ANNEX A-2

RESPONSES AND COMMENTS OF PARTIES TO QUESTIONS FROM THE PANEL FOLLOWING THE SECOND SUBSTANTIVE MEETING

A. MEASURES AT ISSUE

167. (*China*)Following up on China's response to Panel question No. 5,

(a) China states in the second paragraph of its response that "[t]he manufacturer's determination, *whatever the result,* is subject to *review* and verification under Chapter IV of Decree 125 (Articles 17-18)." (emphasis added) Please clarify whether even if the manufacturer's determination based on self-evaluation is positive, i.e. that auto parts imported should be characterized as complete vehicles, such a determination is still subject to review by the Verification Center under Article 7 of Decree 127;

Response of China

1. China confirms that even if the manufacturer's self-evaluation is positive, such conclusion is still subject to review. This is because the manufacturer's understanding of whether the imported parts in that vehicle model should be characterized as having the essential character of a motor vehicle may differ from what is contemplated by Decree 125. It is possible that the verification result would demonstrate that the vehicle model does not meet one or more of the thresholds set forth in Decree 125, even if the self-evaluation suggested a positive result. This has happened in several cases.

Comments by the European Communities on China's response to question 167(a)

2. China's reply is contrary to the clear text of Article 7 of Decree 125 and Article 6 (2) and (3) of Announcement 4. Article 7(2) of decree 125 clearly states

> "If the self-evaluation suggests that the imported automobile parts should not be characterized as complete vehicles, the automobile manufacturer shall request the CGA to conduct a review" (emphasis added).

3. Article 7(3) further provides

> "When an automobile manufacturer applies to the NDRC to be listed on the Public Bulleting on On-Road Motor Vehicle Manufacturers and Products and applies to the Ministry of Commerce for an Automatic Importation License, it shall submit the self-evaluation results for the vehicle models for the vehicle models concerned. If the imported automobile parts are not characterised as complete vehicles, the automobile manufacturer shall also submit the review opinion by the CGA" (emphasis added).

4. Article 6, paragraphs 2 and 3 of Announcement 4 also make a clear distinction between the obligations of the manufacturer depending on the results of the self-evaluation.

5. These provisions would have no meaning if the review is necessary in all cases. China's reply demonstrates the arbitrary manner in which it describes the content of the measures to the Panel.

(b) In the last paragraph of its response to Panel question No. 5, China states that "the effect of this system is that the determination of whether imported auto parts should be classified as a motor vehicle is made prior to the importation of the parts, based on the self-evaluation and *verification process* described above." (emphasis added) Please clarify whether the "verification process" referred to in this paragraph is review process by the Verification Center under Article 7 of Decree 125 or verification conducted by the Center after importation of auto parts under Article 17 of Decree 125.

Response of China

6. In order to respond to this question, China has to emphasize that the review and verification process is conducted on a *vehicle model* basis. Article 19 of Decree 125 makes clear that the manufacturer may request verification after the first batch of complete vehicles is assembled. The first batch can be one vehicle or a small quantity of vehicles, a number that the manufacturer may choose at its discretion. The verification will conclude, on a per model basis, whether the imported auto parts in that vehicle model, in their entirety, have the essential character of a complete vehicle.

7. The verification finding applies to all subsequent importation of auto parts for the same vehicle model until the manufacturer can demonstrate, under Article 20.2 of Decree 125, that the imported parts and components in that vehicle model no longer have the essential character of a motor vehicle. There is no additional verification process that occurs after *each* entry of auto parts for that vehicle model. Nor is there an additional verification process that occurs after each assembly of a motor vehicle of that vehicle model type. The evaluation and verification process results in a *prior* determination of whether the auto manufacturer imports parts and components that have the essential character of a motor vehicle in order to assemble a specific vehicle model.

Comments by the European Communities on China's response to question 167(b)

8. China does not reply to the question. It is clear on the face of the measures that there is a verification process after the production of a new vehicle model has been completed. This is laid down in detail in Article 19 of Decree 125 and Article 7 of Announcement 4. This verification process is an obligation under the measures, not an option as China's use of the word 'may' suggests. China's reply is contrary to the clear wording of the measures (see Article 19 of Decree 125: "An automobile manufacturer shall submit a verification application to the CGA within 10 days after the first batch of vehicles of the registered vehicle model are produced/assembled …"; Article 7 of Announcement 4: "The automobile manufacturer shall apply for verification to the Office within 10 working days after the vehicles of a to-be-registered registered new model are produced/assembled…" (emphasis added)).

Comments by the United States on China's response to question 167(b)

9. In its response to part (b), China states that "[t]he evaluation and verification process results in a prior determination of whether the auto manufacturer imports parts and components that have the essential character of a motor vehicle in order to assemble a specific vehicle model." China implies that its answer uses the term "prior" to mean "prior to the entry of the part into China's territory." To the contrary, however – and based on the plain text of China's own measures – no determination is final until the imported parts are either used in manufacturing, or (if not used in manufacturing within one year) the imported part is assessed a charge at a 10 per cent parts rate at the end of the one-year period following importation.

10. First, verification is made, as China concedes in its answer, *after* the first batch of complete vehicles is assembled. So, clearly a number of parts have to be imported before verification – China cannot verify the assembled vehicle unless the parts are in the vehicle. Secondly, it is not simply the first batch of vehicles that is affected – as China states in its response to Panel question No. 171 – China (remarkably) doesn't even know how long the verifications take, but acknowledges that the verifications can take longer than 90 days. Unless China is blocking importations, parts will likely be flowing into China during that period.

11. This information should also be viewed in light of Article 20 of Decree 125. The second paragraph of that article notes that there may be a change in a vehicle's status under that measure during the course of production, thus necessitating a "re-verification" of the base model. Similarly, the last paragraph of Article 6 of Annoucement No. 4 provides that "If the percentage make-up of imported parts changes, such that the imported parts used in the vehicle model become Deemed Whole Vehicles, or are no longer a Deemed Whole Vehicle, the changed vehicle model should be registered as a new vehicle model." During this shift and re-verification, presumably, parts will continue to enter China.

12. The first paragraph of Article 20 points to another factor – the inclusion of optional parts into the base model. The manufacturer has to report to the local Customs office *when optional parts are fitted in*, which will also require a re-verification.

13. Then there are also parts that may be damaged, replaced in the assembly process by other (better-designed) parts prior to assembly, or otherwise not included into a new vehicle. The second paragraph of Article 29 provides that when imported parts are not used in the production of whole vehicles for one year, the manufacturer shall make a declaration to Customs for payment of duties – apparently at the parts rate. Accordingly, it is not until production of a new vehicle that the charge on a part is actually fixed.

168. (*China*) China has explained throughout the proceedings that the determination under the measures of whether certain imported auto parts should be characterized as complete vehicles, i.e. an assessment of how to classify imported auto parts, is *not* made after the assembly of imported auto parts into a complete vehicle, but made prior to the importation of such parts. For example, China has stated in paragraph 13 of its second oral statement that "[t]he classification of motor vehicles under Decree 125 is based on the declaration by the importer that a shipment of parts and components is one of a series of shipments of parts and components that can be assembled into a single article that has the essential character of a motor vehicle. China considers that classification based upon documentary evidence, including the customs declaration, is consistent with a proper interpretation of the term 'as presented' under GIR 2(a)."

If that is the case, what is the rationale for the verification process under Chapter IV of Decree 125? In other words, under the measures at issue, why are auto manufacturers/importers required to wait until the assembly of auto parts into a complete vehicle for further verification?

Response of China

14. In response to question 167(b), China has explained that the self-evaluation and verification results in a prior determination of the essential character test. It is important to understand that verification is conducted on a per-model basis. The verification finding will apply to all subsequent

importation of auto parts of the same vehicle model until the manufacturer can demonstrate that the underlying facts in respect of that vehicle model have changed.

15. Chapter IV, and Article 19 in particular, concerns the timing and basis on which this prior determination is made. As described in Article 19, the manufacturer is to submit a verification application within 10 days after the first batch of the to-be-registered vehicle model is assembled. As discussed in response to question 167(b), this could be a single example of the vehicle model to be verified. The reason that Decree 125 requires verification based on an actual example of the motor vehicle model in question (as opposed to conducting the verification on the basis of paperwork) is that motor vehicles are complex products. It is therefore prudent, and facilitates the verification process, to examine an actual example of the motor vehicle model.

16. As emphasised in response to question 167(b), there is no additional verification process that occurs after the assembly of *each* motor vehicle of that vehicle model type.

Comments by the European Communities on China's response to question 168

17. In its reply China admits that the final determination is made after manufacture of concrete vehicles. The fact that this determination is thereafter applied in a standardised manner to all imported parts that the manufacturer is forced to identify as being part of a given vehicle model is irrelevant for the legal assessment of the measures. The fact that each vehicle does not need to go through all the procedures in order for all imported parts in that individual vehicle being charged the 25 % duty is simply a rule that facilitates the practical administration of the measures.

18. Further, as China itself admits, this verification will need to be revised if there is a change in the production leading to a modification of the status of the imported auto parts under the measures. The classification of the imported auto parts will thus be determined by what actually happened during the production and more precisely by the balance of local and imported auto parts used in that production. If a modification leads to imported parts becoming characterised as complete vehicles, the auto manufacturers is under the obligation to go through the process of self evaluation, registration and review (Article 6(5) of Announcement 4). Failure to do so would expose the auto manufacturer to sanctions (Article 36 of Decree 125). Conversely, if imported parts are not characterised as complete vehicles anymore, the auto manufacturer will have to apply for and go through verification by Customs to avoid having to pay the 25% duty (Article 20(2) of Decree 125).

19. This also means that auto manufacturers using imported parts will have to constantly monitor the process of production, and face administrative hurdles whenever the production cannot go as initially planned. This takes away the flexibility needed in the production process to adapt to the evolutions of the market or accidents in production (parts broken) and seriously penalises the use of imported auto parts.

Comments by the United States on China's response to question 168

20. The United States respectfully refers the panel back to its comments on China's response to Panel question No. 167. The United States also notes that China acknowledges in its response to this question that the verification is based on the assembled vehicle, not on documentation or the condition of parts at the time of importation.

169. (*China*) In relation to your response to Panel question No. 43, could China please clarify whether its response is the same when "auto part manufacturers", not automobile manufacturers, import such key components or sub-assemblies.

Response of China

21. Article 2.1 of Decree 125 provides that the measure only applies to certain auto manufacturers. Therefore, auto part manufacturers are not within the reach of the regulation. As a result, when an auto part manufacturer imports the key components or sub-assemblies, they are assessed at the corresponding parts rates.

22. This is exactly why Article 29 is necessary. Decree 125, without Article 29, would create an incentive for auto manufacturers to relocate their importation through their suppliers in order to circumvent the measure.

170. (*China*) In response to Panel question No. 59, China states that it has deferred the application of Article 21(3) of Decree 125 primarily because of the administrative complexity of implementing this particular criterion. Please elaborate on the specific nature of such complexity relating to the implementation of Article 21(3), including administrative complexity relating to the implementation of Article 21(2).

Response of China

23. The specific difficulty encountered by the customs is how to identify the fair value of the parts. First, it is normal for a manufacturer to import many types of auto parts from a single exporter. In these circumstances, it is possible for the manufacturer and the exporter to manipulate prices among different types of auto parts, without affecting their overall interest in the transaction. Second, the companies that export auto parts are often affiliated with the auto manufacturer in China. As in any affiliated-party transaction, it can be difficult to identify fair value in these situations.

24. The implementation of Article 21(2) is relatively easy by comparison to Article 21(3), as Article 21(2) is based on the physical attributes of the motor vehicle model in question.

Comments by the European Communities on China's response to question 170

25. China's reply demonstrates very concretely how Article 21(3) of Decree 125 is unrelated to the "objective characteristics of the product in question", which is the standard set out by the Appellate Body for the purposes of tariff classification (*EC - Chicken Cuts*, paragraph 246). Article 21(3) of Decree 125 is an explicit local content requirement. In its reply China makes entirely unsubstantiated assertions of "manipulation of prices". The whole context of China's reply is at odds with the fact that parts manufacturers are highly specialised and fragmented. China has previously explicitly acknowledged this fact (see China's reply to question 3 of the Panel and the EC's reply to question 3 of the Panel).

