ordinary customs duties" in Article II:1(b) of the GATT 1994.

146. In *EC – Chicken Cuts,* the Appellate Body considered the issue of whether the Harmonized System could constitute context for the interpretation of a term in the European Communities' Schedule of Concessions. The Appellate Body pointed out that, although the Harmonized System is not formally part of the *WTO Agreement*, there is nonetheless a close link between that System and the covered agreements.[213] The Appellate Body explained 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.[214] (original emphasis)

[212]Panel Reports, paras. 7.184 and 7.204. See *supra*, para. 129.
[213]Appellate Body Report, *EC – Chicken Cuts*, para. 198.
[214]Appellate Body Report, *EC – Chicken Cuts*, para. 199.

147. China points to this statement in support of its position that the Harmonized System is also context for the interpretation of the first sentence of Article II:1(b). The appellees disagree, pointing out that the Harmonized System is only relevant context, if at all, for the interpretation of Members' Schedules.

148. We turn to the text of the first sentence of Article II:1(b) of the GATT 1994, which provides:

> 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.

149. The negotiators of the *WTO Agreement* used the Harmonized System as the basis for negotiating Members' Schedules of Concessions, and included express references to the Harmonized System in certain covered agreements for purposes of defining product coverage of those agreements or specific provisions thereof.[215] It follows that the Harmonized System is context for purposes of interpreting the covered agreements, in particular for the classification of products under Schedules of Concessions and for defining the product coverage of certain covered agreements. This is what the Appellate Body found in *EC – Chicken Cuts.* Yet this does not answer the question of whether the Harmonized System is context that is relevant to the determination of whether a charge is an ordinary customs duty or an internal charge.

[215]In *EC – Chicken Cuts*, the Appellate Body observed that:

> [a] number of WTO agreements that resulted from the Uruguay Round negotiations use the Harmonized System for specific purposes; the *Agreement on Rules of Origin* (in Article 9), the *Agreement on Subsidies and Countervailing Measures* (in Article 27), and the *Agreement on Textiles and Clothing* (in Article 2 and the Annex thereto) refer to the Harmonized System for purposes of defining product coverage of the agreement or the products subject to particular provisions of the agreement.

(Appellate Body Report, *EC – Chicken Cuts*, para. 197) In paragraph 195, the Appellate Body did not exclude that the Harmonized System could also fall within the scope of Article 31(2)(b) or Article 31(3)(c) of the *Vienna Convention*.

150. We recall that Article 31(2) of the *Vienna Convention* provides:

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

151. We have already stated that the task of the treaty interpreter is to ascertain the meaning of particular treaty terms using the tools set out in Articles 31 and 32 of the *Vienna Convention.* The realm of context as defined in Article 31(2) is broad. "Context" includes all of the text of the treaty—in this case, the *WTO Agreement*—and may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". Yet context is *relevant* for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue. Thus, for a particular provision, agreement or instrument to serve as *relevant* context in any given situation, it must not only fall within the scope of the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language. Because WTO Members' Schedules of Concessions were constructed using the nomenclature of the Harmonized System, the Harmonized System is apt to shed light on the meaning of terms used in these Schedules. It does not, however, automatically follow that the Harmonized System was context relevant to the interpretative question faced by the Panel in its analysis of the threshold issue in this dispute.

152. If the question before the Panel were whether auto parts could, consistently with China's Schedule of Concessions, be classified as complete motor vehicles, then the Panel would have been required to interpret the relevant entries in China's Schedule, and the Harmonized System would have been context relevant to that task. However, this was *not* the question before the Panel, at least not at

this stage of its analysis.[216] Rather, in dealing with the threshold question, the interpretative task of the Panel was to identify the scope and meaning of Article II:1(b) and Article III:2 of the GATT 1994, including ascertaining the meaning of the term "ordinary customs duties" in order to appreciate the types of charges that can constitute such ordinary customs duties.

153. The other terms contained in the first sentence of Article II:1(b) shed some light on the scope and meaning of "ordinary customs duties" and indicate, for example, that an ordinary customs duty is a charge imposed on *products*, *on their importation*. The Panel recognized both of these elements as immediate context for the term "ordinary customs duties" in the first sentence of Article II:1(b), and attached particular significance to the second of these elements. Thus, the Panel emphasized the *temporal* limits of the first sentence of Article II:1(b), and underlined that a key criterion for a charge to constitute an ordinary customs duty under Article II:1(b) is that it accrue at the moment of importation.[217]

154. China does not dispute that the moment of importation is relevant to determining whether a charge is an ordinary customs duty. According to China, however, it is also relevant that, to be an ordinary customs duty, a charge must be based on the "condition" or "status" of the product at the moment it enters the customs territory. China argues that the rules of the Harmonized System are necessary, for example, to determine the condition or status of a completely unassembled motor vehicle at the moment it enters the customs territory, and in particular to determine the "condition" or "status" of auto parts that "are demonstrably related to each other through their common assembly into the same motor vehicle".[218]

155. We have some difficulties with this argument. The Harmonized System categorizes products, and the characteristics of particular products are relevant to how they are categorized. We recognize, as China argues, that classification, and hence the tariff rate applied, might, in some circumstances, vary depending on the condition of goods at the moment of importation. Since different categories of

[216]Indeed, the Panel relied on the context provided by the Harmonized System in making its alternative findings under Article II:1(a) and (b) of the GATT 1994 and in its findings with respect to the consistency of China's tariff treatment of CKD and SKD kits with Article II:1(b). (See Panel Reports, paras. 7.389-7.451, 7.662-7.667, and 7.677-7.697)

[217]Panel Reports, para. 7.184.

[218]China's appellant's submission, para. 12. At the oral hearing in this appeal, China submitted that the "objective characteristics" that determine classification at the moment of importation include the accompanying documentation presented with the product, in this case the declaration made upon importation that the auto parts are "characterized as complete vehicles".

products are subject to different bound and applied tariff rates, the classification of a given product may affect the amount of the duty imposed. Accordingly, classification issues have some bearing on the question of whether a Member applying such a duty is in conformity with its obligation, under Article II:1(b), not to impose duties in excess of the bound rate set out in the Member's Schedule for the product concerned. Yet this issue (whether a duty applied to a *product* by virtue of its classification is consistent with Article II:1(b)) is separate from the issue of whether a *charge* falls under the first sentence of Article II:1(b) at all (as opposed to under Article III:2). It is not evident to us how classification rules are relevant to the latter issue. While it is true, as China argues, that the "classification of the product necessarily precedes the determination of which 'ordinary customs duty' applies"[219], it is not the case that classification of the product (even if properly done) necessarily precedes a determination of *whether* the charge that applies is an ordinary customs duty.

156. We understand China's argument regarding the context that the Harmonized System allegedly provides to be based on one of the General Rules for the Interpretation of the Harmonized System, namely, GIR 2(a), which 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 falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

157. China points out that GIR 2(a) allows national customs authorities to classify unassembled parts and components as the complete article, even though the assembly of the parts into the complete article will necessarily occur *after* the parts enter the customs territory of the importing country. China submits that a country may apply GIR 2(a) not only to auto parts that arrive in a single shipment, but also to parts that arrive in multiple shipments. In both cases, assembly must necessarily occur after entry of the parts into the customs territory and, in both cases, contends China, the charges are ordinary customs duties, because they are based on a proper determination of the product that is subject to the duty.

158. Yet we fail to see how the Panel erred in not relying on GIR 2(a) in resolving the threshold issue of whether the charge imposed under the measures at issue is an ordinary customs duty or an internal charge. The *right* of a WTO Member to impose a customs duty, and the *obligation* of an

[219]China's appellant's submission, para. 21.

importer to pay such a duty, accrue at the very moment the product enters the customs territory of that Member and by virtue of the event of importation.[220] In contrast, the classification rules according to which customs authorities determine under which tariff heading the "product" concerned falls, depending on its "status" or "condition", are not relevant to the nature of the "duty" itself because they do not determine the *moment* at which the *obligation* to pay accrues, but only the *amount* of that duty. Similarly, as all of the participants agree, the moment at which a charge is *collected* or *paid* is not determinative of whether it is an ordinary customs duty or an internal charge. Ordinary customs duties may be collected *after* the moment of importation, and internal charges may be collected at the moment of importation.[221] For a charge to constitute an ordinary customs duty, however, the *obligation* to pay it must accrue at the moment and by virtue of or, in the words of Article II:1(b), "on", importation.

159. Although China does not, in its appeal, explicitly call into question the Panel's interpretation of the term "internal charges" in Article III:2 of the GATT 1994, we consider that we cannot conclude our review of the Panel's disposition of the threshold issue without, as the Panel did, juxtaposing, that is, considering side-by-side, the first sentence of Article II:1(b) and Article III:2. The Panel adopted an analytical approach that required it to examine the respective scope of application of *both* provisions, and we have already expressed our approval of that approach.

160. Article III:2 of the GATT 1994 provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

[220]Panel Reports, para. 7.184.

[221]As regards the collection of internal charges, the *Ad* Note to Article III of the GATT 1994 provides:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

161. Like the Panel, we consider that the adjectives "internal" and "imported" suggest that the charges falling within the scope of Article III are charges that are imposed on goods that have already been "imported", and that the obligation to pay them is triggered by an "internal" factor, something that takes place *within* the customs territory.[222] Further, the second sentence of Article III:2 expressly refers to the principles set forth in Article III:1.[223] The Appellate Body has stated that Article III:1 articulates a general principle, that informs all of Article III, that internal measures should not be applied so as to afford protection to domestic production.[224] We note that, in addition to laws, regulations and requirements affecting, *inter alia,* the use and sale of imported goods on the internal market, the first paragraph of Article III also specifically mentions "internal quantitative regulations requiring the ... use of products in specified amounts or proportions" as among the types of measures that should not be applied so as to afford protection to domestic production, and such measures are subject to the specific disciplines of Article III:5, which also serves as relevant context.

162. As already mentioned, in examining the scope of application of Article III:2, in relation to Article II:1(b), first sentence, the time at which a charge is collected or paid is not decisive. In the case of Article III:2, this is explicitly stated in the GATT 1994 itself, where the *Ad* Note to Article III specifies that when an internal charge is "collected or enforced in the case of the imported product at the time or point of importation", such a charge "is nevertheless to be regarded" as an internal charge. What is important, however, is that the *obligation* to pay a charge must accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product.[225]

163. This leads us, like the Panel, to the view that a key indicator of whether a charge constitutes an "internal charge" within the meaning of Article III:2 of the GATT 1994 is "whether the obligation

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[222]Panel Reports, paras. 7.128 and 7.129.

[223]Article III:1 of the GATT 1994 provides:

> The Members recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

[224]Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, 97, at 111.

[225]The Panel referred to the Panel Report in *Argentina – Hides and Leather* in support of this proposition. In that case, the panel found that a requirement to pre-pay value-added tax (VAT) at the border fell within the scope of Article III:2, first sentence, because the measure applied to "definitive import transactions, but only if the products imported were subsequently re-sold in the internal Argentinean market", that is, only on the basis of the *internal* sale of the imported products. (Panel Reports, para. 7.131 (quoting Panel Report, *Argentina – Hides and Leather*, para. 11.145))

to pay such charge accrues because of an *internal* factor (e.g., because the product was *re-sold* internally or because the product was *used* internally), in the sense that such 'internal factor' occurs *after the importation* of the product of one Member into the territory of another Member."[226] We also observe that the Harmonized System does not serve as relevant context for the interpretation of the term "internal charges" in Article III:2.