26. China's reply also demonstrates the burden and legal uncertainty imposed by the measures on the use of imported auto parts in the production of vehicles, as it is equally difficult for manufacturers to accurately foresee how imported auto parts will be valued. It is worth stressing that this 60% threshold concept also applies at lower level and is already in force. Thus, an assembly (or system) will be characterised as imported if the price of its imported parts accounts for at least 60% of its total price (Article 22(3) of Decree 125 and Article 24 of Announcement 4). A key part will also be deemed as imported if imported parts account for more than 60% of its price (Note 2 in Annex 1 to Decree 125).

Comments by the United States on China's response to question 170

27. China's response is puzzling in that China casually denies that the measures impose any real administrative burden on the use of imported auto parts[1], and then in its response to this question and Panel question No. 59, it indicates that the "administrative complexity" relating to the implementation of Article 21(3) necessitates a two-year delay.

28. China's attempts to attribute the administrative complexity to "enforcement" issues are not convincing. The first problem China postulates is that the manufacturer and exporter may manipulate prices among different types of imported parts. Even if true, that fact would be irrelevant since the overall 60% threshold refers to the aggregate value of all imported parts – shifting prices between imports of the same model would not affect the aggregate total.

29. Next, China states that companies that export auto parts are often "affiliated" with auto manufacturers in China. China, however, provides no evidence of the existence or extent of this assertion, which is limited to a great extent by the fact that foreign participation in Chinese automakers is limited to a minority share.[2] In any event, transactions between affiliates present a common issue in customs valuation and would not present any unique problems in this context.

30. Finally, China asserts that implementation of Article 21(2) is "relatively easy" as it is based on the physical attributes of the motor vehicle. Implementation of Article 21(2) is far from "easy" for either the auto manufacturer or the Customs administrator. First, the manufacturer must account for the origin of all "key parts" in the vehicles, which, as explained in the US comments on China's response to Panel question No. 167, requires tracking many streams of different types of parts obtained from various sources. In addition, pursuant to Article 20 of Order No. 4, the manufacturer must trace parts obtained from local suppliers back through the second tier suppliers (*i.e.*, suppliers two steps up the supply chain). And finally, the manufacturer must be able to verify whether under Article 24 of Decree 125 and Article 18 of Order No. 4, "substantial processing" by one of the suppliers has resulted in the parts being deemed as "domestic." These are not simple tasks for the manufacturer or the administrative authority.

171. (*China*) Please explain how long each step of the procedural requirements under the measures at issue takes on average. Please also provide any supporting evidence for your answer.

Response of China

31. Unfortunately, China does not maintain these statistics, so it is not possible to calculate an average period of time or provide another form of estimate. As set forth in Article 19 of Decree 125, auto manufacturers are to request a verification within 10 days after the assembly of the first batch of the vehicle model that is to be verified. After receiving a complete set of documentation from the Customs General Administration, the Verification Center is to complete the verification and issue a verification report within 30 days. In some cases, the documentation submitted by the auto manufacturer may give rise to further inquiries and on-site reviews, or may require the submission of additional documentation. In these cases, the verification of a vehicle model can take longer than 30 days.

[1] See e.g. paragraph 175 of China's rebuttal submission and its response to Panel question No. 275.
[2] Article 48 of the Policy on Development of the Automotive Industry (JE-18).

32. It is important to note that the evaluation and verification process does not prevent the auto manufacturer from importing parts and components to assemble a particular vehicle model.

Comments by the European Communities on China's response to question 171

33. China's reply completely ignores the fact that the applications for review and verification under the various procedural stages of the measures are publicly available on the website concerning the measures <http://autoadmin.chinaport.gov.cn>. A sample of currently pending applications has been provided as Exhibit EC - 26. This demonstrates that the completion of the various procedures under the measures can take years, during which the auto manufacturer will have no certainty on the charge that will apply to the imported auto parts and therefore of the economic viability of its investment as the 15% additional charge would simply make the vehicle uncompetitive (see first written submission of the European Communities, paragraphs 16, 68 to 74). China's reply that it "does not maintain these statistics" and that "it is not possible to calculate an average period of time or provide another form of estimate" is simply not tenable because China clearly possesses detailed information on the different stages of the procedures. Presumably China attempts to direct attention away from concrete proof of the fact that the measures make imported parts less attractive.

34. China's reply that "the evaluation and verification process does not prevent the auto manufacturer from importing parts and components to assemble a particular vehicle model" is also difficult to reconcile with the text of Article 7(3) of Decree 125:

> "When an automobile manufacturer applies ... to the Ministry of Commerce for an Automatic Importation License, it shall submit the self-evaluation results for the vehicle models concerned. If the imported automobile parts are not characterized as complete vehicles, the automobile manufacturer shall also submit the review opinion by the CGA".

35. Clearly, to get the import licence allowing the import, the auto manufacturer will need to go first through the self-evaluation and the review by Customs when the self-evaluation has concluded that the imported auto parts are not characterised as complete vehicles.

172. (*China*) Let's assume that an automobile manufacturer/importer of auto parts is willing to pay for its imports of auto parts the tariff rate applicable for complete motor vehicles in accordance with the Chinese government's policy. Can such manufacturer/importer import auto parts without going through the procedural requirements under the measures concerned?

Response of China

36. No. The hypothesis of this question is that the manufacturer would import parts and components for a vehicle model that is not a registered vehicle model under Decree 125, but would nonetheless declare the parts and components as elements of an imported motor vehicle and pay the 25 per cent rate of duty applicable to motor vehicles. Setting aside the implausibility of this scenario, this practice would create certain problems relating to customs administration. Most importantly, if the parts and components are not related to a registered vehicle model, there would be no documentary basis to ensure the correct classification of the parts and components. This is why Decree 125 requires an evaluation and verification of each vehicle model that is assembled using imported parts and components.

Comments by the European Communities on China's response to question 172

37. China's reply demonstrates why the procedures are not related to customs administration and enforcement of the 25% duty on complete vehicles allegedly being circumvented by multiple shipments of auto parts. If such was the purpose of the measures, there would be no reason to impose them in the scenario envisaged by the Panel.

38. The question of the Panel and reply of China perfectly illustrates the claims and arguments made by the European Communities under the *TRIMs Agreement* and Article III of the GATT 1994. As soon as an auto manufacturer uses imported auto parts in its production process, the measures will impose a host of administrative burdens, and the ultimate threat of having to bear a 15% additional charge sometimes several years after starting the whole procedure. The only way for an auto manufacturer to escape the measures, and regain legal certainty and flexibility in the production process is to use exclusively local auto parts (see first written submission of the European Communities, paragraphs 114, 126, 147 – 158).

173. (*China*) In respect of the import license necessary for the importation of auto parts in China,

(a) Is an import license issued automatically upon application by importers or are there any conditions attached to the issuance of such license? Please explain the procedural requirements that automobile manufacturers/importers need to satisfy to order to obtain an import license for the importation of auto parts;

Response of China

39. An import license is automatically issued upon application by importers to the Ministry of Commerce. No substantive condition is attached to the issuance of such a license. Article 7 of Decree 125 requires the importer to submit the self-evaluation results for the vehicle model as part of the documentation submitted with the license application.

Comments by the European Communities on China's response to question 173(a)

40. Before the allegedly "automatic" import licence can be granted, the automobile manufacturer is obliged to carry out the self-verification foreseen in Article 7 of Decree 125 and Article 6 of Announcement 4. If the conclusion of the self-verification is that the model is not "characterised as complete vehicles" i.e. that it contains sufficient local content (Articles 21 and 22 of Decree 125), the manufacturer is obliged to provide also the review report from customs (Article 7(3) of Decree 125).

41. China's reply makes it clear that the import licence is far from automatic as the manufacturer is obliged to go through cumbersome and lengthy procedures before the licence is granted (see the response of the European Communities to question 8 of the Panel). Indeed, China's reply is inherently contradictory because China states on the one hand that no substantive conditions are attached while in the next sentence China acknowledges that the self-assessment is necessary (China ignores the review report required under Article 7(3) of Decree 125) before the import licence can be granted.

(b) Can such auto manufacturers/importers import auto parts without an import license?

Response of China

42. It depends. Not all auto parts require an automatic import license.

Comments by the European Communities on China's response to question 173(b)

43. In its reply "it depends" China makes a general assertion without providing any justification or argument. Moreover, this reply seems to be inconsistent with China's reply to question 172, according to which Decree 125 must be complied with in all cases.

Comments by Canada on China's response to question 173

44. China claims that an import licence is automatically issued upon application by importers to the Ministry of Commerce. It also claims that no substantive conditions are attached to the issuance of a licence. Canada considers this answer to be inaccurate.

45. The import licence contemplated in Article 7 of Decree 125 is *not* automatically issued upon request. An importer must first examine, and declare to customs, the source of all parts used in vehicle manufacture, and that must occur *prior to importation*. And if an importer's examination results in a declaration that the parts used in a vehicle are not deemed to be whole vehicles, then the importer's examination must undergo further review by customs. A simple request for a licence is *not* sufficient without this declaration; therefore, the grant of a licence is clearly conditional and not automatic. See also Canada's comments on China's response to Question 219.

174. (*China*) What documents are auto manufacturers required to provide at the border to import auto parts into China?

Response of China

46. In respect of auto parts and components for registered vehicle models, this question is answered by Article 14 of Decree 125. As set forth therein, the importer must submit to customs (1) an import declaration form; (2) the automatic import license market with "Characterized as Complete Vehicles"; (3) any other licenses required in respect of that import entry; and (4) the other documents that are normally required by the Customs (which are detailed in response to question 249 below).

175. (*China*) At the second substantive meeting, China stated that it lists imported auto parts originating in different countries that are characterized as complete vehicles under China's measures as complete vehicles in its import statistics. Does any importation document submitted by automobile manufacturers/importers of auto parts that are characterized as complete vehicles under China's measures show the countries of origin of those parts? How does China determine the country of origin for the "complete article" when it is assembled from parts and components from various countries of origin? Do China's import statistics match the export statistics recorded by exporting countries in respect of such auto parts?

Response of China

47. As China stated at the second substantive meeting, the classification and statistics under Chinese customs practice are consistent with each other. Thus, an entry of parts for a registered vehicle model is recorded as a motor vehicle in China's customs statistics. Of course, the Chinese customs authorities reconcile these statistics to ensure that they reflect the number of registered vehicle models that are actually imported (and not the number of *shipments* of parts and components for registered vehicle models). This problem of reconciliation arises in *any* circumstance in which customs authorities classify multiple shipments of parts and components as the complete article (for example, under national split shipment or multiple conveyance rules).

48. China understands that this is a question about how to record the country of origin of a motor vehicle, when it is imported in an unassembled form. This is, in no sense, a question that is implicated uniquely by the challenged measures. A typical and similar situation is the importation of CKD kits. Many parts within a CKD kit can come from different countries. For instance, BMW maintains a global logistics centre in Germany. Parts produced in other countries are shipped to this logistics centre, from which the parts are assembled into a CKD kit and shipped to a BMW assembly facility. In this scenario, a quite similar country-of-origin "problem" arises. The fact that the CKD kit was shipped from a German logistics centre does not mean that all parts in the CKD kit have a German country of origin, or even that the CKD kit, in its entirety, has a German country of origin. The country of origin of individual parts is not a decisive factor in determining the country of origin of the CKD kit. This must be determined based upon the general character of the *entire* group of the parts that make up the CKD kit.

49. In the majority of cases, the determination of the country of origin for a motor vehicle in unassembled form does not pose a significant challenge to customs authorities. The country of origin of a product is normally determined by application of a set of multi-tier rules, which may include the alteration of tariff classification, the *ad valorem* percentage of parts from different origins, the existence of a substantial manufacturing or processing step, and so on. In most cases, the rule of origin of motor vehicles that are registered under Decree 125 is determined by reference to the *ad valorem* percentage of parts from different origins, but each case is determined on its own facts.

50. With regard to the question of whether the import statistics of China will match the export statistics of other countries, in most cases the figures will match, but there are always exceptions. Again, this is not a question that is uniquely implicated by the challenged measures. Take, for example, a Chinese manufacturer that sells goods through a Hong Kong trading company to a US importer, under circumstances in which the Chinese manufacturer does not know the destination of the goods. The export statistics of China would record Hong Kong as the destination and the United States would not appear in this entry. However, in the US import statistics, the country of origin of the goods would be recorded as China. There would no way to match these two records.

51. A similar disjunction in import/export statistics can occur when the exporting country classifies the exported good differently than the importing country. For example, the exporting country may consider that the goods fall under one HS heading, while the importing country considers that they fall under another HS heading. In this circumstance, the exporting country's export statistics for the good in question will not match the importing country's import statistics for the good in question. This problem is not unique to motor vehicles or parts and components of motor vehicles. Major trading partners (such as the United States and Canada) have established regular consultative processes among customs authorities to reconcile these kinds of technical issues in customs statistics.

Comments by the European Communities on China's response to question 175

52. China states in its answer to the above question that tariff classification under its customs practice and import statistics are consistent with each other. China is therefore admitting that if it misclassifies certain goods, as it is the case here with auto parts, its import statistics will be influenced by such misclassification of goods. This is also proved by China's admission that "[t]hus, an entry of parts for a registered vehicle model is recorded as a motor vehicle in China's customs statistics. Of course, the Chinese customs authorities reconcile these statistics to ensure that they reflect the number of registered vehicle models that are actually imported (and not the number of shipments of parts and components for registered vehicle models)." In other words, China explicitly states that entries of parts subject to the measures at issue are registered as if they were a complete vehicle. China's fatal mistakes in the tariff classification of such goods are therefore transposed into its statistical system.

This runs directly against the object and purpose of the Harmonised System, which is precisely to harmonize classification of goods and thus allow comparison of trade statistics: a good leaves a country as a brake, is registered as an export of a brake, but on import into China becomes an import of a complete vehicle and is registered as such.

53. Concerning the issue of origin, the European Communities can agree on the suggested general principles that the country of origin of a product is normally determined by application of a set of multi-tier rules, which may include the alteration of tariff classification, the *ad valorem* percentage from different origins incorporated into a product, the existence of substantial manufacturing etc. However, China fails the mention that such legal and factual tests to determine the origin of a good must be applied on a product-by-product basis and to products as presented at the border for customs clearance. The origin of the auto parts must therefore be determined individually and not on the basis of what China incorrectly considers being a complete vehicle after manufacture. China's incorrect characterization of the goods at issue as "complete vehicles" also triggers the incorrect application of rules of origin to auto parts.

Comments by the United States on China's response to question 175

54. China claims that "the classification and statistics under Chinese customs practice are consistent with each other. Thus, an entry of parts for a registered vehicle model is recorded as a motor vehicle in China's customs statistics. Of course, the Chinese customs authorities reconcile these statistics to ensure that they reflect the number of registered vehicle models that are actually imported (and not the number of *shipments* of parts and components for registered vehicle models)." This answer is non-responsive – it means nothing other than an assertion that China's import statistics are consistent with themselves.

55. China entirely ignores the a fundamental objects and purposes of the HS Convention (the agreement upon which China has based its entire defense): namely, to ensure the consistency between import, export, and production statistics, and to ensure the collection of meaningful trade statistics for the purpose of trade negotiations. The reason China ignores this key point is clear: China's measures destroy the utility of China's import statistics on auto parts, and makes those statistics incompatible with both other countries export statistics, and with China's own export statistics. In particular, by classifying imported auto parts from various countries as "complete vehicles," China no longer collects any meaningful statistics on auto part imports.

56. China's response uses the example of a CKD kit to discuss how to "record the country of origin of a motor vehicle, when it is imported in an unassembled form." But this example only serves to highlight the incompatibility of China's measures with the objects and purposes of the HS Convention. If a country exports to China a legitimate CKD kit, and assuming that GIR 2 applied to that kit, the export statistics would show the export of a vehicle, and China's import statistics would show the import of a vehicle.[3] Nothing here is problematic under the HS Convention's goal of ensuring the usefulness and consistency of statistics.

57. The issue the Panel raises in this question is not addressed by China. If Country A exports 1000 gasoline engines to China and Country B exports 1000 chassis to China, Country A will include 1000 gasoline engines in its export statistics and Country B will include 1000 chassis in its export

[3] If the importing and/or exporting country had more detailed statistical breakouts, the statistics could also indicate whether the imported article was a CKD kit or a vehicle. Thus, if China wanted separately to track imports of kits and imports of assembled vehicles, it would be free to do so consistent with its HS Convention obligations.

statistics. However, it is clear from China's response that it neither reflects the importation of *engines* from Country A nor the importation of *chassis* from Country B. If, for example, China determines that Country B is the country of origin of the "motor vehicle" and it does not record the number of shipments of parts in its "reconciled" statistics, then presumably China records no importation whatsoever from Country A. It is completely implausible that import and export statistics will match in these circumstances. It is also worth noting that China acknowledges in its response to Panel question No. 213 that parts will most commonly enter China in this fashion, i.e., through multiple importations.

176. The European Communities stated during the second substantive meeting that the economic reality of the automotive industry has resulted in the standardization of parts, such as tyres and navigation systems, which, as a consequence, fit in various vehicles models and that "the identification of imported parts that belong to a given specific model is an entirely fictitious condition imposed under the measures." (European Communities' second oral statement, paragraph 7-8) On the other hand, China has been of the view that automobile manufacturers know exactly, *inter alia*, what auto parts and auto parts from which auto part manufacturers are going to be used for a specific vehicle model.

(a) (*China and other complainants*) Do you agree with the European Communities' view?

Response of China

58. No.

Response of Canada (WT/DS342)

59. Canada agrees with the European Communities. Ensuring the availability of parts in standard formats – standardization or "commonization" of parts – is a major cost-reduction strategy for vehicle manufacturers. This allows these manufacturers to realize economies of scale at a global rather than regional level. At the same time, it allows parts manufacturers to deal with now-globalized supply and production chains. Vehicle manufacturers have incorporated steadily increasing proportions of auto parts used in different models, and across vehicle platforms. For example:

60. Ford implemented platform standardization and a globally-used engine series in module production for Ford North America, Ford Europe, Matsuda and Jaguar.[4]

61. DaimlerChrysler uses the same standardized platform to produce the Chrysler 300/300C, Dodge Magnum and Dodge Charger in Canada.

62. GM and Ford developed jointly a new six-speed automatic transmission, for use in models produced by both companies.[5]

63. A transmission system for a hybrid vehicle, jointly developed by GM, DaimlerChrysler and BMW, is widely used in different vehicles, buses, trucks and cars.[6]

[4] Koichi Shimokawa, "Reorganization of the Global Automobile Industry and Structural Change of the Automobile Component Industry" (Massachusetts Institute of Technology, International Motor Vehicle Program, issued June 20, 2002), online: http://imvp.mit.edu/papers/99/shimokawa.pdf (Exhibit CDA-33).

[5] General Motors Press Release, "New Hydra-Matic 6T70 Six-Speed Automatic Delivers Performance and Fuel Economy" (August 25, 2005), online: http://media.gm.com/servlet/GatewayServlet?target=http://image.emerald.gm.com/gmnews/viewmonthlyreleasedetail.do?domain=3&docid=17537 (Exhibit CDA-34).

(b) (*All parties*) Please provide evidence supporting your respective views on the commercial reality of the automotive industry.

Response of China

64. China could not identify a documentary source that discusses the interchangeability of auto parts and components in general terms. Part of the problem is that "interchangeability" in the automobile industry has different meanings in different contexts. Interchangeability of parts and components is much lower between models produced by different auto manufacturers.

65. A specific example illustrates the low degree of commonality among auto parts and components, even between vehicle models produced by the same auto manufacturer. CHI-46 shows the strut suspension systems for a derivative of the VW Passat B6 and for the VW Sagitar. Both of these systems are a type of Macpherson Strut Suspension. Though these two suspension systems look similar, the major parts, as shown in the illustrations, are not interchangeable with each other. As this example shows, parts and components for different vehicle models are usually different in terms of shape, material, and structure, even when they form part of assemblies that are fundamentally similar in design.

Response of the European Communities (WT/DS339)

66. This question is closely linked with question 217 a). The economic reality of the automotive industry is well illustrated by the notion of an "automobile platform", which is a shared set of components common to a number of different vehicle models including from different auto manufacturers. Exhibits EC – 12 to 25 demonstrate how the industry is increasingly using such platforms in order to cut costs, speed development time and increase flexibility to adapt to the changes in the market. A platform can be stretched, made wider and taller, and can accommodate a range of engines and transmissions. An increasing number of vehicles share the same platform though they appear on the outside to be unique. This allows to share expensive key components such as engines, instrument panels or suspension parts between different models and thus to obtain volumes that make it possible to be competitive and profitable.

67. This demonstrates how entirely artificial the Chinese measures are in requiring that each part be identified in advance as belonging to a specific vehicle model. In today's real world of the automotive industry a large part of parts are not only common between different vehicle models of the same manufacturer but even between different manufacturers.

Response of the United States (WT/DS340)

68. The United States agrees with the EC view. The present commercial reality in the automotive industry is a trend toward the standardization of vehicle platforms (the basic structural components underpinning a vehicle) and the sharing of parts and components across vehicles. The trend is a result of the continuous cost and competitive pressures within the industry and is also common among many other manufacturing industries. By sharing platforms, parts, and components, manufacturers save money by not having to engineer, manufacture, and purchase specialized parts for every model they make, enabling them to increase the number of models produced off of common platforms; reduce the

[6] BMW, DaimlerChrysler, General Motors Press Release, "Global Alliance for Hybrid Drive Development: Cooperation between BMW, DaimlerChrysler and GM" (September 7, 2005), online: http://media.gm.com/servlet/GatewayServlet?target=http://image.emerald.gm.com/newspublisher/support_file/09-07-2005/2007/en.doc (Exhibit CDA-35).

time it takes to bring out new models; and reduce service and warranty costs by using parts common to many vehicles.

69. Many manufacturers design and build multiple models based on a single platform which includes many shared components. "Because it is more expensive to produce and market a number of small-volume vehicles rather than one big seller, car manufacturers have to adopt a variety of cost-cutting strategies to survive. One approach is the so-called 'platform' strategy, in which common components are shared wherever possible between different models."[7] Many models may share components, including vehicles that do not appear very similar, such as passenger cars and sport utility vehicles or trucks. "What counts now is the flexibility to make different sorts of vehicles, especially on the same production line. Many of the SUV-type vehicles share parts with cars." Manufacturers adjust production based on demand for particular models.

70. A specific example of parts that are common and interchangeable with different models is tires. Exhibit US-6 shows the same original equipment manufacturer tires used on three different models. In general, tires of the same dimensions are interchangeable with tires on any model with similar dimensions.

71. Additionally, the parts used in a particular model will change over time as improved or lower cost parts become available, or a defect is detected in a part. Thus the specific parts used in a vehicle model is constantly evolving.

72. It is also important to note that even if a manufacturer could identify that certain auto parts are going to be used in a specific vehicle *model*, given the assembly-line process, the manufacturer would have no idea into which particular *vehicle* a particular part is going to be incorporated. Moreover, within a bulk shipment of parts, one cannot identify in advance which parts will actually be used in production, as opposed to being discarded as defective, damaged in processing, or being held in inventory for eventual use as replacement parts. Thus, there is not – and cannot be – a specific vehicle identified with a collection of specific parts until that vehicle has actually been assembled within China. (The United States notes that although China asserts that it can identify parts of a specific *model* at the border, China does not assert that it can identify parts of a specific *vehicle*.) As a result, the measures wait until the vehicle has been assembled before making the final assessment of charges. See Articles 5 and 28 of Decree 125.

Response of Canada (WT/DS342)

73. Canada understands the Panel's question to relate to the general description of the automotive industry in China as set out in Section A of the complainants' joint background (paragraphs 8-19 in Canada's first written submission), which includes extensive exhibits setting out the complexity of the market, and the fact that most auto parts manufacturers in China are independent and produce for various vehicle manufacturers. See, for example:

- Exhibit JE-4, at pages 19-22, listing a number of parts suppliers and some of their customers;

- Exhibit JE-5, describing vehicle manufacturers in China, including, at pages 19-25, the major Chinese vehicle manufacturers and their different joint ventures with separate independent foreign vehicle manufacturers, and, at pages 30-34, lists of various independent foreign parts manufacturers' operations in China;

[7] "Wave goodbye to the family car," *The Economist*, 11 January 2001 (Exhibit US-5).

- Exhibit JE-14, at page 11, providing the case study of ASIMCO, a successful independent foreign parts company in China.