164. In sum, we see the Harmonized System as context that is most relevant to issues of classification of products. The Harmonized System complements Members' Schedules and confirms the general principle that it is "the 'objective characteristics' of the product in question when presented for classification at the border"[227] that determine their classification and, consequently, the applicable customs duty. The Harmonized System, and the product categories that it contains, cannot trump the criteria contained in Article II:1(b) and Article III:2, which distinguish a border measure from an internal charge under the GATT 1994. Among WTO Members, it is these GATT provisions that prevail, and that define the relevant characteristics of ordinary customs duties for WTO purposes. Thus, even if the Harmonized System and GIR 2(a) would allow auto parts imported in multiple shipments to be classified as complete vehicles based on subsequent common assembly, as China suggests, this would not *per se* affect the criteria that define an ordinary customs duty under Article II:1(b). In any case, the Panel did not accept the broad interpretation of GIR 2(a) suggested by China.[228] Rather, the Panel remarked that its findings on the meaning of "as presented" in GIR 2(a) did not appear to contradict its finding as to the meaning of "on their importation" in Article II:1(b).[229]

165. In our view, accepting that a charge imposed on auto parts following, and as a consequence of, their assembly into a complete motor vehicle can constitute an ordinary customs duty would significantly limit the scope of "internal charges" that fall within the scope of Article III:2 of the GATT 1994. We also share the concerns expressed by the Panel to the effect that the security and predictability of tariff concessions would be undermined if ordinary customs duties could be applied based on factors and events that occur internally, rather than at the moment and by virtue of importation, and that this, in turn, would upset the carefully negotiated and balanced structure of key GATT rights and obligations, including the different disciplines imposed on ordinary customs duties and internal charges.[230]

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[226]Panel Reports, para. 7.132. (original emphasis)
[227]Panel Reports, para. 7.187 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 246).
[228]Panel Reports, paras. 7.451 and 7.611.
[229]Panel Reports, footnote 396 to para. 7.188.
[230]Panel Reports, paras. 7.186 and 7.211.

166. Based on all of the above, we consider that a determination of whether a particular charge falls under Article II:1(b) or Article III:2 of the GATT 1994 must be based on a proper interpretation of these two provisions. The Harmonized System does not provide context that is relevant to the threshold question or to the assessment of the respective scope of application of "ordinary customs duties" in the first sentence of Article II:1(b) and "internal charges" in Article III:2 of the GATT 1994 that must be undertaken in answering that question. It follows that the Panel did not err in interpreting the term "ordinary customs duties" in the first sentence of Article II:1(b) of the GATT 1994 without relying on the rules of the Harmonized System, in general, or GIR 2(a), in particular.

3. The Panel's Evaluation of the Charge under the Measures in the Light of its Interpretation of the Terms "Ordinary Customs Duties" and "Internal Charges"

167. Having interpreted the terms "internal charges" in Article III:2 and "ordinary customs duties" in Article II:1(b), the Panel applied these interpretations to the "charge" imposed on imports of auto parts under the measures at issue. To do so, the Panel identified various characteristics of that charge. The Panel explained why it considered that certain characteristics were significant for the determination of whether the charge falls within the scope of Article III:2 or Article II:1(b). The Panel also acknowledged other characteristics of the charge imposed under the measures and explained why these were not *determinative* of the nature of that charge.

168. The Panel then found:

> In sum, based on the above elements considered as a whole, in particular the fact that the charge under the measures relates to the internal assembly of auto parts into motor vehicles, we conclude that the charge is an internal charge within the meaning of Article III:2 of the GATT 1994.[231]

169. In its appeal, as indicated above, China argues that the Panel erred in finding that the charge imposed under the measures at issue is an internal charge rather than an ordinary customs duty. China emphasizes, in this connection, that "the fact that the assembly of parts into the complete article will necessarily occur *after* the parts have entered the customs territory does not mean that a charge assessed on this basis is an 'internal charge'".[232]

[231]Panel Reports, para. 7.210.
[232]China's appellant's submission, para. 39. (original emphasis)

170. We therefore next consider whether the Panel properly evaluated the nature of the charge imposed in this case, in the light of the meaning of "ordinary customs duties" and "internal charges".

171. We consider that a panel's determination of whether a specific charge falls under Article II:1(b) or Article III:2 of the GATT 1994 must be made in the light of the characteristics of the measure and the circumstances of the case.[233] In many cases this will be a straightforward exercise. In others, the picture will be more mixed, and the challenge faced by a panel more complex. A panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics. Having done so, the panel must then seek to identify the leading or core features of the measure at issue, those that define its "centre of gravity" for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge. It is not surprising, and indeed to be expected, that the same measure may exhibit some characteristics that suggest it is a measure falling within the scope of Article II:1(b), and others suggesting it is a measure falling within the scope of Article III:2. In making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant charge and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements.

172. We understand the Panel to have adopted just such an approach to the measures at issue in this case. The Panel identified the following characteristics of the charge as having particular significance for legal characterization purposes: (i) the obligation to pay the charge accrues internally after auto parts have entered the customs territory of China and have been assembled/produced into motor vehicles; (ii) the charge is imposed on automobile manufacturers rather than on importers in general; (iii) the charge is imposed based on how the imported auto parts are *used*, that is, *not* based on the auto parts as they enter, but instead based on what other parts from other countries and/or other importers and/or domestic parts are subsequently used, together with those imported parts, in assembling a vehicle model; and (iv) the fact that identical auto parts imported at the same time in the same container or vessel can be subject to different charge rates depending on which vehicle model they are assembled into.[234]

[233]In *India – Additional Import Duties*, the Appellate Body made a similar observation with respect to the issue of whether a measure falls under Article II:2(a) or the *Ad* Note to Article III. (Appellate Body Report, *India – Additional Import Duties*, footnote 304 to para. 153)

[234]Panel Reports, paras. 7.205 and 7.207.

173. We agree with the Panel as to the legal significance of these features of the measures at issue. Furthermore, there are additional characteristics of the charge imposed under the measures that the Panel recognized, and that support its characterization of that charge as an internal charge falling within the scope of Article III:2 of the GATT 1994. Foremost among these is the fact that it is not the declaration made at the time of importation, but rather the declaration of duty payment made subsequent to the assembly/production of complete motor vehicles, that determines whether the charge will be applied.

174. That the declaration made at the time of importation does not control or necessarily affect whether the charge under the measures will ultimately be applied to specific imported parts is illustrated most prominently in the scenario where an automobile manufacturer does not import parts directly, but instead purchases them from an independent third party supplier within China. In such circumstances, the third party supplier imports and declares those auto parts at the border and pays a 10 per cent duty. Yet those same parts may subsequently be subject to the 25 per cent charge[235]—imposed after assembly—if they are sold to an automobile manufacturer and assembled into a vehicle model that meets the thresholds set out in the measures at issue.

175. In addition, there are at least two circumstances in which imported auto parts that are not characterized as complete vehicles or declared as such at the moment of importation will nonetheless be subject to the charge under the measures at issue following vehicle assembly: (i) when imported auto parts are installed on a vehicle as *options* (that is, such parts were not mentioned in the self-evaluation or Verification Report because they are not installed on the baseline models of the particular vehicle model in question), the manufacturer must report the options to the Verification Centre and make declarations for purposes of paying the charge at the time of the actual installation of the optional parts[236]; and (ii) when, following re-verification due to an increase in the combinations or value of imported parts vis-à-vis domestic parts, a vehicle model that previously did not meet the criteria under the measures at issue is determined to meet those criteria, the imported parts used in the production/assembly of that model must be declared after assembly, and will then be subject to the charge.[237]

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[235]The automobile manufacturer is, in principle, liable to pay a 25 per cent charge. If the automobile manufacturer purchases imported parts from an independent supplier, the automobile manufacturer may deduct from the 25 per cent charge the value of any customs duties that the third party supplier paid on those parts, provided that the automobile manufacturer can furnish proof of the payment of such import duties. (S*upra,* 121, Panel Reports, paras. 7.36-7.38; and Article 29 of Decree 125 .

[236]Panel Reports, para. 7.58 (referring to the first paragraph of Article 20 of Decree 125).

[237]Panel Reports, para. 7.241.

176. There are also at least two circumstances in which auto parts that are characterized as complete vehicles and declared as such at the time of importation will *not* attract the 25 per cent charge under the measures at issue, namely: (i) when imported parts that are characterized as complete vehicles in the declaration made at the time of importation are not assembled/produced into complete vehicles within 12 months, they must be declared within 30 days of the expiration of the 12-month period and will be subject to a 10 per cent charge, rather than the 25 per cent charge that would otherwise apply under the measures at issue[238]; and (ii) when, following re-verification due to a decrease in the combinations or value of imported parts vis-à-vis domestic parts, a vehicle model that previously met the criteria under the measures at issue is determined no longer to meet those criteria, the imported parts used in the assembly/production of that model will not be subject to the charge under the measures at issue.[239]

177. In contrast, regarding the characteristics of the measures at issue that might suggest that the charge imposed thereunder is an ordinary customs duty, the Panel expressly acknowledged the following: (i) the measures at issue use language typically reserved for references to "ordinary customs duties"[240]; (ii) China's explanation of the policy purpose of the measures, and that the charge imposed thereunder "objectively relate[s] to the administration and enforcement of China's tariff provisions for motor vehicles"[241]; (iii) China's view that parts imported directly by an automobile manufacturer remain subject to customs control until after assembly/production of the relevant vehicle model[242]; and (iv) the measures at issue and the charge imposed thereunder are administered primarily by China's customs authorities.[243] Ultimately, the Panel considered that none of these factors, nor all of them taken together, was *determinative* of the issue of the legal characterization of the charge imposed under the measures at issue in this case.

178. We see no error in the Panel's approach. Taking each of these criteria in turn, we first observe that the way in which a Member's domestic law characterizes its own measures, although useful,

[238]See the second paragraph of Article 29 of Decree 125.
[239]Panel Reports, para. 7.57 (referring to the second paragraph of Article 20 of Decree 125).
[240]Panel Reports, para. 7.190. The measures at issue refer to, for example, "customs duties", "the tariff", "tariff rates", "duty bonds", "declaration of duty payable", "dutiable prices", "duty collection", "duty calculation", "duty rates", "duty deferral", "tariff classification" and "tariff experts".
[241]Panel Reports, para. 7.208.
[242]Panel Reports, paras. 7.208 and 7.209.
[243]Panel Reports, para. 7.190.

cannot be dispositive of the characterization of such measures under WTO law.[244] Secondly, "the intent, stated or otherwise, of the legislators is not conclusive" as to such characterization.[245] Thirdly, with respect to the alleged "ongoing customs control" over imported parts subject to the charge under the measures at issue, the Panel acknowledged that parts imported by automobile manufacturers are deemed to remain under bond and, to that extent, subject to ongoing customs control. Yet the Panel also found that there is no physical confinement or any other restriction by customs authorities on the use of these auto parts in the internal market so that the bond requirement is in the nature of a financial guarantee.[246] Lastly, with respect to the administration of the measures at issue by customs authorities, we recall that, in addition to the CGA, other agencies within the Chinese Government have a role under those measures. For example, the NDRC, the Ministry of Commerce, and the Ministry of Finance are assigned some responsibilities in the administration of the measures at issue.[247] In addition, as the Panel recognized, and as is the case with all of the criteria we have just mentioned, a degree of caution must be exercised in attributing decisive weight to characteristics that fall exclusively within the control of WTO Members, "because otherwise Members could determine by themselves which of the provisions would apply to their charges."[248]

179. We also note that some of China's arguments on appeal obscure what the Panel found and what the Panel did *not* find with respect to the measures at issue in this dispute. The Panel did *not*, as China suggests, find that the mere fact that the assembly of parts into a complete vehicle will necessarily occur *after* the parts have entered the customs territory means that a charge assessed on this basis is an internal charge. The Panel did, however, find "the *obligation* to pay the charge *accrues internally after* auto parts enter into the customs territory of China and are

[244]The Appellate Body has previously observed that "municipal law classifications are not determinative of issues raised in WTO dispute settlement proceedings." (Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 82 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 56))

[245]Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 259.