- Exhibit JE-21 at page 17, which shows a chart illustrating joint ventures in vehicle manufacturing, showing that foreign vehicle manufacturers do not dominate their Chinese partners (e.g., SAIC and First Auto Works both have joint ventures with GM and VW). Pages 3-4 show various auto parts companies broken down by region, together with their market capitalization. For example, Aisin Seiki in Japan has a market capitalization listed at US$4.5 billion, Brembo at US$536 million, and Magna at US$7.7 billion; and

- Exhibit JE-23, at pages 25-30, listing various parts manufacturers and their locations in China and, at page 25, noting the broad customer base of BorgWarner in China (FAW, Dongfeng, Shanghai-VW, FAW-VW, Shanghai-GM, Changan Ford, Beijing Jeep and Cherry).

74. In the event that it may assist the Panel further, Canada has in addition prepared Exhibit CDA-36.[8] That exhibit contains numerous citations, primarily links to the websites of individual auto parts manufacturers, with a particular focus on the manufacturers of brake parts. Those links provide an indication of the variety of parts manufacturers involved in the manufacturing process, and support the material cited above in establishing a number of key propositions relating to the commercial reality of the automotive industry, both in China and abroad. Notably, these are as follows:

- most parts suppliers have many customers – contrary to China's suggestion that they are controlled by particular vehicle manufacturers, they rarely rely on a particular company for the majority of their sales;

- there are complex ownership relationships between foreign and domestic companies for particular facilities in China. Foreign parts manufacturers and vehicle manufacturers do not dominate the market – many Chinese owned companies compete with a variety of foreign manufacturers; and

- most parts suppliers are legally independent of the major vehicle manufacturers, and, where vehicle manufacturers have an ownership interest in a particular auto parts production facility in China, it is most often a joint venture with local Chinese vehicle manufacturers.

Comments by the European Communities on China's response to question 176(b)

75. In its reply, China compares the suspension of two different Volkswagen models (VW Passat and VW Sagitar) to illustrate the low degree of commonality among auto parts and components used by the same manufacturer. The EC notes that the suspension has a function which is strictly related to the performance and the size of the vehicle, and that therefore it is perfectly normal that a model weighting 2270 kilos with a maximum speed of 246 km/h (such as the top version of the Passat) has a different suspension than a model weighting 1870 kilos with a maximum speed of 194 km/h (such as the lower version of the Sagitar, which is also known as "Jetta") (Exhibit EC-39).

76. The vehicle models used in China's example belong to different model ranges. A relevant comparison would have been between models of the same range. The Sagitar/Jetta, for example, is

[8] Auto Parts Suppliers – Internet links (Exhibit CDA-36).

developed on the same platform[9] and shares a great number of parts and components with several other models, ranging from the light van VW Caddy, to the family car VW Golf, to the roadster Audi TT (Exhibit EC-40). Moreover, even though the Passat and the Sagitar/Jetta belong to different model ranges, they still share parts and components. For example, several versions of these two models have the same engine (Exhibit EC-39, third and sixth page).

Comments by the United States on China's response to question 176

77. China asserts a low degree of commonality among parts between vehicles of the same manufacturer. The measures provide a particular meaning of "vehicle models". Article 25 of Order No. 4 provides, "If additional configurations to the original vehicle model cause the imported parts used in the new configuration to become Deemed Whole Vehicles, the additionally configured model should be registered with the Leading Group Office as a new vehicle model." Thus additional features like a more powerful engine, a sport coupe (as opposed to a regular coupe), or the inclusion of special comfort or safety features could result in the creation of a different "model". In such circumstances there would be especially high commonality of parts within the two "models".

Comments by China on Complainants' responses to question 176

78. In response to this question and question 217, the complainants submit extensive documentation about the use of common vehicle platforms in the automobile industry, none of which directly responds to the question – does an auto manufacturer import parts and components with the knowledge that it will use those parts and components to assemble a specific vehicle model? The complainants have sought to describe a world in which auto manufacturers import various parts and components, and only then decide what kinds of cars they will assemble, and in what amounts. This notion is entirely antithetical to modern systems of supply chain management, which seek to minimize the costs of maintaining inventory by ensuring the delivery of specific parts as they are needed to assemble a specific quantity of a specific product.

79. [ ], widely recognized as the world's most efficient producer of automobiles, was a pioneer in the application of just-in-time supply chain management. As [ ] describes:

> "Just-in-Time" means making only "what is needed, when it is needed, and in the amount needed." To efficiently produce a large number of products such as automobiles, which are comprised of some 30,000 parts, it is necessary to create a detailed production plan that includes parts procurement, for example. Supplying "what is needed, when it is needed, and in the amount needed" according to the production plan can eliminate waste, inconsistencies, and unreasonable requirements, resulting in improved productivity."[10]

80. Thus, [ ] has "a detailed production plan" of what it is going to assemble (e.g., so many [ ] at a specific assembly facility), and it then arranges for the delivery of parts that are required to fulfill that production plan, as they are needed, in the amounts that they are needed. The parts arrive at the assembly facility with a pre-determined relationship to the production of a particular vehicle model for which that part is required. It is this pre-determined relationship that allows the auto manufacturer to know that a particular shipment of parts and components is related to the production of a specific vehicle model.

[9] Reference is made to the EC reply to question 176 and to exhibits EC-12 to EC-25 for an illustration of this concept.

[10] See CHI-49.

81. For these reasons, the complainants' effort to depict some degree of commonality of parts and components among different vehicle models misses the relevant point – even if a part is common to two or more vehicle models, the auto manufacturer is aware that a particular shipment of that part is associated with the assembly of a specific vehicle model. It is not a "fiction," as the EC claims, for the auto manufacturer to associate a specific import entry of parts with the production of a specific vehicle model; the manufacturer would be aware of this association even in the absence of the challenged measures.

82. Even so, the complainants have not, in fact, established that there *is* a high degree of commonality of parts and components among different vehicle models. By emphasizing the use of common *platforms* by an auto manufacturer, the complainants have sought to leave the impression that all platforms have common *parts.* But, as the EC itself notes, "a platform can be stretched, made wider and taller, and can accommodate a range of engines and transmissions."[11] As the auto manufacturer makes these types of adjustments to the platform for a specific vehicle model, many of the parts used in the assembly of that model will change, even in relation to other vehicle models assembled on the same platform. As further evidence of the commonality of parts among different vehicle models, the United States provides the specific example of *tires* – parts of a motor vehicle that are sold as after-market products, and that are meant to be replaced periodically by the owner of vehicle. This is hardly evidence of a high degree of commonality among auto parts and components.

83. An example drawn from [ ]'s assembly operations in China illustrates the very low degree of commonality of parts and components among different vehicle models. [ ] assembles the [ ] and the [ ] at the same assembly facility in China. As shown in CHI-50, these cars, while not built on the same platform, are similar types of passenger sedans. Of the thousands of parts that make up these two vehicles, they have exactly *five* in common. These parts are as follows:[12]

PARTS	NUMBER PER VEHICLE
Tire wrench	1
Engine label	1
Starter relay	1
A specific type of screw	4
A specific type of screw	33

84. As this example shows, auto parts have a low degree of commonality, even between two vehicle models assembled by the same auto manufacturer at the same facility. This further underscores the fact that the manufacturer is fully aware of the relationship between an import entry of specific parts and components and the assembly of a specific vehicle model.

177. (*China*) Canada states in paragraph 31 of its second oral statement that "[d]ocumentary evidence *in context* is only one aspect of this assessment. Yet China oversimplifies 'as presented' by claiming that 'a customs declaration or other documentary evidence' is sufficient for classification purposes. China would treat it as the sole determinant." Does China agree with Canada's statement? If not, why not?

[11] EC answers after second meeting at para. 1.

[12] This information is compiled from data that [ ] provided to the Customs General Administration in connection with the evaluation process under Decree 125. China is submitting this information as confidential information in accordance with the overall confidentiality of this submission, as established by Article 18.2 of the DSU and paragraph 2 of the Working Procedures for the Panel.

Response of China

85. China does not agree with this statement, and does not understand the basis for Canada's assertion. As China has explained, the customs declaration establishes that a particular shipment of auto parts and components is one of a series of shipments that, in their entirety, have the essential character of a motor vehicle. China considers that the fact that a particular shipment is one of a series of related shipments is part of the "context" in which auto parts and components are presented to the customs authorities. While Canada acknowledges the relevance of documentary evidence as an element of the classification determination, it provides no basis for its (implicit) assertion that Decree 125 makes an improper use of documentary evidence. Moreover, as Canada itself explained during the second substantive meeting of the Panel, the factors that will be relevant in making a classification determination will vary from one circumstance to another. Canada does not explain why a particular weighting and balancing of these factors is prescribed by the rules of the Harmonized System in any given circumstance, or in the circumstances addressed by the challenged measures.

Comments by the European Communities on China's response to question 177

86. It is clear e.g. under paragraph 41 of China's rebuttal submission that China puts significant emphasis on the customs declaration, which under the measures obliges the importer to identify the model for which the imported part is intended. This is circular. In the absence of the measures vehicle manufacturers would not identify with certainty whether a given imported part will be used in a given vehicle model. They would import parts in bulk on the basis of estimated needs in different models be it for manufacture, repair or spare parts. As stated in paragraph 12 of the EC's second written submission, it is paradoxically the contested measures that create the fiction of different vehicle models consisting of entirely different parts. In any event, the requirement to identify the intended internal use in China is a demonstration that the measures fall under Article III of the GATT 1994.

Comments by the United States on China's response to question 177

87. China's response asserts that "the fact that a particular shipment is one of a series of related shipments is part of the 'context' in which auto parts and components are presented to the customs authorities." China takes an extremely loose approach to how the shipments are "related"; presumably all that is necessary is that one shipment contains a part or component that could eventually end up being assembled into the same vehicle model as a part in the other shipment. The measures do not examine or consider who the importer or the exporter is, when the shipment was sent or when it arrives, where the shipment originates or where it arrives, or how the parts are shipped. The "context" of the measures is not concerned with "importation" or activities "related to importation", but rather the measures are focused on the amount of local content used in a vehicle assembled in China.

88. In this regard, Article 5 of Decree 125 provides that "'Deemed Whole Vehicles' . . . refers to imported parts used by an automobile manufacturer that are already Deemed Whole Vehicles *when the vehicle is being assembled.*" Under Article 7 of Decree 125 (and Article 4 of Order No. 4), verification is conducted "on-site" at the manufacturing facility. Verification pursuant to Article 19 of Decree 125 examines the first batch of *assembled vehicles*. Moreover, vehicles will *continue* to be assembled – under great uncertainty – until such time as China actually issues the results of the verification. Article 20 of Decree 125 requires reporting regarding optional parts "when optional imported parts are fitted on," and provides for re-verification "during the course of production." And Article 28 of Decree 125 requires manufacturers to declare items to Customs "after the imported parts are assembled and manufactured into whole vehicles" at which point Customs will proceed with categorization and duty collection.

89. The measures focus on assembly and the proportion of local and imported content in the final vehicle. That is the "context" provided by the measures.

178. (*China*) In response to Panel question No. 11, China states that it had adopted broad policy instruments of the same nature of the auto parts measures in other industry sectors, but it did not specifically name them or provide them. Could China please indicate such policy instruments in other industry sectors.

Response of China

90. Question 11 asked whether China had adopted legal instruments similar to the Policy on the Development of the Auto Industry in relation to other industry sectors. These are not necessarily "of the same nature" as the "auto parts measures." The measures at issue in the present dispute relate to only one chapter of the Policy on the Development of the Auto Industry, concerning the implementation and enforcement of customs laws. With respect to broad policy instruments in other industry sectors, the National Development and Reform Commission (NDRC) has issued several Industry Development Policies, including, for example, the Steel Industry Development Policy (8 July 2005) and the Cement Industry Development Policy (17 October 2006).

Comments by the European Communities on China's response to question 178

91. To the knowledge of the European Communities, the broad policy instruments cited by China in its reply to question 178 do not provide any measures similar to those imposed by China on imports of auto parts (Automotive Policy Order 2004 and its implementing measures, i.e. Decree 125 and Announcement 4).

92. The European Communities emphasises again that Decree 125 and Announcement 4 do not implement only one chapter of the Automotive Policy Order 2004, but the whole of it (see e.g. the second written submission of the European Communities, paragraph 24).

Comments by the United States on China's response to question 178

93. Given China's response, it appears that China does not have any policy instruments in other industry sectors which, in relevant respects, are of the same nature as the auto parts measures.

B. LEGAL NATURE OF THE MEASURES

179. China claims that parties have reached substantial agreement on the principles that are relevant to determining whether a particular measure or charge is subject to the disciplines of Article II or to the disciplines of Article III of the GATT (China, second written submission, paragraphs 4 and 100):

(a) (*China*) What are exactly these principles? Please explain how are they are found within the meaning of the applicable GATT provisions?

Response of China

94. As China has explained throughout these proceedings, a measure or charge is within the scope of Article II:1(b), first sentence, if it imposes an "ordinary customs duty" on the goods of another Member "on their importation" into the customs territory. China does not understand any party in this proceeding (including any third party) to have taken the position that the term "on their importation"

is defined by the point in time or space at which a charge is collected. That is, China does not understand any party to have taken the position that a measure must be imposed, and a charge must be collected, when goods *physically cross the frontier* in order for that measure or charge to fall within the scope of Article II:1(b), first sentence. Under modern systems of customs administration, customs duties are not "tolls" that are collected as a precondition to the movement of goods off the dock. On the contrary, the parties have acknowledged that customs authorities impose customs-related measures, and collect ordinary customs duties, after the point in time and space at which goods have crossed the frontier.

95. Consistent with Article 31(3)(b) of the Vienna Convention, the term "on their importation" must be interpreted in the light of the consistent and widespread practice among Members of imposing customs-related measures, and collecting customs duties, after goods have crossed the frontier. As China documented in paragraph 103 of its second written submission, the interpretations offered by the parties to this dispute (again, including the third parties) all point to the *reason* or *event* that triggered the imposition of the measure or charge as the determinative consideration in evaluating whether the measure or charge is within the scope of Article II:1(b).[13] Canada states, for example, that "[i]n assessing the characterization of a charge, one must consider *why*, as well as how or when, the charge is assessed."[14] At the meeting of the Panel with the third parties, Brazil referred to this as the "event or events that trigger the application of the measures at issue."[15]

96. Consistent with these explanations, and consistent with the practice of WTO Members, a measure or charge is imposed on goods "on their importation" into a Member's customs territory if the measure or charge is triggered by, or arises by reason of, the importation of goods into the Member's customs territory. A Member may impose a customs-related measure or collect an ordinary customs duty after goods physically cross the frontier, provided that the measure or charge relates to a condition or liability that arose by reason of the entry of the goods into the Member's customs territory.

97. For the reasons that China has explained, China considers that if a measure or charge is determined to fall within the scope of Article II:1(b), the same measure or charge cannot be evaluated under Article III of the GATT. The complainants' respective positions on the binary character of Article II and Article III are not entirely clear. Canada, at a minimum, appears to accept that a measure or charge that is validly within the scope of Article II cannot be analyzed under Article III.[16] Thus, there appears to be less scope of agreement among the parties concerning the factors that are relevant in determining whether a measure or charge is subject to the disciplines of Article III.

Comments by the European Communities on China's response to question 179(a)

98. China's reply to question 179 (a) of the Panel is illustrative of the tactics it has chosen for these Panel proceedings. First China tries to find agreement between the Parties that "on importation" is not "defined by the point in time or space at which a charge is collected" (emphasis added). Then China 'innocently' paraphrases this alleged 'agreement' to meaning that "China does not understand any party to have taken the position that a measure must be imposed, and a charge must be collected, when goods physically cross the frontier …. " (emphasis added). "Collecting" has all of a sudden been extended to "imposition and collecting". A couple of sentences later these 'principles' are extended to

[13] China rebuttal submission at para. 103.
[14] Canada answers at p. 19 (emphasis added).
[15] Written responses by Brazil to the Panel's questions to the third parties at p. 6.
[16] See China rebuttal submission at para. 123.

"customs related measures" and the "reason or event that triggered the imposition of the measures or charge".

99. China paraphrases alleged "agreements" in order to widen such "agreements" almost *ad eternum* to fit its own arguments. The European Communities has set out a detailed analysis of the factors relevant in the analysis of the respective scope of application of Articles II and III of the GATT 1994 in paragraphs 35 to 49 of its second written submission.

Comments by the United States on China's response to question 179(a)

100. In the first paragraph of its response, China attempts to conflate two distinct concepts, when a charge is "imposed" and when it is "collected." The United States has previously provided comments on these different concepts in its responses to Panel question Nos. 32, 87, and 180. Similarly, the United States has addressed China's assertions regarding the relevance of the "reason" for the imposition of a change in its response to this question and to Panel question Nos. 181 and 183.

101. Finally, China seems to use the following method to determine whether a charge falls within the scope of Article II or Article III: completely disregard Article III, see if the measure could arguably fit within the definition of a customs duty, and then conclude that Article II applies to the exclusion of Article III. That does not follow the type of approach or reasoning employed by previous panels examining this or similar issues. See e.g. *Belgium – Family Allowances*, BISD 1S/59, *EEC –Parts and Components*, BISD 37S/132, paragraphs 5.4-5.8, *India – Autos*, WT/DS146, 175/R, paragraphs 7.217 et. seq., and *EC – Asbestos*, WT/DS135/R, paragraphs 8.83-8.100. Rather, each charge must be examined based on its particular facts and circumstances, taking into account the text of both Article II and Article III, in context, and in light of the object and purpose of the WTO Agreement.

(b) (*Complainants*) Do you agree with China? Please comment?

Response of the European Communities (WT/DS339)

102. The European Communities does not agree with China. The European Communities considers that the Chinese measures fall within the scope of the *TRIMs Agreement* and Article III of the GATT 1994 and therefore it cannot agree with the various unclear formulations China has offered in support of its claim that the measures should be examined exclusively under Article II of the GATT 1994. The clear substantive criteria for this conclusion have been set out in the submissions of the European Communities, most recently in paragraphs 17 to 20 of its second oral statement and paragraphs 35 to 56 of its rebuttal submission.

Response of the United States (WT/DS340)

103. In paragraph 4 of its rebuttal submission, China asserts that "the parties now appear to agree on certain basic principles concerning the characterization of a charge in relation to the rights and obligations of a Member under Article II and Article II of the GATT 1994" and that "the issue is whether the charge is one that a Member is allowed to impose by reason of the importation of the product, or, alternatively whether the charge relates to the status of a product after it has been imported."

104. The United States does not agree that the parties have reached agreement on these "principles". First, customs duties must be based on the condition of the article as imported, while China's measures impose charges based on whether the article is used in domestic production and on

the domestic content of the complete vehicle produced within China. Second, the issue is not whether the charge is one that a Member is *allowed* to impose, as Article II and Article III do not grant permission but rather provide restrictions on Members' measures. The fact that a measure is or is not consistent with one obligation does not necessarily determine whether the measure is consistent with a different obligation. A determination of whether a particular measure or charge is subject to the disciplines of Article II or Article III requires an analysis of the language of those Articles, an analysis China largely avoids.

Response of Canada (WT/DS342)

105. Canada does not agree that there is substantial agreement with China on the principles relevant to determining whether GATT Article II applies, and in particular under what circumstances ordinary customs duties may be charged under Article II:1(b), first sentence. Canada's position is that ordinary customs duties must be assessed based upon the state of the goods as presented at the border, which China's measures do not do. The legal foundation for this argument is set out in detail in Section II.B of Canada's second written submission.

180. (*Complainants*) China claims that the parties agree that the time and place at which a charge is *collected* is not the determinative consideration in evaluating whether that charge is subject to the disciplines of Article II or Article III (China, second written submission, paragraph 4). Do you agree, given the complainants' respective responses to question No. 87 see to indicate that Canada disagrees with the European Communities' and the United States' position on this point? Would you have a different position on the relevance of the time and place if it would to refer instead to the *calculation* and *assessment* of the charge?

Response of the European Communities (WT/DS339)

106. The European Communities does not see any substantive difference in the positions of the complainants on this issue. The European Communities is of the view that the precise time and place of the actual collection of a charge is not determinative in characterising the charge or the measure that imposes the charge. In other words, the actual collection or payment of an ordinary customs duty may occur after importation but the determination of the amount due must be made on importation i.e. on the basis of the objective characteristics of the product when presented for classification at the border (see Appellate Body report in *EC – Chicken Cuts*, paragraph 246). The European Communities prefers the word determination instead of the words "calculation and assessment" of the charge used in the question from the Panel although these notions could be considered in this context to be synonymous.

Response of the United States (WT/DS340)

107. The United States does not believe that there is a disagreement between the complainants on this point. The United States does not maintain that the time and place at which a charge is collected is *the* determinative consideration in evaluating whether the charge is an internal charge or a customs duty. The United States does maintain, however, that this issue may be relevant to the characterization of the charge. The United States considers that the time and place of assessment or calculation of the charge would also be relevant in evaluating whether the charge is an internal or a customs duty.

Response of Canada (WT/DS342)

108. Canada does not consider that there is any disagreement between the complainants on this point. As set out in more detail in answer to Question 87, and Section II.B of Canada's second written submission, ordinary customs duties must be imposed based upon the state of the product as it arrives at the border. The actual payment need not take place at the border, nor even must the amount owing be determined at that point (which could be characterized as the "calculation" or "assessment" of the charge), provided that the duty is levied in respect of the good as presented.

109. Canada does not agree with China's characterization of the issue, in its second written submission at paragraph 4, as being "whether the charge is one that a Member is allowed to impose by reason of the importation of the product". Article II:1(b), first sentence, only allows the imposition of ordinary customs duties to products "on their importation", not "by reason of the importation". This is discussed in detail in Canada's second written submission, in Section II.B.

181. (*Complainants*) China submits that it does not perceive any substantial disagreement on the understanding that the term "on their importation" under Article II of the GATT means that the characterization of a given charge under that provision will *depend upon the reason or event* that triggers its imposition. (China's second written submission, paragraph 103). Do you agree? Please explain.

Response of the European Communities (WT/DS339)

110. There is a fundamental disagreement between China and the European Communities on the interpretation of the notion "on importation" under Article II of the GATT 1994. China attempts to link the contested measures with Article II in various artificial ways.

111. It is self-evident that the "reason or event" under Article II of the GATT that triggers the imposition of an ordinary customs duty is the importation of the good into the customs territory of a Member. However, the reason or event that triggers the imposition of the charges under the measures is not the importation of the good into the customs territory of China but the assembly, fitting, equipping and manufacture of the imported parts into a complete vehicle after importation in combination with an insufficient proportion (in value or amount) of domestic parts. Article II does not allow that ordinary customs duties may be imposed as long as they somehow "depend upon" importation.

112. China uses several very different notions in its attempt to define "on importation" and "the reason or event that triggers its imposition" is only one of many[17]. In particular China attempts to extend the material scope of "on importation" suggesting that "a charge is 'on … importation' of a product (…) if the charge *bears an objective relationship to the administration and enforcement of a valid customs liability*".[18] The European Communities reiterates that Article II:1(b), first sentence does not contain any language that would allow the unprecedented extension of its scope in the way China suggests.[19] This criterion proposed by China is overly broad, lacks precision and is, therefore, not suitable to distinguish internal charges and ordinary customs duties imposed "on importation".

113. As set out by the European Communities in its second written submission the term "on importation" has a temporal and a material aspect (see paragraphs 39 to 49). China overstretches the

[17] See second written submission of the European Communities, paras, 37 to 49.
[18] See first written submission of China, para. 67 (emphasis added).
[19] See the response by the European Communities to Question 90 from the Panel.

temporal side of "on importation" by referring to a "process of importation", which is not complete before "all of the customs formalities required in connection with the importation of those goods have been satisfied, and the goods are no longer subject to customs control".[20] Not surprisingly, China maintains that the entire administrative procedure under Decree 125 and Announcement 4 is part of a customs procedure which is not finished before charges are imposed pursuant to Article 28 of Decree 125.[21] China's position entirely ignores the panel report in *EEC – Parts and Components*, which rejected the question of goods being in free circulation as a relevant criterion in determining whether a measure falls under Article II of the GATT.