[246]Panel Reports, para. 7.209. China explained that the "bonding requirements" under the measures at issue also require automobile manufacturers to register the vehicle models which will use imported auto parts that have the essential character of a complete vehicle; to keep accurate records of the parts and components that it imports in bond and account for their assembly into registered vehicle models; and to establish an Internet account with the relevant customs office recording entries of parts and making adjustments as parts that entered in bond are assembled into registered vehicle models and duties are paid. (Panel Reports, para. 7.55)

[247]Panel Reports, footnote 211 to para. 7.39. See *supra*, footnote 132 to para. 110.

[248]Panel Reports, para. 7.190 (referring in footnote 398 thereto to GATT Panel Report, *EEC – Parts and Components*, paras. 5.6 and 5.7; Panel Report, *US – 1916 Act (Japan)*, paras. 6.58, 6.63, 6.134 and 6.152(a) and footnotes 461, 464, 504 and 518, respectively, thereto).

assembled/produced into motor vehicles."[249] China has not appealed this finding. China has also not challenged certain other findings made by the Panel with respect to the operation of the measures at issue, including: (i) that the measures at issue are the source of the legal obligation to pay the 25 per cent charge[250]; and (ii) that the 25 per cent charge imposed under the measures at issue is the same charge whether it is imposed upon automobile manufacturers purchasing imported parts from third party suppliers within China, or on automobile manufacturers importing parts directly.[251]

180. In sum, we consider that the Panel correctly identified those characteristics of the measures at issue that were relevant to the characterization of the charge imposed thereunder as either an ordinary customs duty within the meaning of Article II:1(b) or an internal charge within the meaning of Article III:2. The Panel did not err in its appreciation of the relative weight and significance to be accorded to those various characteristics, nor in its characterization of the charge as an "internal charge".

4. Conclusion

181. We consider that the Panel committed no error in its analytical approach to the threshold issue or in its interpretation of the term "ordinary customs duties" in Article II:1(b). Nor do we see any error in the Panel's related interpretation of the term "internal charges" in Article III:2 and its understanding of the key criteria that distinguish ordinary customs duties from internal charges. We have determined that the Panel did not err in applying its interpretations to the measures at issue and in relying on the characteristics of the measures that it had identified as relevant to the legal characterization of the charge.

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[249]Panel Reports, para. 7.205. (emphasis added; footnote omitted) The Panel referred, in particular, to Articles 5 and 28 of Decree 125 as support for this finding, and noted that, by the "charge" it meant the charge paid by manufacturers both when they had imported the parts themselves and when they had purchased such parts from third party suppliers. (Panel Reports, paras. 7.205 and 7.206)

[250]The Panel found that "the measures do impose both the charge and the administrative procedures attached to the charge." (Panel Reports, para. 7.19 (footnotes omitted)) At the oral hearing in this appeal, China stated that, except with respect to CKD and SKD kits, it was not appealing this finding of the Panel.

[251]The Panel found that, under the measures, "there is only one charge, which is ultimately triggered by the application of the thresholds after the assembly of the imported parts into complete vehicles in China." (Panel Reports, para. 7.115) At this stage of the analysis, the Panel was not examining the charge applied to imports of CKD and SKD kits pursuant to Article 2(2) of Decree 125. The Panel dealt with CKD and SKD kits separately, and some of its findings in this regard are subject to appeal by China. See *infra*, Section VIII.

182. For these reasons, we *uphold* the Panel's resolution of the threshold issue and its finding that "the *charge* under the measures is an *internal charge* under Article III:2 of the GATT 1994".[252]

VI. Consistency of the Measures at Issue with Article III of the GATT 1994

A. *Article III:2 of the GATT 1994*

183. Having resolved the threshold issue and found that the charge imposed under the measures is an internal charge falling within the scope of Article III:2 of the GATT 1994, the Panel went on to examine the consistency of the measures at issue with that provision. The Panel determined that: (i) "auto parts of domestic and foreign origin are like products within the meaning of Article III:2 of the GATT 1994"[253]; and (ii) "imported auto parts are subject to an internal charge in excess of those applied to domestic products within the meaning of Article III:2 of [the] GATT 1994".[254] As a result, the Panel concluded that:

> ... the charge under the measures is inconsistent with the first sentence of Article III:2 of the GATT 1994.[255]

184. On appeal, China does not contend that the Panel erred in finding that the products upon which the measures impose a charge are "like" domestic products, or in finding that the charge is "in excess" of that applied to like domestic products. Instead, China's claim of error is dependent upon its claim that the Panel erred in finding the charge imposed under the measures to be an internal charge rather than an ordinary customs duty. In this connection, China expresses agreement with the Panel that a charge cannot be at the same time an ordinary customs duty and an internal charge.[256] China

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[252]Panel Reports, para. 7.212. (original emphasis; footnote omitted) In footnote 431 thereto, the Panel qualified this finding by noting that it did not encompass the charge levied on the importation of CKD and SKD kits under the optional provision of Article 2(2) of Decree 125. We deal with China's appeal relating to the charge imposed on the importation of such kits *infra*,Section VIII.

[253]Panel Reports, para. 7.217. The Panel stated that, because "under the measures *origin* is the sole criterion distinguishing the imported and domestic parts, it is correct to treat such products as like products within the meaning of Article III:2 of the GATT 1994." (Panel Reports, para. 7.216; (original emphasis) (referring to Panel Report, *Canada – Autos*, para. 10.74, and Panel Report, *India – Autos*, paras. 7.174-7.176))

[254]Panel Reports, para. 7.222. The Panel found that, because domestic products are not subject to *any* charge under the measures, it could determine that the charge imposed on imported products was in excess of those applied to domestic products without answering "the question of whether the precise amount of this internal charge is equivalent to an *ad valorem* rate of 25 per cent or only 15 per cent over the imported part." (Panel Reports, para. 7.221)

[255]Panel Reports, para. 7.223. (footnote omitted) In footnote 445 thereto, the Panel qualified the scope of this finding, noting that it did not encompass the "ordinary customs duties" levied under Article 2(2) of Decree 125. We deal with China's appeal relating to the charge imposed on imports of CKD and SKD kits under Article 2(2) of Decree 125 *infra*, Section VIII.

[256]China's appellant's submission, para. 117 (referring to Panel Reports, para. 7.105).

acknowledged at the oral hearing in this appeal that, if we uphold the Panel's finding that the charge imposed under the measures is an internal charge falling within the scope of Article III:2, we must also uphold the Panel's finding that the charge is inconsistent with China's obligations under the first sentence of Article III:2 of the GATT 1994.

185. The appellees point out that the "sole basis"[257] of China's appeal regarding the consistency of its measures with Article III:2 is that the Panel erred in finding that the charge imposed under the measures at issue is an internal charge rather than an ordinary customs duty, and that China has not appealed the Panel's findings regarding the "actual features of the measures".[258] They contend that China's appeal on this ground should be rejected for the same reasons that its appeal of the Panel's resolution of the threshold issue should be rejected.

186. In view of the above, since we have upheld the Panel's finding that the charge imposed under the measures at issue is an internal charge falling within the scope of Article III:2 of the GATT, we also *uphold* the Panel's finding that:

> Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts.[259]

B. *Article III:4 of the GATT 1994*

187. In its analysis of the claims raised by the complainants under Article III:4 of the GATT 1994, the Panel found that: (i) "auto parts of domestic and foreign origin are like within the meaning of Article III:4"[260]; (ii) the measures at issue are laws, regulations and requirements within the meaning of Article III:4[261]; (iii) "the measures affect 'the internal sale, offering for sale, purchase, transportation, distribution or use' of imported auto parts, within the meaning of Article III:4"[262]; and

[257]Canada's appellee's submission, para. 66. See also United States' appellee's submission, para. 32.
[258]European Communities' appelllee's submission, para. 101. See also United States' appellee's submission, para. 32.
[259]Panel Reports, Section VIII:A(a)(i); Section VIII:B(a)(i); Section VIII:C(a)(i). See also Panel Reports, para. 7.223. In footnote 445 to this paragraph, the Panel expressly excluded the charge levied on the importation of CKD and SKD kits under Article 2(2) of Decree 125 from the scope of this finding. We deal with China's appeal relating to the charge imposed on imports of CKD and SKD kits under Article 2(2) of Decree 125 *infra*, Section VIII.
[260]Panel Reports, para. 7.235.
[261]Panel Reports, para. 7.243.
[262]Panel Reports, para. 7.257.

(iv) the measures accord less favourable treatment to imported auto parts than to domestic auto parts.[263] Based on these findings, the Panel concluded that:

> China's measures, which fall within the scope of Article III:4, are inconsistent with its obligations under Article III:4 of the GATT 1994 to afford no less favourable treatment to like imported products.[264]

188. On appeal, China contends that the Panel's finding that the measures fall within the scope of Article III:4 was "premised upon"[265] its finding that the charge imposed under the measures is an internal charge. Because, in China's view, the latter finding is in error, the Panel's findings under Article III:4 must also be reversed. China adds that, because the measures impose ordinary customs duties, the administrative procedures associated with those duties under the measures should be viewed as "customs measures that implement a valid method of classification under the rules of the Harmonized System"[266] and that these procedures do not, therefore, fall within the scope of Article III:4 of the GATT 1994.

189. The first part of China's appeal under Article III:4 is linked to and dependent upon its appeal relating to the Panel's determination that the charge imposed under the measures is not an ordinary customs duty, but is instead an internal charge falling within the scope of Article III:2 of the GATT 1994. In paragraph 182 above, we upheld the Panel's resolution of this threshold issue. Accordingly, we must reject China's appeal of the Panel's finding under Article III:4 to the extent that it is premised upon China's appeal of the threshold issue.

190. However, China also makes another argument in support of its appeal of the Panel's finding under Article III:4. Specifically, China contests the Panel's finding that the measures at issue "influence[] an automobile manufacturer's choice between domestic and imported auto parts and thus affect[] the internal use of imported auto parts."[267] China contends that the Panel erred in making this finding because, according to China, any "influence" that the measures may have on an automobile manufacturer's decision to use domestic over imported auto parts is attributable to the structure of the tariff rates bound in China's Schedule of Concessions, which are 10 per cent for auto parts and 25 per cent for complete vehicles. Thus, according to China, any incentives created are "inherent in China's

[263]Panel Reports, para. 7.271.
[264]Panel Reports, para. 7.272. See also Panel Reports, Section VIII:A(a)(ii); Section VIII:B(a)(ii); Section VIII:C(a)(ii).
[265]China's appellant's submission, para. 121.
[266]China's appellant's submission, para. 122.
[267]Panel Reports, para. 7.256.

permissible duty rates".[268] This means, in China's view, that the Panel erred in using the incentives created by the differential rates in China's Schedule to find a violation of Article III:4 when the Panel itself recognized that "the discrimination inherent in a customs duty that a Member validly imposes is not a form of discrimination that is prohibited under Article III".[269]

191. Both the United States and the European Communities point out that the difference in bound rates for auto parts and motor vehicles in China's Schedule of Concessions is *not* the "discrimination" relied upon by the Panel in finding that the measures at issue are inconsistent with Article III:4 of the GATT 1994. In their view, the Panel relied instead upon its finding that the measures at issue, including the administrative requirements that they impose upon manufacturers of vehicles meeting the criteria under the measures, influence a manufacturer to choose domestic auto parts over imported auto parts.

192. With respect to this issue, we observe, first, that China made an argument before the Panel very similar to the one it raises on appeal. The Panel stated that China appeared to "misunderstand" the claim made by the complainants with respect to this element of Article III:4:

> The complainants do not challenge the fact that China's tariff structure creates an incentive to *import auto parts* instead of *motor vehicles* but, instead, they challenge the alleged incentive created by the criteria under the measures to use *domestic auto parts* instead of *imported auto parts*.[270] (original emphasis)

193. In examining this "alleged incentive", the Panel reasoned that, in order to avoid the charge imposed under the measures at issue, automobile manufacturers 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. Producing vehicles that meet the criteria in the measures implies not only attracting the charge, which is imposed subsequent to assembly, but also the tracking and reporting of auto parts imported in multiple shipments. The Panel considered that these aspects of the measures "inevitably influence[]"[271] an automobile manufacturer's choice between domestic and imported auto parts and thus affect the internal use of imported auto parts.

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[268]China's appellant's submission, para. 123.

[269]Panel Reports, footnote 495 to paragraph 7.256 (quoting China's response to Panel Question 85, Panel Reports, Annex A-1, p. A-84).

[270]Panel Reports, para. 7.256.

[271]Panel Reports, para. 7.256.

194. In its reasoning on this issue, the Panel referred to certain other disputes, including *US – FSC (Article 21.5 – EC)*. We recall that the Appellate Body determined that a 50 per cent "fair market value" rule under the measure at issue in that case "affected" the internal use of imported products because it created an incentive for a manufacturer *not* to use imported input products.[272] Similarly, the Panel in *India – Autos* found that "indigenization requirements" (requirements to use a minimum amount of domestically produced parts) and "trade balancing requirements" (requirements to export products of an equivalent value to the imported products) created incentives for automobile manufacturers to purchase Indian parts and components rather than imported parts and components and, thereby, "affected" the internal sale, offering for sale, purchase and use of imported parts and components in the Indian market within the meaning of Article III:4 of the GATT 1994.[273] That panel also observed that "[t]he fact that a provision is not necessarily primarily aimed at regulating the offering for sale or use of the product on the domestic market is ... not an obstacle to its 'affecting' them."[274]

195. Returning to the circumstances of this case, we note that the measures at issue set out specific thresholds for determining when imported auto parts will be characterized as complete vehicles. The use by an automobile manufacturer, in a given vehicle model, of certain key assemblies or combinations of assemblies that are imported means that a higher (25 per cent) charge will be payable on *all* imported parts than would be the case if those combinations of imported assemblies were *not* used and the thresholds were *not* met, in which case any imported parts used in the vehicle model would be subject to only a 10 per cent duty. This creates an incentive for manufacturers to *limit* their

[272]At paragraph 212 of its Report in *US – FSC (Article 21.5 – EC)*, the Appellate Body explained:

> A manufacturer's use of imported input products always counts against the 50 percent ceiling in the fair market value rule, while in contrast, the same manufacturer's use of like domestic input products has no such negative implication.

[273]That panel reasoned that, in order to meet the "indigenization requirements", automobile manufacturers had to buy Indian parts and components rather than imported ones. As for the trade balancing requirements, the panel saw these as imposing an additional burden on car manufacturers importing parts (an obligation to export goods of equivalent value). The panel took the view that because a manufacturer's use of domestic parts would carry no such burden, the trade balancing requirement created an incentive to use domestic parts. (Panel Report, *India – Autos*, paras. 7.195-7.198 and 7.307-7.309)

[274]Panel Report, *India – Autos*, para. 7.305.

use of imported parts relative to domestic parts.[275] In addition, the measures at issue in this dispute impose administrative procedures, and associated delays, on automobile manufacturers using imported parts, which could be avoided entirely if a manufacturer were to use exclusively domestic auto parts. These incentives "affect" the conditions of competition for imported auto parts on the Chinese internal market.

196. On the basis of these elements of the measures at issue, and with reference to previous panel and Appellate Body decisions, the Panel found that "the administrative procedures imposed on any auto manufacturer using imported auto parts as well as the criteria set out in the measures, combined with the assessment of the charge which is based on the final assembly internally, create an incentive for auto manufacturers to use domestic auto parts instead of imported auto parts."[276] We see no error in this finding, which also served as the basis for the Panel's finding that the measures at issue "affect 'the internal sale, offering for sale, purchase, transportation, distribution or use' of imported auto parts, within the meaning of Article III:4 of the GATT 1994."[277] Furthermore, China has presented no challenge to, and we see no error in, the Panel's other findings under Article III:4, namely that imported auto parts are "like" domestic auto parts[278]; that the measures at issue are laws, regulations and requirements within the meaning of Article III:4[279]; and that the measures accord less favourable treatment to imported auto parts than to domestic auto parts.[280]

197. Accordingly, we *uphold* the Panel's finding that:

> Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts.[281]

[275]Similar incentives are created by virtue of Article 21(3) of Decree 125. This provision deems all imported auto parts used in a vehicle model to have the essential character of a complete vehicle when the vehicle model incorporates imported parts with a total price that accounts for 60 per cent or more of the total price of the complete vehicle. We note that this "value" criterion was originally scheduled to take effect on 1 July 2006, but its entry into force was postponed until 1 July 2008 because of "the administrative complexity of implementing this particular criterion". (See Panel Reports, para. 7.32 and footnote 202 thereto)

[276]Panel Reports, para. 7.257.

[277]Panel Reports, para. 7.257.

[278]Panel Reports, para. 7.235.

[279]Panel Reports, para. 7.243.

[280]Panel Reports, para. 7.271.

[281]Panel Reports, Section VIII:A(a)(ii); Section VIII:B(a)(ii); Section VIII:C(a)(ii). See also Panel Reports, para. 7.272.

VII. The Panel's "Alternative" Findings under Article II:1(a) and (b) of the GATT 1994

198. Having found that the charge under the measures at issue falls within the scope of, and is inconsistent with, Article III:2, first sentence, and that China had not demonstrated that the measures are justified under Article XX(d) of the GATT 1994[282], the Panel reached the "alternative" claim raised by the complainants under Article II of the GATT 1994. The complainants claimed that, in the event that the Panel were to consider that the charge under the measures constituted an ordinary customs duty, then such ordinary customs duty would be inconsistent with China's obligations under Article II:1(a) and (b) because it was imposed in excess of the bound tariff rates for auto parts in China's Schedule of Concessions. The Panel decided to analyze this alternative claim, and set out several reasons for doing so[283], including to assist the Appellate Body in completing the analysis in the event that the Appellate Body were to disagree with the Panel's resolution of the threshold issue and its characterization of the charge as an internal charge falling within the scope of Article III:2.

[282]The Panel's finding at Panel Reports, para. 7.365 that China's measures are not justified under Article XX(d), is not appealed.

[283]In footnote 641 to para. 7.371 of its Reports, the Panel set out the following reasons for deciding to examine the alternative claims:

> (i) all the complainants made an alternative claim under Article II of the GATT 1994; (ii) the complainants and China disagree on whether the measures are consistent with Article II of the GATT 1994 in the event the charge would fall within the scope of Article II of the GATT 1994; (iii) the precise borderline between Articles III:2 and II of the GATT 1994 may not always be clear-cut; (iv) if our finding under Article III:2 would be reversed, the Appellate Body could be called upon to examine the claims made under Article II, which would require a complex factual assessment and the weighing of evidence submitted by the parties to this dispute, an exercise which could go beyond the jurisdiction of the Appellate Body and make it impossible for the DSB to provide recommendations and rulings on all legal claims within the time-frame prescribed by the DSU; (v) if the DSB adopts our findings on Article III, the DSU's declared objectives of "prompt settlement" of disputes (Article 3.3 of the DSU), of a "satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and the covered agreements" (Article 3.4 of the DSU), of "a positive solution to a dispute" (Article 3.7 of the DSU) and of "effective resolution of disputes to the benefit of all Members" (Article 21.1), may be facilitated if the parties would have at their disposal the Panel's examination of the matter under Article II of the GATT 1994.

199. In examining this alternative claim, the Panel found that:

> ... the tariff provisions for motor vehicles (87.02-87.05) of China's Schedule of Concessions do not include in their scope auto parts imported in multiple shipments based on their assembly into a motor vehicle. Accordingly, to the extent the measures could be considered as falling within the scope of Article II of the GATT 1994, China's measures have the effect of imposing ordinary customs duties on imported auto parts in excess of the concessions contained in the tariff headings for auto parts under its Schedule, inconsistently with its obligations under Article II:1(a) and (b) of the GATT 1994.[284]

200. This finding, regarding the interpretation of "motor vehicles" in China's Schedule of Concessions, was one of two findings upon which the Panel based its ultimate conclusion with respect to the "alternative" claims raised. The other finding on which its conclusion was based was that certain aspects of "the criteria for the essential character determination under Article 21(2) and (3) and Article 22 of Decree 125 ... necessarily lead to a violation" of Article II:1(a) and (b) of the GATT 1994.[285]

201. These two findings led the Panel to conclude as follows:

> *In the alternative*, assuming that the measures fall within the scope of the first sentence of Article II:1(b) of the GATT 1994, with respect to imported auto parts in general ...
>
> (i) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article II:1(a) and Article II:1(b), first sentence of the GATT 1994 in that they accord imported auto parts treatment less favourable than that provided for in the appropriate Part of China's Schedule of Concessions.[286] (original italics)

202. China's appeal mainly concerns the first alternative finding above, namely the Panel's interpretation of the term "motor vehicles" in China's Schedule of Concessions. This part of China's appeal is linked to its claim that we should reverse the Panel's finding that the charge imposed under

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[284]Panel Reports, para. 7.523.

[285]Panel Reports, para. 7.612. In this regard, the Panel found for example that, to the extent that Article 21(2) of Decree 125 has an element that would necessarily lead to "a chassis fitted with engine" being classified and assessed as a complete motor vehicle notwithstanding that China's Schedule of Concessions has a specific tariff heading, 87.06, for "chassis fitted with engines", Article 21(2) is inconsistent with China's Schedule of Concessions. (See Panel Reports, para. 7.588)

[286]Panel Reports, Section VIII:A(b)(i), Section VIII:B(b)(i), and Section VIII:C(b)(i). The Panel also found that the measures at issue are "not justified under Article XX(d) of the GATT 1994 as measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994". (Panel Reports, Section VIII:A(b)(ii), VIII:B(b)(ii) and VIII:C(b)(ii))

the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994 and find, instead, that the charge imposed under the measures at issue is an ordinary customs duty. China considers that the Panel should not have examined GIR 2(a) and its application to multiple shipments "in the alternative", but as part of its examination of the threshold issue. Accordingly, China requests us to examine this part of the "alternative" analysis of the Panel, including its interpretation of GIR 2(a) and China's Schedule of Concessions, in order to determine that the charge imposed under the measures at issue is properly characterized as an ordinary customs duty. China argues that we should also find that the ordinary customs duties imposed under the measures are based upon a valid classification of related shipments of parts as "motor vehicles", and that, because such duties are not in excess of the relevant tariff bindings under China's Schedule of Concessions, there is no inconsistency with Article II:1(a) or (b). In the event that we reverse the Panel on the threshold issue, China does *not* appeal the Panel's finding regarding the "essential character" criteria under Article 21(2) and (3) and Article 22 of Decree 125.[287]

203. If, however, we uphold the Panel's finding that the charge under the measures is an internal charge within the meaning of Article III:2 of the GATT 1994, then China requests us to "find that the Panel's alternative reasoning and findings ... as well as the alternative conclusions and recommendations set forth in Section VIII of its Reports, are moot and of no legal effect."[288] In other words, China requests us to declare *both* of these findings made by the Panel, as well as its *ultimate* conclusion, to be moot and of no legal effect. This is, explains China, because both of these findings, as well as the conclusion, were based on the Panel's "alternative assumption that the charge imposed under the challenged measures is an ordinary customs duty".[289]

204. As indicated above, the appellees all request us to uphold the Panel's finding that the charge imposed under the measures at issue is an internal charge within the meaning of Article III of the GATT 1994. They all agree, as well, that if we uphold this finding, we should *not* accept China's request to declare the Panel's alternative findings to be moot and of no legal effect. Yet the appellees do not appear to share the same position on the question of whether we could or should examine the Panel's alternative findings under Article II:1(b) of the GATT 1994 in the event that we uphold the Panel's findings under Article III:2.