114. Furthermore, these procedures can take months and even years to be completed and require collecting and submitting information that has nothing to do with what is necessary for the purposes of classifying goods under the Chinese schedule and clearing the goods through customs (such as the annual production plan for the vehicle model or the list of domestic and foreign suppliers under Article 9 of Decree 125). Exhibit EC – 26 demonstrates that many applications made in 2005 and 2006 and most if not all applications made in 2007 under the procedures of the measures (see Chapter 2 of Announcement 4 for details) are still pending before the Chinese authorities. Such extremely lengthy and cumbersome procedures have nothing to do with normal customs procedures as applied in the rest of the world including in the EC, US and Canada.

Response of the United States (WT/DS340)

115. The United States does not agree that the term "on their importation into the territory to which the Schedule relates" means that the characterization of a charge under Article II depends on the alleged reason or event that purportedly triggers the charge. The "reason" that a customs duty is assessed may be "because an item is imported". But an internal tax (for purposes of Article III:2) may likewise be imposed "because an item is imported". Thus that factor is not determinative.

116. Article II:1(b) provides that, on the importation of a product into the territory of a Member, the Member may not impose ordinary customs duties in excess of those set forth and provided in its Schedule. The imposition of ordinary customs duties thus occurs at the time of importation of goods into the territory to which a Member's Schedule relates.

117. As the United States has emphasized, China imposes a 25% charge on imported auto parts only if (1) the part is actually used in the manufacture of a vehicle and (2) the amount of imported content in that vehicle exceeds the thresholds set out in China's measures. A charge which is assessed based on the level of local content contained in an internally manufactured product can not be considered to be a charge on "importation."

Response of Canada (WT/DS342)

118. Canada does not agree. This is an attempt to infer, without any justification in the text of Article II, that the application of a border charge is somehow related to the ultimate justification for importation, independent of the proper classification of the good as presented at the border. The reason or event that triggers a charge is the physical act of importation.

[20] See the response by China to Question 87 from the Panel.

[21] See the response by China to Question 135 from the Panel ("China has explained that Decree 125 is a customs procedure to ensure the correct tariff classification of multiple shipments of parts and components that are related to each other through their common assembly into a particular vehicle model.").

119. China attempts, incorrectly, to read the phrase "impose as a condition of" into "on or in connection with", found in the second, legally distinct sentence of GATT Article II:1(b). China then argues that its interpretation is linked to the term "on their importation" found in the first sentence. As noted in paragraph 27 of Canada's second oral statement, there is a clear and important distinction between these terms. Under Article II:1(b), first sentence, the reason or event does *not* change. Canada has made clear in Section II.B of its second written submission that the "reason or event" is always the same under Article II:1(b), first sentence, as ordinary customs duties may only be imposed on products based upon their physical state when arriving at the border. Liability for a duty can only flow from that single event.

120. There is no basis in Article II, or in the practice of WTO Members, for a suggestion that ordinary customs duties may be imposed generally as long as they somehow "depend upon" the fact of importation. As the panel in *EEC –Parts and Components* held, neither the policy purpose nor the domestic description or characterization of a charge is relevant to the assessment of whether the charge is internal.[22] That is directly applicable to this case, where the dependence of the internal charges upon importation is *only* linked to the fact that the parts were at one time imported.

182. (*China*) Canada claims that China concedes that if the imported content in a manufactured vehicle changes *after* importation, imported parts may be found to be a Deemed Imported Vehicle when the vehicle model was *not* self-assessed as such (resulting in higher charge). Canada then concludes that "self-assessment is therefore nothing more than a mechanism for the administration of an internal charge, whether or not at the border." (Canada, second written submission, paragraph 36). Do you agree? Please explain.

Response of China

121. Canada's statement is incorrect. As explained in response to questions 167 and 168 above, the classification of auto parts and components is based on the results of the verification report and the declaration that the manufacturer provides to customs authorities when the auto parts enter China.

122. If the classification of a previously registered vehicle model changes between the entry of the parts into China and the time at which the customs duties are due, China allows the manufacturer to pay duty on any such parts on the basis of the revised classification of the vehicle model. This is an accommodation to the manufacturer, in that it recognizes the right of the manufacturer to submit a revised evaluation of the vehicle model and to obtain a verification of that revised evaluation. In practice, this accommodation would apply, if at all, to a limited number of import entries. Because customs duties are due on a monthly basis (as specified in Article 31 of Decree 125), there will be a limited number of auto parts and components for which the manufacturer has not yet paid duty at the time that the Verification Center issues a report concluding that the vehicle model no longer has the essential character of an imported motor vehicle. It is only in respect of parts and components that fall within this narrow window that the manufacturer is allowed to pay the lower rates of duty applicable to parts.

Comments by the European Communities on China's response to question 182

123. As the charges are "due" because of assembly and manufacture of parts into a complete vehicle in combination with an insufficient number or proportion of local parts the charges are manifestly internal (Article 28 of Decree 125). The fact that China facilitates the payment or collection of the charges by applying the results of the verification procedures under the measures in a

[22] *EEC – Parts and Components*, GATT Panel Report, at p. 50.

standardised way after the first batch of vehicles has been manufactured is irrelevant under the legal assessment of the measures.

124. Furthermore, China's assertion in its reply that "the classification of auto parts and components is based on the results of the verification report and the declaration that the manufacturer provides to customs authorities when the auto parts enter China" is counterfactual on the face of the measures (see above comments on China's reply to question 168). In addition, China's explanation that, in most cases, the 25% duty on complete vehicles will have anyway been paid before the verification report concludes that parts are no longer characterised as complete vehicles can only mean that the measures impose a 25% charge (allegedly to enforce the 25% Customs duty on complete vehicles) on imported auto parts, which even by China's standards, do not qualify as complete vehicles.

Comments by the United States on China's response to question 182

125. The United States again emphasizes that if the level of imported content in a manufactured vehicle changes after some or all of the parts used in that vehicle have been imported, the imported parts may be found to be a Deemed Imported Vehicle – even if the vehicle model was not self-assessed as such. This occurs through the operation of Article 20 of Decree 125[23] and the last paragraph of Article 6 of Order No. 4.[24]

126. The structure of the measures establishes that final categorization of an imported part occurs after assembly, rather than at the border. If the parts were categorized at the border, there would be no reason to impose a payment bond on all parts, and delay payment of the charge. The whole structure of the measures is centered around the actual assembly of the vehicle.

127. Finally, China's response indicates that a change may occur as an "accommodation to the manufacturer," as if the delayed determination is a benefit to the importer. The change actually may also result in the manufacturer being required to pay the additional charges. *See* Article 6 of Order No. 4.

183. (*Complainants*) For China the nature of a charge depends on whether it is one that a Member is allowed to impose (a) by reason of the importation of the product, or, alternatively, (b) whether the charge relates to the status of a product after it has been imported. (China, second written submission, paragraphs 4 and 112). Do you agree? Please explain.

Response of the European Communities (WT/DS339)

128. It would seem to the European Communities that the distinction made by China between 'whether the charge is one that a Member is allowed to impose (a) by reason of the importation of the product, or, alternatively, (b) whether the charge relates to the status of a product after it has been imported' is nothing but a reformulation of the words "on importation" and "internal" without providing any additional substantive arguments.

[23] "If during the course of production, there is a change to the Deemed Whole Vehicle status of an item, the automobile manufacturer may apply to Customs for re-verification of the basic-model vehicle. Customs, pursuant to the new verification report issued by the Center, will determine the duty-paid price for calculating duties."

[24] "If the percentage make-up of imported parts changes, such that the imported parts used in the vehicle model become Deemed Whole Vehicles, or are no longer a Deemed whole Vehicle, the changed vehicle model should be registered as a new vehicle model."

129. Members are naturally allowed to impose ordinary customs duties in accordance with their schedules "on importation" in accordance with Article II:1 (b), first sentence. In contrast, Members are not allowed to impose ordinary customs duties after importation or even in connection with importation. As set out in paragraphs 39 to 49 of the European Communities' rebuttal submission, "on importation" has a temporal and a material aspect. With the words "by reason of the importation of the product" China appears to entirely ignore the temporal aspect of the notion while at the same time blurring its material aspect.

130. It is not very clear what China attempts to achieve with its reference to "whether the charge relates to the status of a product after it has been imported". In particular, the words "the status of a product" are most unclear. In any event, the European Communities considers that it has demonstrated that the charges are imposed after the products have been imported thus making the charges internal.

Response of the United States (WT/DS340)

131. As stated in the response to question No. 181, the United States does not agree that a charge imposed "by reason of the importation of a product" is necessarily an ordinary customs duty. Any internal charge imposed on an imported product because it is an imported product may be considered imposed "by reason of the importation of the product." Thus that criterion does not provide a useful distinction between an internal charge and a customs duty.

132. It is also not clear what China means by stating "whether the charge relates to the status of a product after it has been imported." A product could have any of a number of differing "statuses" after being imported depending on the measures at issue (for example, whether it is an input for VAT purposes, a luxury good for a luxury tax, or is treated differently because it was imported).

Response of Canada (WT/DS342)

133. Canada does not agree. See responses to Questions 180 and 181, above.

184. ***(United States)*** **In its response to question No. 106 the United States, unlike the other two co-complainants, takes the position that although charges levied under Article 2(2) of Decree 125 would be in principle "ordinary customs duties," the Panel should nevertheless address the claims under Articles III:4, III:5 of the GATT and the TRIMS Agreement in regard to such charges. Please, explain the legal basis for your position given that under Article 2(2) of Decree 125 no other provision of the measures apply to such importations.**

Response of the United States (WT/DS340)

134. Under the second paragraph of Article 2 of Decree 125, if the importer so elects, Decree 125 does not otherwise apply to CKDs and SKDs imported by auto manufacturers, and the manufacturer conducts clearance procedures and pay 25 per cent duties at their local Customs office. The original US response to Panel question No. 106 misinterpreted that question; the United States in fact agrees with Canada and the European Communities that in the scenario where the importer uses Article 2 of Decree 125 for CKDs and SKDs, issues under Articles III:4 and III:5 of the GATT and Article 2 of the TRIMs Agreement are not involved.

(European Communities and Canada) **Please, confirm that the European Communities and Canada do not take the same position as the United States on the need to address the claims under Articles III:4, III:5 of the GATT and the TRIMS Agreement in regard to charges under**

Article 2(2) of Decree 125. If confirmed, please explain in detail why you do not take such a position.

Response of the European Communities (WT/DS339)

135. Provided the normal customs procedures are applied under Article 2(2) of Decree 125, the European Communities considers that it would be sufficient for the Panel to decide whether it is in accordance with Article II of the GATT 1994 to apply the duty on complete vehicles to such kits generally and in all cases. As the European Communities has demonstrated in its various submissions (most recently see paragraphs 130 to 132 of the second written submission), such standard treatment is inconsistent with Article II of the GATT 1994.

Response of Canada (WT/DS342)

136. Canada does not consider that there is any fundamental disagreement between the co-complainants. As Canada noted in response to Question 33, CKDs or SKDs that contain virtually all the parts for a vehicle in a single shipment can appropriately be classified as whole vehicles at the six-digit level. However, the fundamental point, as set out in detail in Sections II.E and F of Canada's second written submission, is that the appropriate duty rate for such vehicles is 10% irrespective of classification. This is characterized properly as a question of the proper application of China's Schedule, Article II:1(b) first sentence, and paragraph 93 of the Working Party Report. Of course, the fact that an ordinary customs duty is not subject to scrutiny under Article III:2 does not mean that such charges are exempt from scrutiny under GATT Article III:4 or Article 2 of the *TRIMs Agreement*. See, for example, *Canada – Autos*[25] and *Indonesia – Autos*.[26]

137. However, where Article 2(2) of Decree 125 is applied to exempt imported parts from the administrative burdens of the measures, and where ordinary customs duties are charged based upon the state of those imported parts as they arrive together in China (i.e., if it properly applies to the narrow definition of CKD or SKD), then it is not necessary to examine this very specific (and very limited) instance of the application of the measures under Articles III:4 and III:5, and the *TRIMs Agreement*.

185. China submits that there is a "conceptual difference" between charges under Article 29 of Decree 125 and other charges under the measures. More specifically, China refers to various aspects related to the former that differentiates it from the latter, *inter alia*: importation by supplier not manufacturer, payment of applicable charge by supplier and difference paid later by manufacturer (deduction from applicable charge); such supplier would have completed the "necessary customs formalities;" such imported auto parts would no longer be subject to "customs control"; "rules for bonded goods" would not apply in these circumstances; and such imported auto parts would therefore be in "free circulation in China.