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[287]Panel Reports, para. 7.612.

[288]China's appellant's submission, para. 49. In other words, China's request that we declare the Panel's alternative findings to be moot and of no legal effect encompasses even those findings that it has not specifically appealed, including "the Panel's findings concerning the application of the 'essential character' test set forth in Section VII.D.3 of its Reports". (China's appellant's submission, footnote 91 to para. 116)

[289]China's appellant's submission, footnote 91 to para. 116.

205. At the oral hearing in this appeal, the European Communities invited us to address some of the troubling elements of the arguments made by China under Article II, so as to leave no doubt about the serious systemic implications of China's position, or as to the inconsistency of the measures at issue with WTO law from all possible angles. To do so would, in the estimation of the European Communities, help to secure a positive solution to the dispute in accordance with Article 3.7 of the DSU.

206. Canada highlights that the reasoning used by the Panel to reach its alternative findings reveals that certain elements of the measures, such as the "essential character" criteria contained therein could, under a modified measure, be applied to auto parts at the border. Canada explained at the oral hearing that, for this reason, it would be *useful* for us to examine the alternative findings made by the Panel. Canada believes that maintaining the Panel's findings under Article II would assist in securing prompt settlement and a positive solution to this dispute, and in preventing or resolving any disagreement as to the measures that China might take to comply with its WTO obligations.

207. The United States considers that, if we uphold the finding of the Panel that the charge imposed by China's measures is an internal charge, we need not examine the alternative findings of the Panel. At the oral hearing in this appeal, the United States agreed with the European Communities and Canada that the arguments made by China are troubling and would, if accepted, pose significant systemic concerns, but also pointed out that the Panel's alternative findings were expressly conditioned on an assumption that the charge is an ordinary customs duty. If we were to find that this assumption is false, then the Panel's alternative findings would no longer remain in place. The United States adds that the Panel nonetheless made a number of significant findings regarding Article II:1(b) of the GATT 1994 in its analysis of the threshold issue, and that these findings *would* remain in place if we uphold the Panel's resolution of the threshold issue.

208. After finding that the charge imposed under the measures at issue is, indeed, an internal charge within the meaning of Article III:2, the Panel went on to make alternative findings on the assumption that the charge imposed under the measures at issue is an ordinary customs duty within the meaning of Article II:1(b). We note that none of the participants have appealed the Panel's decision *to make* these alternative findings, or suggested that the Panel acted inappropriately in doing so. It is not unprecedented for panels to make alternative findings[290], and indeed this may be useful in

[290]See, for instance, Panel Report, *India – Patents (US)*, paras. 6.11, 6.12 and 7.44-7.50; Panel Report, *Canada – Dairy*, para. 7.119; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 6.234-6.246; Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.172-7.184; and Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1612 and 7.1618-7.1626.

resolving a dispute, particularly when, on appeal, the Appellate Body reverses other findings made by a panel.[291]

209. The only issue before us is whether we should examine the Panel's alternative findings. The Panel made these findings on the assumption that it had erred in finding the charge to be an internal charge. Yet we have found that it made no such error. To the contrary, the Panel properly characterized the charge imposed under the measures at issue as an internal charge, and properly found the measures at issue to be inconsistent with China's obligations under the first sentence of Article III:2 of the GATT 1994. In these circumstances, we see no reason to examine the Panel's alternative findings under Article II:1(a) and (b). Nor do we see any reason to accede to China's request to declare them to be "moot and of no legal effect".

VIII. The Panel's Findings with respect to Paragraph 93 of China's Accession Working Party Report

A. *Introduction*

210. This Section of our Reports deals with the Panel's findings with respect to the treatment of CKD and SKD kits under the measures at issue. CKD and SKD kits are a sub-set of all of the products covered by the measures. The Panel found, and it is undisputed, that the reference to CKD and SKD kits under the measures at issue is a reference to all, or nearly all, of the auto parts and components necessary to assemble a complete vehicle, which must be packaged and shipped in a single shipment, and which must go through the assembly process to become a complete vehicle after they have been imported into the importing country.[292]

211. Before the Panel, the complainants claimed that, under the measures at issue, China's tariff treatment of imports of CKD and SKD kits was inconsistent with Article II:1(b) of the GATT 1994. The Panel found that the complainants had not established these claims of inconsistency with

[291]The Appellate Body has stated that "panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level" (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126); and that "panels sometimes make alternative factual findings that serve to assist the Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by the panel" (Appellate Body Report, *US – Softwood Lumber IV*, para. 118).

[292]See Panel Reports, paras. 7.644-7.647.

Article II:1(b) of the GATT 1994, and that CKD and SKD kits could, in principle, be classified as motor vehicles.[293] These findings are not appealed.

212. The United States and Canada[294] also claimed that, under the measures at issue, China's tariff treatment of imports of CKD and SKD kits was inconsistent with the commitment made by China in paragraph 93 of its Accession Working Party Report. That provision reads as follows:

> 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.

213. At the outset of its analysis of the claims raised by Canada and the United States under paragraph 93 of China's Accession Working Party Report, the Panel stated:

> All parties agree that China's commitments under its Working Party Report are enforceable in WTO dispute settlement proceedings. The Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol. In turn, paragraph 342 of China's Working Party Report incorporates China's commitments under its Working Party Report, including paragraph 93, into the Accession Protocol. Therefore, China's commitment in paragraph 93 of the Working Party Report is also an integral part of the WTO Agreement.
>
> Accordingly, the Panel will interpret China's commitment under paragraph 93 of the Working Party Report in accordance with the interpretative rules of the *Vienna Convention* to determine whether China has acted inconsistently with commitments under paragraph 93 of the Working Party Report.[295] (footnotes omitted)

[293]Panel Reports, para. 7.736. In the course of a detailed analysis of this issue the Panel examined the context relevant to the term "motor vehicles" in China's Schedule of Concessions, including the context provided by the Harmonized System, and found, *inter alia*, that "the context of the term 'motor vehicles', in particular GIR 2(a), suggests that CKD and SKD kits could in principle be classified as complete vehicles". (Panel Reports, para. 7.697)

[294]The European Communities did not make a claim under paragraph 93 of China's Working Party Report.

[295]Panel Reports, paras. 7.740 and 7.741.

214. The Panel proceeded, therefore, on the basis that the commitment made by China in paragraph 93 of its Accession Working Party Report is enforceable in WTO dispute settlement proceedings and should be interpreted in accordance with the customary rules of interpretation as codified in Articles 31 and 32 of the *Vienna Convention*. Neither of these propositions has been disputed at any point in these proceedings, including in this appeal.

215. After examining the claims raised by the United States and Canada, the Panel found that:

> China has violated its commitment under paragraph 93 of China's Working Party Report, which is an integral part of the WTO Agreement, that it will apply tariff rates of no more than 10 per cent to CKD and SKD kits if China creates tariff lines for CKD and SKD kits.[296] (footnote omitted)

216. China appeals this finding on several grounds. China makes two allegations of a preliminary nature: first, that the Panel erred in construing the measures at issue as imposing a charge on importers of CKD and SKD kits who declare and pay duties at the border; and, secondly, that the Panel erred in ruling on a claim for which a *prima facie* case had not been established by either the United States or Canada. In addition, and in the alternative, China claims that the Panel erred in its substantive finding that the measures are inconsistent with the commitment in paragraph 93 of China's Accession Working Party Report. We consider these elements of China's appeal below.

B. *Applicability of the Measures at Issue to Imports of CKD and SKD Kits*

217. The first ground upon which China alleges that the Panel erred in reaching its findings under paragraph 93 of China's Accession Working Party Report is that the Panel erred in construing the measures at issue as imposing a "charge" or "duty" on importers of CKD and SKD kits who exercise the option provided under Article 2(2) of Decree 125 to declare these kits and pay duties at the border. Before examining the substance of this claim of error, we first set out relevant provisions of the measures at issue, and then identify key elements of the Panel's analysis of this issue.

1. Relevant Provisions of the Measures at Issue

218. Three provisions of the measures at issue expressly refer to CKD and SKD kits. Article 2(2) of Decree 125 provides:

[296]Panel Reports, para. 7.758.

> 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.[297]

Article 21(1) of Decree 125 provides:[298]

> 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.

Article 56 of Chapter XI of Policy Order 8 provides:

> Auto parts shall be determined to have the character of a complete assembly in the following cases: complete assemblies imported in their constituent parts (completely knocked-down), or assemblies and/or systems imported dismantled into several key parts (semi-knocked-down). Whenever imported key parts attain or exceed the stipulated quantity they shall be characterized as Imported Assemblies.

2. The Panel's Analysis

219. The Panel dealt with the scope and meaning of the provisions of Decree 125 applicable to CKD and SKD kits as part of its description of the measures at issue and, in particular, of the "[e]xceptions under the measures".[299] The Panel found that Article 2(2) "is a provision that gives auto manufacturers *an option* to have their CKD or SKD kit[s] imports excluded from the 'administrative procedures' under the measures and to import them under regular customs procedures and pay the duties applicable to motor vehicles at the time of importation."[300] The Panel opined that the language

[297]Panel Reports, para. 7.72. Before the Panel, it was undisputed that, since the enactment of the measures, all imports of CKD and SKD kits have been made under Article 2(2).

[298]See also Article 13(1) of Announcement 4.

[299]See the heading to Section VII:A.1(c) of the Panel Reports, p. 164. At the outset of its discussion of the measures at issue, the Panel stated, at paragraph 7.2 of its Reports, that:

> [a]lthough we are mindful that the measures are part of the domestic law of China, we will be required to determine the meaning of particular provisions of the measures if interpretations of such provisions are contested by the parties. Our examination in such cases will be for the sole purpose of determining the conformity of the measures with relevant obligations under the WTO covered agreements ... .

[300]Panel Reports, para. 7.77. (emphasis added)

in Article 2(2) that "these Rules shall not apply" relieves importers of CKD and SKD kits only of their obligations to comply with the various administrative requirements under the measures. The Panel found that Article 2(2) does *not,* however, exempt importers of CKD and SKD kits from the "charge" imposed under the measures at issue. In so finding, the Panel relied upon the "substantive" criteria in Article 21(1), which it found provided the basis for the imposition of a charge on imports of CKD and SKD kits.[301] Reading the two provisions of Decree 125 together, the Panel determined that the exemption provided to CKD and SKD kit importers under Article 2(2) did not alter the fact that "their obligation to pay the charge under the measures for CKD and SKD kits arises from Article 21(1) of Decree 125."[302]

220. This finding had several consequences for the Panel's analysis of the measures at issue and the charge imposed thereunder. As we explained in Section V above, the Panel determined that the charge imposed under the measures at issue accrued *after* the assembly of the imported auto parts into complete vehicles. Relying, in particular, on this element, the Panel characterized that charge as an internal charge falling within the scope of the first sentence of Article III:2 of the GATT 1994. However, the Panel clarified that its finding with respect to this "internal charge" did not extend to the "charge" imposed on importers of CKD and SKD kits who, pursuant to Article 2(2) of Decree 125, declare their goods and pay the 25 per cent "charge" at the moment of importation. That latter "charge" was, in the view of the Panel, different in nature from the charge that accrues following assembly of parts into complete vehicles. Specifically, the Panel found that:

> ... to the extent the importation of CKD and SKD kits is exempted by Article 2(2) of Decree 125 from the administrative procedures under the measures and subject to China's regular customs procedures, including automatic issuance of an import licence, the imposition of the charge on CKD and SKD kits can be considered as an ordinary "customs duty" ... under Article II:1(b), first sentence of the GATT 1994.[303]

221. Thus, the Panel found that the 25 per cent "charge" imposed under the measures at issue upon importers of CKD and SKD kits under Article 2(2) of Decree 125 is an "ordinary customs duty". This finding in turn served as a basis for the Panel's ultimate finding that the measures at issue are

[301]Panel Reports, para. 7.77.
[302]Panel Reports, para. 7.78.
[303]Panel Reports, para. 7.636. See also Panel Reports, footnote 244 to para. 7.77. The Panel ultimately rejected, however, the complainants' claims that China's tariff treatment of CKD and SKD kits was inconsistent with China's obligations under Article II:1(b) of the GATT 1994. (Panel Reports, para. 7.736)

inconsistent with the commitment set out in paragraph 93 of China's Accession Working Party Report to apply a duty of no more than 10 per cent to imports of CKD and SKD kits.

3. The Treatment of CKD and SKD Kits under Decree 125

222. China appeals the Panel's finding that Article 2(2) of Decree 125 excludes the application of only the administrative procedures, and not the charge, under the measures. China argues that, read properly, Article 2(2) exempts *altogether* imports of CKD and SKD kits from the measures at issue, that is, it exempts them from *both* the administrative procedures *and* the charge imposed thereunder. Imports of CKD and SKD kits under Article 2(2) are, according to China, subject to import duties under China's regular customs laws, and *not* to a charge under the measures at issue. Because the measures impose *no charge* or *duty* on such imports of CKD and SKD kits, it follows, in China's view, that the Panel erred in finding that the measures at issue are inconsistent with paragraph 93 of China's Accession Working Party Report. China adds that the Panel's finding that the "charge" imposed on CKD and SKD kits imported under Article 2(2) is an ordinary customs duty cannot be reconciled with the Panel's resolution of the threshold issue and finding that the charge imposed by the measures is an internal charge falling under Article III of the GATT 1994.

223. Canada and the United States agree with the Panel that Article 2(2) must be read in conjunction with Article 21(1) of Decree 125. These provisions together clarify that the charge under the measures applies to *all* imports of CKD and SKD kits, although its characterization as a charge under either Article II or Article III depends on the import procedures used by automobile manufacturers importing these kits (that is, whether or not they invoke Article 2(2) of Decree 125). Canada and the United States challenge China's arguments that Article 2(2) somehow leaves intact a set of "regular customs procedures" with respect to imports of CKD and SKD kits. In their view, Article 2(2) was likely included in Decree 125 simply to expedite customs treatment of CKD and SKD kits, which are more easily verifiable as complete vehicles under the measures. Canada and the United States reject the notion that Article 2(2) was intended to exclude completely imports of CKD and SKD kits from the measures at issue, depending on the customs procedures chosen by importers of these kits.

224. In examining this issue, we first note that the participants appear to disagree on the standard of review that we should apply to the Panel's findings regarding the scope and meaning of Articles 2(2) and 21(1) of Decree 125. China submits that the Panel's finding as to the applicability of the charge imposed under the measures at issue to imports of CKD and SKD kits is a matter of legal

interpretation.[304] The United States, on the other hand, considers that a panel's "constructions of municipal law are factual determinations in WTO dispute settlement".[305] This means, for the United States, that the Appellate Body may not review such findings *de novo,* but must accord them the "same deference as other types of factual findings made by panels in WTO dispute settlement proceedings".[306]

225. The Appellate Body has explicitly stated that 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.[307] When a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU.[308] The Appellate Body has reviewed the meaning of a Member's municipal law, on its face, to determine whether the legal characterization by the panel was in error, in particular when the claim before the panel concerned whether a specific instrument of municipal law was, as such, inconsistent with a Member's obligations.[309] We recognize that there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements.[310] With respect to such elements, the Appellate Body will not lightly interfere with a panel's finding on appeal.

226. China's appeal regarding the Panel's assessment of how imports of CKD and SKD kits are treated under Decree 125 requires us to examine the Panel's construction of certain provisions of Decree 125. In doing so, we are mindful of the scope and standard of review set out above.

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[304]China's appellant's submission, para. 140 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105).

[305]United States' appellee's submission, para. 80.

[306]United States' appellee's submission, para. 83. Canada expressed a similar view at the oral hearing in this appeal, stating that a panel's interpretation of municipal law is a matter of fact and is subject to the standard of review to be accorded to factual findings.

[307]Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105. See also Appellate Body Report, *India – Patents (US)*, paras. 65-66 and 68.

[308]Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

[309]See, for instance, Appellate Body Report, *US – Section 211 Appropriations Act*, para. 106.

[310]The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* stated that "[i]f the meaning and content of the measure are clear on its face then the consistency of the measure can be assessed on that basis alone. If, however, the meaning … is not evident on its face, further examination is required." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168) See also Appellate Body Report, *US – Carbon Steel*, paras. 156 and 157.

227. China asserts that the Panel's assessment of Article 2(2) of Decree 125 is inconsistent with the plain meaning of that provision. In China's view, the two paragraphs of Article 2, read together, define: on the one hand, the circumstances in which the rules set forth in Decree 125 are applicable (in respect of auto parts that have the "essential character" of a motor vehicle and are characterized as complete vehicles following vehicle assembly); and, on the other hand, the circumstances in which those rules "shall not apply" (when CKD and SKD kits are imported under China's regular customs procedures and duties are paid upon importation). For China, Article 2(2) allows importers of CKD and SKD kits to be entirely exempt from the measures and, instead to declare CKD and SKD kits, and pay duties, by virtue of the application of China's customs law, and not by virtue of Decree 125.

228. Both the United States and Canada argue that, as a whole, the measures at issue create a new customs regime for the importation of auto parts characterized as complete vehicles into China, and that Article 2(2) merely sets up a special procedure within that regime for the payment of the charge under the measures. The United States asserts that, as a result of the adoption of Decree 125, an importer of a CKD or SKD kit can follow one of two paths set out in Decree 125: pay the charge upon importation as a customs duty; or subject the kit to the detailed internal requirements set out in Decree 125. At the oral hearing in this appeal, Canada suggested that, looking beyond Decree 125 to Chapter XI of Policy Order 8—pursuant to which Decree 125 was implemented—it is clear that the measures were intended to alter the normal procedures for all imports of auto parts characterized as complete vehicles.[311] Canada notes that Chapter XI refers specifically to CKD and SKD kits as being covered by the measures, and provides no exception for them. According to Canada, therefore, when Policy Order 8 and Decree 125 are read together, it is clear that the charge applies even to automobile manufacturers that import CKD and SKD kits under Article 2(2).

229. China's appeal calls for us to consider whether the Panel erred in construing Decree 125 to mean that: (i) automobile manufacturers that import CKD and SKD kits under Article 2(2) are exempt from the administrative procedures, but not from the charge, under the measures at issue; and (ii) the charge that the measures impose on such imports is an ordinary customs duty paid on importation.

[311]In particular, Canada considers that Article 53 of Chapter XI of Policy Order 8 illustrates that the measures at issue modify the procedures for declaring auto parts at the border. Article 53 provides:

> Any vehicle manufacturers using imported parts characterized as complete vehicles to produce vehicles should report this factually to the Ministry of Commerce, the Customs and NDRC. The imported parts for the vehicle models in question must all be declared for duty payment to the Customs office under whose jurisdiction the enterprise falls, so as to enable the relevant departments to exercise effective management.

230. We begin our analysis with the text of Article 2 of Decree 125 which, in its entirety, provides:

> *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.* (footnote omitted; emphasis added)

231. We note first that Article 2(2) provides that "these Rules shall not apply" to those automobile manufacturers importing CKD and SKD kits under this provision that opt to declare and pay duties on importation. The reference to "these Rules" in both the first and second paragraphs of Article 2 seems in both instances to be an abbreviated reference to Decree 125 itself, which is entitled "Administrative *Rules* on Importation of Automobile Parts Characterized as Complete Vehicles".[312] There is no textual limitation in Article 2(2) on the "Rules" that shall *not* apply. In particular, Article 2(2) does not indicate that importers of CKD and SKD kits are exempted from *only* the administrative procedures, while remaining subject to the charge, under the measures.

232. On its face, Article 2(2) provides an option to automobile manufacturers who import CKD and SKD kits to declare such importation and pay duties. There is no indication of what such "declaration" entails[313], nor of the legal basis for the "duties" to be paid by the automobile manufacturers importing CKD and SKD kits under this provision. Thus, we do not see a textual basis for reading Article 2(2) as establishing a new or special customs procedure for those importers that avail themselves of that provision. If anything, the language used in Article 2(2) seems typical of language that would be used to describe standard customs procedures at the time of importation, in that it refers to a declaration of importation and to the payment of duties.

[312]Emphasis added.

[313]Article 2(2) specifies that the declaration to be made thereunder must be made to the district customs office for the area where the manufacturer is located. At the oral hearing in this appeal, China explained that this is somewhat more restricted than China's regular customs procedures, which allow an importer the option of declaring imported goods *either* at its district customs office *or* at the port of entry of the goods. For imports of CKD and SKD kits under Article 2(2), only the former option is available.

233. As already explained, we read the references in Article 2 to "these Rules" as references to *all* of Decree 125. The Rules of Decree 125 do not appear to contemplate the type of separation of the charge under the measures from the administrative procedures associated with it that the Panel found to have been accomplished by virtue of Articles 2(2) and 21(1). This is because, as we have seen[314], Decree 125 sets out a number of procedural steps that precede or accompany the imposition of the charge under the measures at issue. These include: an automobile manufacturer's self-evaluation; requirements regarding the declaration to be made at the time of importation; bonding requirements, including tracking and reporting requirements; verification; and requirements in respect of the monthly declaration of duty payment that must be made by the automobile manufacturer using auto parts that are characterized as complete vehicles under the measures at issue. The provisions of Decree 125 never refer to any "charge" or "duty" in isolation, but only in connection with one or more of the procedural elements set out therein.

234. Furthermore—and leaving aside the possible import of Article 2(2)—the "charge" that is referred to throughout Decree 125[315] is a charge that is imposed *following* both assembly of the complete motor vehicles and verification.[316] Indeed, in describing the measures at issue, the Panel itself explained that the charge under the measures is not triggered until *after* assembly and *after* verification.[317] The Rules of Decree 125 also consistently make clear that it is the "characterization" of auto parts as "complete vehicles" that results in the imposition of the charge, and that such characterization occurs *at the stage when the vehicles are assembled*, as opposed to the time of importation.[318]

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[314]*Supra*, paras. 114-126.

[315]As explained at *supra,* footnote 127, the measures at issue do not use the word "charge", but instead use "tariff" or "duty".

[316]This is illustrated by, for example, the text of Article 17 of Decree 125, which stipulates, in relevant part, that "customs shall determine the applicable tariff rates and the dutiable prices, and shall handle the duty collection based upon the Verification Report issued by the Verification Center." Similarly, Article 31 makes clear that automobile manufacturers are to make a declaration of duty payment in respect of auto parts that *have already been assembled* into a vehicle model in respect of which a Verification Report has been issued, and that imposition of the charge occurs upon such declaration.

[317]The Panel explained, in paragraph 7.69 of its Reports:

> [T]o determine the applicability of the charge, customs officials wait pursuant to Article 28 of Decree 125 until automobile manufacturers finish assembling auto parts into motor vehicles and then the Verification Centre finishes its verification of whether the imported auto parts used in the assembly of a certain vehicle model should be characterized as complete motor vehicles within the meaning of the measures.

[318]Article 5 provides, in relevant part: "The reference to 'automobile parts characterized as complete vehicles' in these Rules shall mean that the imported automobile parts should be characterized as complete vehicles *at the stage when complete vehicles are assembled*." (emphasis added)

235. Taken together, all of the provisions of Decree 125 seem therefore to set up a seamless regime for *both* the administrative procedures *and* the charge that are applied in respect of auto parts characterized as complete vehicles. Given the many ways in which the administrative procedures and the charge are intertwined under Decree 125, we have some difficulty understanding how the Panel could read Article 2(2) to mean that CKD and SKD kits that are declared and paid for at the border, prior to assembly, and that are not subject to verification or other procedural steps under the measures at issue, can nonetheless be subject to the charge under the measures at issue.