(a) *(China)* Does the "duty bond" placed in accordance with Article 12 of Decree 125 by a manufacturer assembling auto parts that have been imported by the manufacturer itself guarantee the payment of the customs duties for the importation of parts imported by suppliers that are ultimately included in a vehicle model that is a "deemed whole vehicle"? Please explain.

[25] *Canada – Autos*, Panel Report, at paras. 10.73, 10.90.
[26] *Indonesia – Autos*, Panel Report, at paras. 14.65, 14.91.

Response of China

138. The duty bond only covers parts imported by the auto manufacturer itself. Parts imported by third-party suppliers go through the regular normal customs process and pay the import duty to the customs.

Comments by the European Communities on China's response to question 185(a)

139. China's reply acknowledges that the procedures under the measures are not part of "the regular normal customs process".

(b) *(China)* In the above example, if the "duty bond" also covers the supplier importation of auto parts, how can this be reconciled with China's statement that "suppliers would have completed the necessary customs formalities" and that these parts will be in "free circulation"? Please explain.

Response of China

140. See the answer to 185(a) above.

Comments by the European Communities on China's response to question 185(b)

141. See comment on China's reply to question 185 (a).

(c) *(China)* Please further elaborate your statement that the application of Article 29 of Decree 129 is "conceptually different" and that it presents a "different set of issues in relation to the characterization of the measure under Article II." What is then the key factor that sill makes these charges fall under Article II of the GATT despite such "conceptual differences" and a "different set of issues"?

Response of China

142. As discussed in paragraph 186 of China's second written submission, China considers that charges collected pursuant to Article 29 could be considered ordinary customs duties under Article II, in that they relate to the proper classification of a specific collection of imported parts and components that, in their entirety, have the essential character of a motor vehicle.

Comments by the European Communities on China's response to question 185(c)

143. China does not answer the question and simply repeats the "mantra" it has chosen to use in these proceedings.

(d) *(China)* In its response to question No. 83, China said that "in most cases" under Article 29 of Decree 125 suppliers would have completed customs procedures and goods would therefore be in free circulation. What are the cases in which suppliers would not have completed the customs procedures?

Response of China

144. The issue is largely one of timing. If a supplier were to import parts and components and send them directly to the auto manufacturer (as might be the case under modern systems of supply

chain management), it is possible that the supplier would not yet have paid the applicable customs duties under normal customs procedures. This is because the importer is not always required to pay the applicable customs duties at the time the goods cross the frontier. When the parts are sent directly to the auto manufacturer, the importer is still responsible for the payment of the applicable auto parts duties.

Comments by the European Communities on China's response to question 185(d)

145. China's reply must presumably be understood as meaning that the reference to "in most cases" in its reply to question 25 is irrelevant. In any case, China's reply clearly establishes that auto parts are first subject to a charge of 10% which corresponds to the customs duty on parts paid by the importer[27] (i.e. the supplier in the case envisaged by Article 29 of Decree 125), and after an additional 15% charge due by the auto manufacturer because of the assembly and manufacture of the imported part into a complete vehicle with insufficient local content, *i.e.* an internal charge. The measures function on the same basis for auto parts imported directly by the auto manufacturers. The fact that the Customs duty and the 15% internal measure are due by the same person, and can thus be hidden under a global 25% charge cannot affect the legal assessment under Articles II and III of the GATT 1994.

(e) *(Complainants)* Do you agree with China that despite these differences, Article 29 still involves "border charges" under Article II of the GATT? Please explain.

Response of the European Communities (WT/DS339)

146. The European Communities is of the view that with the exception of Article 2(2) of Decree 125, the measures are subject to Article 2 of the TRIMs Agreement and Article III, paragraphs 2, 4 and 5 of the GATT 1994. All the statements made by China in this connection, only short of openly admitting a violation of the TRIMs Agreement and Article III of the GATT 1994, demonstrate that it does not attempt to defend Article 29 of Decree 125 even under Article II of the GATT 1994. Therefore the European Communities does not agree with China that Article 29 of Decree 125 involves "border charges" and doubts whether China itself is genuinely maintaining such a position.

Response of the United States (WT/DS340)

147. The United States maintains that all charges imposed by Decree 125 are internal charges in breach of Article III:2 of the GATT. There are no "separate" charges imposed by Article 29 of Decree 125. Under Decree 125, if the number or value of imported parts in a specific vehicle exceed the designated thresholds, all imported parts in that vehicle will be assessed a 25% charge. Article 29 of Decree 125 allows a manufacturer to *deduct* from that charge the value of any customs duties that another supplier has paid on one of the parts assembled into the vehicle. Accordingly there is no "separate charge," only a permissible deduction upon provision of sufficient evidence. Similarly, all imported parts, regardless of their source, are counted together in determining whether the thresholds in Articles 21 and 22 of Decree 125 have been met. Parts imported by suppliers and sold on the domestic market to auto manufacturers are an integral part of Decree 125 – the only distinction between those parts and parts imported by the manufacturer itself is the *possible* deduction of customs duty paid by the parts supplier.

[27] See last sentence of China's reply: "When the parts are sent directly to the auto manufacturer, the importer is still responsible for the payment of the applicable auto parts duties;"

Response of Canada (WT/DS342)

148. No, Canada does not agree that Article 29 of Decree 125 could involve "border charges". Further, all charges that have been imposed under the measures are internal charges (other than charges on CKDs/SKDs, as discussed in response to Question 184). As Canada sets out in paragraph 4 of its second written submission, the effect of China's admission in response to Question 83 must be that charges under Article 29 are internal, and subject to Article III.

Comments by the United States on China's response to question 185(c)

149. China's response to part (c) of the question shows the extremes to which it is distorting the concept of an "ordinary customs duty". It argues that its charge under Article 29 – which is imposed (1) on a manufacturer that did not import the goods; and (2) after all customs formalities have been completed and all customs duties have been paid – could nevertheless be considered ordinary customs duties under Article II. This flies in the face of logic and the plain text of the GATT 1994, and serves to highlight the untenable nature of China's assertions regarding the proper interpretation of "ordinary customs duties" under Article II.

186. *(Complainants)* Is the "status" or "presentation" of the good at the border the most important element in characterizing a measure as a border or internal measure? Please, explain, indicating the legal basis of your response, including linking, if possible, the term "as presented" with the language of Article II:1(b), first sentence, of the GATT.

Response of the European Communities (WT/DS339)

150. It is not possible to say whether the "status" or "presentation" of the good at the border is generally the most important element in characterizing a measure as a border or internal measure as the importance of a given criterion may depend on the context of each case and the Measure that is under examination. However, a Measure that does not determine the good according to its objective characteristics as presented for classification at the border but rather allows the determination of the good to be made much later in time after manufacture of that good into a different product falls outside the scope of Article II:1 (b) first sentence of the GATT 1994.

Response of the United States (WT/DS340)

151. Article II:1(b) provides that products "shall, on their importation into the territory to which the Schedule relates. . . be exempt from ordinary customs duties in excess of those set forth and provided therein." The Article's use of "on their importation into the territory to which the Schedule relates" connects the imposition of the duties to the goods as they exist at the time of importation. Accordingly, a relationship between the charge and the condition of the goods at the border, at the time of importation, must be present in order for the charge to be an ordinary customs duty covered by Article II:1(b).

152. The United States further notes that the findings of the Appellate Body in *EC – Chicken Cuts* support the necessary connection between the condition of the good as imported and the customs duty. In a dispute involving ordinary customs duties under Article II:1(b), the Appellate Body explained that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border." (*EC – Chicken Cuts*, paragraph 246).

153. Also important in characterizing the measure is an examination of the language used in Article III:2. Article III:2 involves a relationship between products which have been "imported into the territory" of a Member with "internal taxes or other internal charges". Thus, in contrast to ordinary customs duties under Article II which are based on the article at the time of importation, an internal charge under Article III:2 may be associated with the article as it exists after it is imported into the Member's territory.

154. Key factors that support the finding of China's charges to be internal charges include:

- the level of the charge depends on details of manufacturing operations that take place within China, *after* importation;
- the level of the charge cannot be determined until this manufacturing process is complete;
- ·the charge is imposed on manufacturers, not importers;
- ·the level of the charge is not determined based on the individual importer's shipment or operations but instead may depend on what other parts from other countries and other importers are used by the manufacturer;
- ·identical imported parts *included in the same shipment* can be subject to different charges depending on their internal use; and
- ·the charge is imposed based on the level of local content in the assembled vehicle.

In short, the operation of the measures revolves around what occurs within China rather than at the border.

Response of Canada (WT/DS342)

155. Canada considers that the issue in interpreting GATT Article II:1(b), first sentence, is not what elements are necessary in characterizing a measure as a border measure, but on what basis ordinary customs duties may be charged. In that regard, as Canada set out in Section II.B of its Second written submission (including making reference to the term "as presented" in paragraph 23), ordinary customs duties under Article II:1(b), first sentence, can only be levied based upon the rates set out in a Member's Schedule. These rates are based upon the proper classification of an imported product in its state as it arrives at the border.

156. This is consistent with the difference in language between the first and second sentence of Article II:1(b), namely "on their importation" compared with "on or in connection with importation". China has attempted to make "as presented" the key interpretative issue, when, at most, it is an aid to inform an interpretation of Article II:1(b), first sentence. Canada notes that the language in Article II existed before the GIRs came into effect, and it is the former which is at issue in this dispute in respect of Article II. Despite China's assertion that the complainants offer no interpretation of "as presented", Canada has shown that the practice of WTO Members is to classify goods based on their

state in a single shipment as presented at the border.[28] Canada has also explained that GIR 2(a) is simply a classification rule and was never designed as a rule to prevent circumvention.

157. As Canada set out in its second written submission in Section II.B.2, other charges under Article II may be applied during a longer (but also limited) period of importation, although such charges are not at issue in this dispute. Indicia of when the process of importation ends (and thus when such charges may no longer be imposed) are provided by Canada in paragraph 31 of its Second written submission.

> **(*China*) Does China agree? Please respond in detail, in particular in light of China's statement in its second written submission, paragraphs 107-110, where China seems that it does not reject the relevance of the "status" of the good at the border as an important element in characterizing a measure.**

Response of China

158. China perceives two closely-related respects in which the notion of the "status" or "presentation" of goods at the border is potentially relevant to the present dispute. In China's view, the term "as presented" is principally relevant to the present dispute in so far as it relates to the application of GIR 2(a) to multiple shipments of parts and components that are related to each other through their common assembly into a finished motor vehicle. This is a *classification* issue within the Harmonized System, and relates to whether the challenged measures result in a proper classification of auto parts and components that have the essential character of a motor vehicle. Seen in this context, the term "as presented" relates to the interpretation and application of China's tariff schedule.

159. The complainants appear to have used the term "as presented" in a somewhat broader context, to refer more generally to whether a particular measure or charge is imposed on goods "on their importation" into a Member's customs territory within the meaning of Article II:1(b). Canada, for example, states that "[f]or a charge, what is significant is whether the charge relates to the product *as presented* at a Member's border. Any border charge, whether collected at the border or at some later time, may only relate to the product at that point in time."[29] The EC makes the same point.[30] Thus, the complainants appear to be using the term "as presented" to interpret the scope of Article II:1(b).

160. China does not perceive a significant substantive difference between these two applications of the term "as presented." In both instances, the interpretive inquiry leads to same question: What are the factors that are relevant in determining the manner in which goods are "presented"? That is, what factors can customs authorities properly take into account in evaluating the condition or status of goods at the border? As China discussed in paragraphs 107 to 110 of its second written submission, one of the factors that is relevant in determining the condition or status of goods at the border is the documentation that accompanies the entry, including the customs declaration. This is consistent with the WCO's statement to the panel in *EC – Chicken Cuts* that, in applying the essential character test, "[r]eference can … be made to accompanying documents."

161. China considers that much of the present dispute, at this juncture, concerns the factors that customs authorities may properly take into account in evaluating the condition or status of goods at

---

[28] See generally Canada's second written submission, para. 23, in particular fn. 20. See also Canada's response to Question 32, para. 3, where the practices of Australia, India, and New Zealand are discussed. See further US rule 19 C.F.R. § 141.1 (Exhibit CDA-37), discussed in answer to Question 210, below.