236. The Panel's view that the measures impose a charge on CKD and SKD kits imported under Article 2(2) of Decree 125 rested in particular on its reading of this provision in conjunction with Article 21(1).[319] Accordingly, we turn to consider the latter provision.

237. Article 21 of Decree 125 lists the criteria for the imported auto parts that must be characterized as complete vehicles under the measures. The first paragraph of Article 21 characterizes as complete vehicles: "imports of CKD or SKD kits for the purpose of assembling vehicles." According to the Panel, this provision is the legal basis for the obligation to pay the "charge" on CKD and SKD kits. We do not see why the Panel was of the view that Article 21(1) served this function. On its face, it seems to us to be a definitional provision that identifies one sub-set of the imported auto parts used in a particular vehicle model that must be "characterized as complete vehicles" under the measures at issue. Article 21 appears to implement and reflect the content of Article 56 of Chapter XI of Policy Order 8, which serves a similar definitional purpose.[320] Unlike other provisions of Decree 125, Article 21 contains no reference to any "duty", "tariff" or "charge". In addition, the Panel's reliance on Article 21(1) of Decree 125 as the source of the obligation to pay the charge on imports of CKD and SKD kits under Article 2(2) is difficult to square with its identification of the source of the charge imposed on imported auto parts in general under the

[319]We recall that the Panel considered, in particular, that, "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." (Panel Reports, para. 7.78)

[320]Article 56 of Chapter XI of Policy Order 8 provides:

> Auto parts shall be determined to have the character of a complete assembly in the following cases: complete assemblies imported in their constituent parts (completely knocked-down), or assemblies and/or systems imported dismantled into several key parts (semi-knocked-down). Whenever imported key parts attain or exceed the stipulated quantity they shall be characterized as Imported Assemblies.

measures. In explaining that "the measures do impose ... the charge", the Panel referred to various provisions of Decree 125, but not to Article 21.[321]

238. Thus, we do not see how the text of Article 2(2) and the overall structure and logic of Decree 125, including Article 21(1), would render it possible to separate the charge from the administrative procedures associated with the imposition of that charge. It follows that the "duties" referred to in Article 2(2), which are to be declared and paid upon importation, are not duties imposed under Decree 125. Consequently, the Panel's construction of Article 2(2), read together with Article 21(1), amounts in our view to legal error.

239. Although we do not accept the Panel's construction of Article 2(2), we nonetheless agree with the Panel that this provision affords automobile manufacturers importing CKD and SKD kits an *option*.[322] Where we differ from the Panel is with respect to the *scope* of that option. In our view, the option provided to automobile manufacturers is an option to declare imports of CKD and SKD kits upon importation and, thereby, remove themselves from the application of the Rules of Decree 125, including from the charge imposed thereunder.[323] Should that option *not* be exercised[324], then the Rules apply, in their entirety. In other words, automobile manufacturers importing such kits would be subject to the administrative procedures under the measures at issue, the criteria in Article 21(1) of Decree 125, and the charge imposed post-assembly and post-verification.

240. It is *this* charge, accruing after assembly, that the Panel characterized as an internal charge within the meaning of Article III:2 of the GATT 1994. Yet, in the context of its construction of Article 2(2), the Panel also said that "[t]o the extent that an importer exercises the option provided in Article 2(2) of Decree 125 and imports CKD or SKD kits under the regular customs procedures ... the treatment of CKD and SKD kits imports under the measures (i.e. imposition of the charge on CKD and SKD kits) falls under the disciplines of Article II, not Article III of the GATT 1994."[325]

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[321]Panel Reports, para. 7.19. In footnote 188 thereto, the Panel referred to "the second sentence of Article 28 of Decree 125 ... ('... the customs ... shall base both the tariff and the import VAT on rates applicable to ...') ... Article 13(1) of Decree 125 ('... an automobile manufacturer ... shall ... pay duties ...'); Article 28(1) ('... Customs shall ... proceed with ... duty collection.'); Article 31(1) of Decree 125 ('An automobile manufacturer shall declare duty payment ...'); and Article 34 ('... declaration for duty payment ...')".

[322]Panel Reports, para. 7.77. China has not appealed this aspect of the Panel's findings.

[323]We also note that, elsewhere in its Reports, the Panel found that, both prior to and following accession, and before adoption of the measures at issue, China classified CKD and SKD kits as motor vehicles. (Panel Reports, para. 7.735)

[324]The Panel found that all imports of CKD and SKD kits had been made under Article 2(2) of Decree 125. (Panel Reports, para. 7.72 and footnote 1122 to para. 7.755)

[325]Panel Reports, footnote 244 to para. 7.77.

241. We recall that China emphasizes that the Panel's finding with respect to the meaning of Article 2(2) and the Panel's finding on the threshold issue are irreconcilable because the Panel also found that the measures impose "one charge", and a charge cannot be simultaneously both a border charge and an internal charge.[326]

242. Although, based on our reasoning above, it may not be necessary for us to consider this argument by China, we wish to make certain observations with respect to the Panel's approach. The Panel's statement that there is "one charge" under the measures at issue was made in response to China's arguments that the charge imposed upon automobile manufacturers that import parts directly was different from the "charge" imposed on automobile manufacturers that purchase imported parts from independent third party suppliers within China.[327] At that stage of its analysis, the Panel was not concerned with the charge applied to CKD and SKD kit importers under Article 2(2)[328], which the Panel dealt with in an entirely separate section of its Reports.[329]

243. Thus, it appears to us that the Panel considered that there were *distinct* charges imposed under Decree 125, and that it could characterize the "charge" imposed on imports of CKD and SKD kits under Article 2(2) of Decree 125 differently, as an ordinary customs duty. However, the Panel did not explain why this was so. Earlier in our analysis, we expressed the view that, in dealing with the threshold issue, the Panel properly scrutinized the key characteristics of the charge, evaluated the significance of those characteristics, and determined that the charge imposed under the measures at issue was an internal charge. In contrast, the Panel did not explain how or why the characteristics of the "charge" imposed on imports of CKD and SKD kits under Article 2(2) differed from those that it had earlier identified in its resolution of the threshold issue. Nor did it explain why such characteristics required characterization of the "charge" imposed on CKD and SKD kits imported under Article 2(2) as an ordinary customs duty. This does not seem to us to have been a proper approach to the characterization of this "charge".

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[326]China's appellant's submission, paras. 157 and 158 (referring to Panel Reports, paras. 7.105 and 7.115).

[327]The Panel rejected this argument and explained that "there is only one charge, which is ultimately triggered by the application of the thresholds after the assembly of the imported parts into complete vehicles in China". (Panel Reports, para. 7.115)

[328]The Panel specifically exempted the charge applied to CKD and SKD kit importers under Article 2(2) from the scope of its findings on the threshold issue (that there is only one charge: an internal charge) and with respect to the consistency of the internal charge with Article III:2 of the GATT 1994. (Panel Reports, para. 7.212 and footnote 431 thereto, and para. 7.223 and footnote 445 thereto)

[329]Panel Reports, Section VII:F.

244. For the reasons set out above, we *find* that the Panel erred in construing Decree 125 to mean that:

> [the] exemption provided for CKD and SKD kits in Article 2(2) of Decree 125 is limited to the administrative procedures under the measures, not the substantive criteria under Article 21(1) of Decree 125. ... 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.[330]

245. The Panel's subsequent finding, that the measures at issue are inconsistent with China's conditional commitment in paragraph 93 of its Accession Working Party Report, was premised upon this erroneous view that the measures at issue impose a charge that is an ordinary customs duty on CKD and SKD kits imported under Article 2(2) of Decree 125. The United States and Canada did not contend, nor do we see how they could have, that the charge imposed under the measures at issue could, as an internal charge within the meaning of Article III:2, somehow have violated China's commitment regarding its tariff treatment of CKD and SKD kits in paragraph 93 of its Accession Working Party Report. It follows that we must *reverse* the Panel's finding regarding such commitment, namely, that:

> Policy Order 8, Decree 125 and Announcement 4 are inconsistent with China's commitment under paragraph 93 of China's Working Party Report, which is an integral part of the WTO Agreement.[331]

C. *Whether the United States and Canada Failed to Establish a Prima Facie Case*

246. China argues that the Panel acted contrary to Article 11 of the DSU by ruling on a claim that neither the United States nor Canada had advanced, and for which they had both failed to establish a *prima facie* case of inconsistency. Specifically, China argues that Canada and the United States failed to make out a *prima facie* case in respect of the applicability of the measures at issue to imports of CKD and SKD kits imported under Article 2(2) of Decree 125, and/or that the charge under the measures could be simultaneously an internal charge and an ordinary customs duty. Having reversed the Panel's finding with respect to the applicability of the measures at issue to CKD and SKD kits imported under Article 2(2) of Decree 125, we need not consider whether the United States and Canada failed to make out a *prima facie* case in this regard.

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[330]Panel Reports, para. 7.78. See also Panel Reports, para. 7.77.
[331]Panel Reports, Section VIII:B(c)(ii) and Section VIII:C(c)(i). See also Panel Reports, para. 7.758.

D. *Consistency of the Measures at Issue with Paragraph 93*

247. We turn to China's conditional appeal relating to China's Accession Working Party Report, paragraph 93 of which provides:

> 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)

248. As stated above, the Panel found that:

> China has violated its commitment under paragraph 93 of China's Working Party Report, which is an integral part of the WTO Agreement, that it will apply tariff rates of no more than 10 per cent to CKD and SKD kits if China creates tariff lines for CKD and SKD kits.[332] (footnote omitted)

249. The Panel found that China had violated this commitment based on two earlier findings that the Panel had made in the course of its analysis, namely, that "under the circumstances surrounding the measures at issue in this dispute, a tariff line for CKD and SKD kits can be deemed created through the measures since China effectively classifies such a kit under specific tariff lines and applies the tariff rates applicable under such tariff lines under the measures"[333], and that "China ... 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."[334]

250. China challenges both of these findings[335] in the event that we do *not* reverse the Panel's finding that the measures are inconsistent with paragraph 93 of China's Accession Working Party Report on the grounds that *either*: the Panel misconstrued Article 2(2) of Decree 125 and erred in finding that the measures at issue impose a duty on imports of CKD and SKD kits under that

[332]See Panel Reports, para. 7.758.
[333]Panel Reports, para. 7.755.
[334]Panel Reports, para. 7.752.
[335]China challenges the substance of both findings and, as regards the Panel's finding that China created separate tariff lines for CKD and SKD kits at the ten-digit level, China also requests us to find that the Panel acted outside of its terms of reference since neither the United States nor Canada identified the alleged ten-digit tariff lines in its request for establishment of the panel.

provision; or the Panel ruled on a claim for which Canada and the United States had failed to make out a *prima facie* case.

251. We have reversed the Panel's finding with respect to paragraph 93 of China's Accession Working Party Report on the grounds that the Panel erred in construing Articles 2(2) and 21(1) of Decree 125 to mean that the measures at issue impose a charge on CKD and SKD kits imported under Article 2(2) of Decree 125. Thus, the condition on which China's substantive appeal of the Panel's findings under paragraph 93 is predicated is not satisfied, and we need not consider these alternative grounds of appeal. We note, in this regard, that at the oral hearing in this appeal, the United States and Canada agreed that, if we reversed the Panel's finding that Article 2(2) of Decree 125 exempts importers of CKD and SKD kits from the administrative procedures, but not from the charge, imposed under the measures at issue, we would also have to reverse the Panel's finding that, through the measures at issue, China has acted inconsistently with the commitment in paragraph 93 of its Accession Working Party Report.

252. We nevertheless observe, as did the Panel, that the commitment made by China in the penultimate sentence of paragraph 93 is a *conditional* one, which becomes operative only "upon the creation of separate tariff lines for CKD and SKD kits, which did not exist at the time of China's accession to the WTO."[336] Given the way in which China has framed its appeal, we do not need to rule on the meaning of the condition set out in paragraph 93. We also need not decide whether a tariff line can be "deemed" created nor whether China created separate tariff lines for CKD and SKD kits at the ten-digit level.

[336]Panel Reports, para. 7.743.

IX. Findings and Conclusions in the Appellate Body Report WT/DS339/AB/R (European Communities)

253. In the appeal of the Panel Report, *China – Measures Affecting Imports of Automobile Parts* (*Complaint by the European Communities*, WT/DS339/R) (the "EC Panel Report"), and with respect to Policy Order 8, Decree 125 and Announcement 4 (the "measures at issue"), for the reasons set forth in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.212 of the EC Panel Report, that the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994, and not an ordinary customs duty within the meaning of Article II:1(b);

(b) upholds the Panel's finding, in paragraph 7.223 and Section VIII:A(a)(i) of the EC Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:2, first sentence, of the GATT 1994 in that they subject imported auto parts to an internal charge that is not applied to like domestic auto parts;

(c) upholds the Panel's finding, in paragraph 7.272 and Section VIII:A(a)(ii) of the EC Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts; and

(d) finds it unnecessary to rule on the Panel's "alternative" finding in Section VIII:A(b)(i) of the EC Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994.

254. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report, and in the EC Panel Report as upheld by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 25th day of November 2008 by:

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Lilia Bautista
Presiding Member

_____ _____

Jennifer Hillman
Member

Giorgio Sacerdoti
Member

IX. Findings and Conclusions in the Appellate Body Report WT/DS340/AB/R (United States)

253. In the appeal of the Panel Report, *China – Measures Affecting Imports of Automobile Parts* (*Complaint by the United States*, WT/DS340/R) (the "US Panel Report"), and with respect to Policy Order 8, Decree 125 and Announcement 4 (the "measures at issue"), for the reasons set forth in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.212 of the US Panel Report, that the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994, and not an ordinary customs duty within the meaning of Article II:1(b);

(b) upholds the Panel's finding, in paragraph 7.223 and Section VIII:B(a)(i) of the US Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:2, first sentence, of the GATT 1994 in that they subject imported auto parts to an internal charge that is not applied to like domestic auto parts;

(c) upholds the Panel's finding, in paragraph 7.272 and Section VIII:B(a)(ii) of the US Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts;

(d) finds it unnecessary to rule on the Panel's "alternative" finding in Section VIII:B(b)(i) of the US Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994; and

(e) finds that the Panel erred, in paragraphs 7.77 and 7.78 of the US Panel Report, in construing the measures at issue as imposing a charge on completely knocked down (CKD) and semi-knocked down (SKD) kits imported under Article 2(2) of Decree 125, and consequently reverses the Panel's finding in paragraph 7.758 and Section VIII:B(c)(ii) of the US Panel Report that, with respect to their treatment of imports of CKD and SKD kits, the measures at issue are inconsistent with the commitment in paragraph 93 of China's Accession Working Party Report.

254. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report, and in the US Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 25th day of November 2008 by:

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Lilia Bautista
Presiding Member

_____ _____

Jennifer Hillman
Member

Giorgio Sacerdoti
Member

IX. Findings and Conclusions in the Appellate Body Report WT/DS342/AB/R (Canada)

253. In the appeal of the Panel Report, *China – Measures Affecting Imports of Automobile Parts* (*Complaint by Canada*, WT/DS342/R) (the "Canada Panel Report"), and with respect to Policy Order 8, Decree 125 and Announcement 4 (the "measures at issue"), for the reasons set forth in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.212 of the Canada Panel Report, that the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994, and not an ordinary customs duty within the meaning of Article II:1(b);

(b) upholds the Panel's finding, in paragraph 7.223 and Section VIII:C(a)(i) of the Canada Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:2, first sentence, of the GATT 1994 in that they subject imported auto parts to an internal charge that is not applied to like domestic auto parts;

(c) upholds the Panel's finding, in paragraph 7.272 and Section VIII:C(a)(ii) of the Canada Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts;

(d) finds it unnecessary to rule on the Panel's "alternative" finding in Section VIII:C(b)(i) of the Canada Panel Report, that, with respect to imported auto parts in general, the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994; and

(e) finds that the Panel erred, in paragraphs 7.77 and 7.78 of the Canada Panel Report, in construing the measures at issue as imposing a charge on completely knocked down (CKD) and semi-knocked down (SKD) kits imported under Article 2(2) of Decree 125 and, consequently reverses the Panel's finding in paragraph 7.758 and Section VIII:C(c)(i) of the Canada Panel Report that, with respect to their treatment of CKD and SKD kits, the measures at issue are inconsistent with the commitment in paragraph 93 of China's Accession Working Party Report.

254. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report, and in the Canada Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 25th day of November 2008 by:

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Lilia Bautista
Presiding Member

_____ _____

Jennifer Hillman
Member

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ANNEX I

WORLD TRADE ORGANIZATION

WT/DS339/12
WT/DS340/12
WT/DS342/12
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CHINA – MEASURES AFFECTING IMPORTS OF AUTOMOBILE PARTS

Notification of an Appeal by the People's Republic of China
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 15 September 2008, from the Delegation of the People's Republic of China, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, China hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports in *China – Measures Affecting Imports of Automobile Parts* (WT/DS339/R, WT/DS340/R, WT/DS342/R, and Add.1 & 2), and certain legal interpretations developed by the Panel in those Reports.[1]

1. China seeks review by the Appellate Body of the following errors of law and legal interpretation contained in Panel Report:

   a. The Panel incorrectly interpreted and applied the term "ordinary customs duties" in Article II:1(b), first sentence, of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Panel's errors principally arise from its failure to take into account the context provided by the *Harmonized Commodity Description and Coding System* ("Harmonized System") as the basis upon which national customs authorities identify the "product" that is subject to the assessment of ordinary customs duties.[2]

[1] The Panel presented its findings as separate Reports contained in a single document, with separate sections on the Panel's conclusions and recommendations for each complaining party. For ease of reference, China hereafter refers to these Reports as the "Panel Report".

[2] *See, e.g.*, Panel Report, paras. 7.166, 7.184 – 7.188, 7.192, 7.204 – 7.207, 7.209 – 7.210.

b. As a consequence of its erroneous interpretation and application of the term "ordinary customs duty" in Article II:1(b) of the GATT 1994, the Panel erred in its finding that the charge imposed under the measures challenged in this dispute is an "internal tax or other internal charge" within the meaning of Article III:2 of the GATT 1994, and in its finding that the 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.[3]

c. In its "alternative" findings set forth in Section VII.D of the Panel Report, the Panel erred in its interpretation and application of the term "motor vehicles" in China's Schedule of Concessions. The Panel's errors principally arise from (i) its misinterpretation of General Interpretative Rule 2(a) of the Harmonized System ("GIR 2(a)"), which provides context for the interpretation of the term "motor vehicles" in China's Schedule of Concessions; (ii) its misinterpretation of a prior decision of the Harmonized System Committee of the World Customs Organization ("WCO") concerning the interpretation of GIR 2(a); and (iii) its failure to take into account the specific guidance provided by the WCO in response to questions from the Panel.[4]

d. In its "alternative" findings set forth in Section VII.D of the Panel Report, the Panel acted inconsistently with Article 3.2 and Article 11 of the DSU by purporting to resolve a known question of interpretation within the Harmonized System, a non-covered agreement, and by adopting an interpretation of Harmonized System that is contrary to the interpretation held by the WCO, the international organization responsible for administering and interpreting the Harmonized System.[5]

e. The Panel erred in its interpretation that the challenged measures apply to importers who import completely knocked-down ("CKD") or semi-knocked down ("SKD") kits of motor vehicles under China's regular customs procedures, and who pay duties under China's regular procedures for the payment of customs duties. On the basis of this erroneous interpretation of the challenged measures, the Panel erred in its conclusion that the challenged measures violate paragraph 93 of the *Report of the Working Party on the Accession of China* (WT/ACC/CHN/49) ("Working Party Report"), as incorporated into the *WTO Agreement* through the *Protocol on the Accession of the People's Republic of China* (WT/L/432).[6]

f. The Panel acted inconsistently with Article 11 of the DSU by making certain findings and conclusions concerning the inconsistency of the challenged measures with paragraph 93 of the *Working Party Report*, in the absence of

[3] *See, e.g.,* Panel Report, paras. 7.204 – 7.212, 7.256 – 7.258.

[4] *See, e.g.,* Panel Report, paras. 7.412 – 7.415, 7.435 – 7.436, 7.439 – 7.441, 7.445 – 7.446. China does not raise specific claims of error in respect of the Panel's findings, set forth in Section VII.D.3 of the Report, concerning the "essential character" test under General Interpretative Rule 2(a) of the Harmonized System. However, in the event that the Appellate Body affirms the Panel's finding that the charge imposed under the challenged measures is an internal tax or charge subject to Article III of the GATT 1994, China requests that the Appellate Body find all of the Panel's "alternative" findings in Section VII.D of the Report, and the related conclusions and recommendations of the Panel, to be moot and of no legal effect.

[5] *See, e.g.,* Panel Report, paras. 7.412 – 7.415, 7.435 – 7.436, 7.439 – 7.441, 7.445 – 7.446.

[6] *See, e.g.,* Panel Report, paras. 7.75 – 7.78, 7.636, 7.648, 7.688, 7.737, 7.754, 7.757 – 7.758.

evidence or legal arguments presented by the complainants to support a *prima facie* case that the challenged measures apply to importers who import CKD or SKD kits of motor vehicles under China's regular customs procedures, and who pay duties under China's regular procedures for the payment of customs duties.[7]

2. Conditionally, in the event that the Appellate Body does not sustain either of China's claims of error set forth in paragraphs 1(d) and 1(e) above, China seeks review by the Appellate Body of the following additional errors of law and legal interpretation contained in Panel Report:

a. The Panel erred in finding that the challenged measures "de facto" create "tariff lines" for CKD or SKD kits of motor vehicles with rates of duty in excess of 10 per cent. The Panel's error of legal interpretation principally relates to the inconsistency of this finding with the ordinary meaning of the term "tariff lines", as identified by the Panel itself. China further considers that, by purporting to modify the condition under which the commitment that China made in paragraph 93 of the *Working Party Report* would arise, the Panel acted inconsistently with Article 3.2 of the DSU.[8]

b. The Panel erred in finding that certain ten-digit statistical annotations for CKD/SKD kits found in China's customs nomenclature constitute "tariff lines" within the meaning of paragraph 93 of the *Working Party Report*. The Panel's errors of legal interpretation principally relate to (i) the inconsistency of this finding with the Panel's interpretation of the term "tariff lines" in paragraph 93 of the *Working Party Report*; and (ii) the Panel's failure to interpret the term "tariff lines" in the context of the *Working Party Report*.[9] China considers that the Panel's errors could also be considered a failure to make an objective assessment of the facts, in contravention of Article 11 of the DSU.

c. The Panel acted inconsistently with Article 6.2, Article 7.1, and Article 11 of the DSU by finding that China violated paragraph 93 of the *Working Party Report* through the creation of ten-digit statistical annotations for CKD/SKD kits in its customs nomenclature, when neither the statistical annotations nor the tariff rates associated with these putative "tariff lines" were within the terms of reference of these disputes.[10]

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[7] *See, e.g.,* Panel Report, paras. 7.75 – 7.78, 7.636, 7.648, 7.688, 7.737, 7.754, 7.757 – 7.758.
[8] *See, e.g.,* Panel Report, paras. 7.754 – 7.758.
[9] *See, e.g.,* Panel Report, paras. 7.749 – 7.752, 7.757 – 7.758.
[10] *See, e.g.,* Panel Report, paras. 7.749 – 7.752, 7.757 – 7.758.