[29] Canada Answers at p. 19 (emphasis added).

[30] See China Rebuttal Submission at para. 107.

the border. Whether it is viewed as a classification issue under GIR 2(a), or whether it is viewed as a question of the scope of the term "on their importation," the question before the Panel is whether the complainants have established a specific interpretation of the term "as presented" with which the challenged measures are inconsistent. As discussed in response to question 228 below, China does not believe that the complainants have established such an interpretation.

162. More generally, the fact that the parties have used the term "as presented" to refer to both the classification issue under GIR 2(a) and the scope of Article II:1(b), first sentence, simply underscores the inseparability of the two issues. As China has explained, if the challenged measures result in a correct classification of auto parts and components that have the essential character of a motor vehicle, the measures collect a valid customs duty on auto parts and components "on their importation" into the customs territory of China. If the classification is correct, then it is a customs duty that China is allowed to impose in accordance with its Schedule of Concessions. Such customs duties are within the scope of China's rights and obligations under Article II:1(b).

Comments by the European Communities on China's response to question 186

163. In its reply China ignores the clear jurisprudence of the Appellate Body according to which "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border" (*EC – Chicken Cuts*, at paragraph 246, emphasis added). The European Communities has repeatedly pointed to this clear standard set out by the Appellate Body. The European Communities refers *inter alia* to its second written submission, paragraphs 67 to 132 (in particular paragraph 73).

Comments by the United States on China's response to question 186

164. China's response essentially repeats arguments it has made elsewhere. The United States will merely comment here on China's assertion that the complainants have the burden of establishing a specific interpretation of the term "as presented." Even assuming that the charges at issue are customs duties, and the United States maintains that they are not, GIR 2(a) is not an element of the prima facie case of the breach of China's tariff commitment on auto parts. Rather, it is China that has introduced this language from outside the WTO Agreement in an attempt to argue that its WTO commitments allow for such tariff treatment.

187. (*United States*) Why does the United States consider "as presented" in GIR 2(a) is irrelevant to decide whether the measure is a border or internal measure? The United States submits in paragraphs 13 and 16 of its second written submission that GIR 2(a) "is not relevant to the consideration of China's obligations under GATT Article III, or to the question of whether China's additional charges on imported parts are to be considered either as 'ordinary customs duties' under Article II:1(b), or as internal charges under Article III:2?"

Response of the United States (WT/DS340)

165. The United States considers GIR 2(a) as irrelevant to deciding whether the measure imposes internal charges or customs duties. That question turns on the application of the text of the GATT 1994 (particularly the text of Articles II and III) to the facts and circumstances in this dispute. And, to be clear, this question does not turn on the content of China's schedule of tariff commitments.[31] A

[31] As the United States has explained, the United States does hold the view that the HS Convention and GIR 2 can be used as a supplementary means of interpretation for China's schedule, since China's schedule is based on the HS nomenclature.

Member's tariff schedule establishes tariff bindings, it does not and cannot redefine the meaning of "ordinary customs duties" in Article II.

166. As the United States has explained, it sees no basis under customary rules of interpretation of public international law, as reflected in the *Vienna Convention*, for the HS Convention to serve as context for interpreting Articles II and III of the GATT 1994. Accordingly, and *a fortiori*, the United States sees no basis under customary rules of interpretation of public international law, as reflected in the *Vienna Convention*, for considering an interpretive rule adopted under the HS Convention as context for interpreting Articles II and III of the GATT 1994.

167. Furthermore, GIR 2(a) deals with the proper classification of items under the HS nomenclature. Tariff classification is only relevant in the interpretation of China's schedule of tariff commitments. If a charge is an internal charge, then tariff classification and China's tariff schedule is irrelevant. China's assertions regarding the applicability of GIR 2(a) are entirely circular. China starts with the presumption that the charges are ordinary customs duties under Article II of the GATT and then draws on GIR 2(a) for support of its position. There is no basis for this presumption.

> **(Canada) Do you agree with the United States? Please explain the legal basis for your position, in particular in light of Canada's argument in paragraph 23 of its second written submission, which seems to contradict the Unites States', and Canada's second oral statement (paragraph 13), which seems to be in agreement with the United States' above mentioned statement.**

Response of Canada (WT/DS342)

168. Canada agrees with the United States that GIR 2(a) is not relevant to consideration of Article III, including whether the measures impose internal charges under Article III:2. Paragraph 23 of Canada's second written submission and paragraph 13 of Canada's second oral statement are not inconsistent with one another. Both point to the same conclusion that GIR 2(a) is only relevant for classification purposes under Article II, but does not speak to the appropriate customs duties to be applied under that Article or the delineation between Article II and Article III.[32] In addition, paragraph 13 of Canada's second oral statement complements paragraph 23, as it notes that the context for the operation of the GIRs must be taken into account. That is, Rule 1 is sufficient to resolve most classification issues respecting auto parts (which requires China to classify first under appropriate headings, including 87.06).

169. Canada sets out in paragraphs 18-22 of its second written submission why the point for charging ordinary customs duties under Article II:1(b) must be based upon the state of a product as it arrives at the border. This is exactly the same period of time contemplated for classification in the Harmonized System, as indicated by the practice of WTO Members,[33] and the term "as presented" in GIR 2(a), which was specifically included to clarify that it applies based upon the state of a product as it arrives at the border and is presented to the customs authority of a WTO Member. That interpretation is consistent with the view of the WCO Secretariat in answer to Question 1, which notes that the term "as presented" refers to "the moment at which the goods are presented to Customs".[34] This is further supported by the Appellate Body, which in *EC – Chicken Cuts* noted with approval the

[32] Also see paras. 41-51 of Canada's second written submission, which point out that GIR 2(a) is relevant simply as part of the Harmonized System for international standards of classification.

[33] See fn 28, above.

[34] See also Exhibit CDA-15, cited in Canada's second written submission at para. 23.

statement by the WCO Secretariat that classification is done based on the essential characteristics of the product as it arrives at the border.[35]

170. Therefore, given the correct meaning of "as presented", GIR 1 and 2(a) are only relevant as context to classify products under Article II, but are not relevant to delineate between Articles II and III. However, even if (contrary to Canada's submissions and the express statement by the WCO Secretariat and the Appellate Body) the Harmonized System allows classification of a product based upon its state after manufacturing, that would be a question for the WCO, not the WTO. As the United States rightly pointed out during the second hearing, China's membership in the WCO cannot give it greater latitude in applying Article II:1(b) than WTO Members who are not also members of the WCO.

171. See also Canada's answer to Question 225 regarding paragraph 13 of Canada's second oral statement.

(*European Communities and China*) Do you agree with the United States? Please explain the legal basis for your position.

Response of the European Communities (WT/DS339)

172. The European Communities understands that the United States is pointing to the fact that the determination of the applicable charges is made after the parts have been used in the manufacture of the vehicle. The European Communities is of the view that GIR 2(a) is not relevant in a context where the determination of the charge is made after importation. Therefore, the European Communities shares the position of the United States. The imposition of the 25 % charge on parts after manufacture into complete vehicles and therefore after the parts have been presented to customs at the border falls under Article III of the GATT 1994 and is inconsistent with Article III:2 of the GATT 1994 as no such internal charge is imposed on domestic like products.

Response of China

173. China does not agree with the US position. As China discusses in detail in response to questions 186 and 234, a charge is within the scope of Article II:1(b), first sentence, if it fulfils an ordinary customs duty that a Member is allowed to collect in accordance with its Schedule of Concessions. In the context of the present dispute, the relevance of the term "as presented" in GIR 2(a) pertains to whether the challenged measures collect the ordinary customs duties that China is allowed to collect in relation to the entry of auto parts and components that have the essential character of a motor vehicle. This question is directly relevant to whether the measures collect an ordinary customs duty within the scope of China's rights and obligations under Article II.

Comments by the United States on China's response to question 187

174. China's response states that "a charge is within the scope of Article II:1(b), first sentence, if it *fulfils* an ordinary customs duty that a Member is allowed to collect in accordance with its Schedule of Concessions." (Emphasis added.) Again, China is attempting to expand on the text of the GATT. There is no mention, or concept, in the GATT of "fulfilling" an ordinary customs duty. A charge is or is not a customs duty. And nothing in Article II:1(b) "allows" a Member to depart from other GATT obligations.

[35] *EC – Chicken Cuts*, Appellate Body Report, at para. 246.

188. (*Canada)* Paragraph 17 of Canada's second oral statement states that under the measures, two otherwise-identical imported goods are given two different tariffs rates solely on the basis of their end use. Can Canada please explain how applying two different tariffs to the same goods is an internal measure within the meaning of Article III.

Response of Canada (WT/DS342)

175. Paragraph 17 of Canada's second oral statement discusses "China's approach". Canada does not accept that the measures in fact impose tariff rates as properly contemplated in Article II. In paragraph 17, Canada describes the systemic legal effect that would arise in respect of the application of Article III if China's argument on this point were accepted. Canada made the referenced statement to highlight the absurdity that would ensue under an Article III "likeness" analysis if two completely different tariff classifications can be given to two identical goods solely based on their end-use, when both are identical to a domestic equivalent. The Appellate Body has made it clear in *Japan – Alcoholic Beverages II* and *EC – Asbestos* that tariff classification is one factor used to assess "likeness" under Article III.[36] Yet this criterion would become completely useless if a Member could classify or re-classify a product once already in the internal market based on its end-use.

176. Returning to the example cited in Canada's second oral statement, two imported brake cylinders that are in all ways identical to a third, domestic unit may be "classified" differently under the measures (and thus have different tariffs) because of their end-use (see the examples on the chart on pages 26-27 of Canada's first written submission). Under China's approach it is not possible to say to which imported brake cylinder the domestic cylinder should be compared in the case of a possible violation of Article III; tariff classification could effectively become the single factor for determining likeness. The value and certainty of Article III are thereby diminished. It is this point that Canada raises in paragraph 17.

189. *(All Parties)* Is there a limit to what can legally be considered to be part of the "importation" process? If so, what is it and what is the legal basis for your response?

Response of China

177. China considers that the elements of any importation process must bear a relationship to the implementation and enforcement of valid customs concerns, such as the collection of ordinary customs duties. There are two principal legal bases for this understanding.

178. First, as China noted in response to question 55 from the Panel, the *Kyoto Convention* defines the term "Customs formalities" as "all the operations which must be carried out by the persons concerned and by the Customs *in order to comply with the Customs law*." The scope and content of a Member's customs law is disciplined, in part, by its WTO commitments. As China has explained, a Member may not include *any* provision within its customs law and seek to enforce that provision as part of the importation process. Rather, the question in each instance is whether the provision at issue is one that is consistent with the rights and obligations of the Member under Article II, i.e., whether it is a *valid* customs concern. To the extent that it is, a Member may adopt customs formalities as part of the importation process to implement and enforce that provision.

179. This conclusion is further supported by the Appellate Body's findings in *EC – Bananas III*. As China explained in response to question 85, *EC – Bananas III* supports the conclusion that the

[36] *Japan – Alcoholic Beverages II*, Appellate Body Report, at pp. 20-22; *EC – Asbestos*, Appellate Body Report, at para. 85.

elements of an importation process must be germane to the enforcement of a measure or charge that the Member is allowed to maintain or impose by reason of the importation of the product. Thus, the limitation on the elements of the importation process is defined by reference to the types of charges and measures that the Member is allowed to maintain on the importation of the goods at issue.

Response of the European Communities (WT/DS339)

180. The European Communities emphasises that "importation process" is not a term used in Article II:1(a), first sentence of the GATT 1994. If importation in reality involves several steps, which may be described as a "process"", any such "importation process" finds its limits in the "broad purpose of Article III of avoiding protectionism" (Appellate Body Report in *Japan – Alcoholic Beverages II*, p. 16). Otherwise Members would be at liberty to extend the process of importation well beyond the border and the scope of Article II, which effectively would render Article III meaningless.

181. The "importation process" must be confined to those procedures genuinely necessary to clear the products through the customs. The importation formalities must be in place and applied in good faith. If the alleged importation process does not determine the product i.e. determine its objective characteristics when presented to customs at the border in accordance with the jurisprudence of the Appellate Body[37], the procedures that extend beyond this purpose and relate to the internal use of the imported goods become necessarily procedures that affect the internal sale, offering for sale, purchase, transportation, distribution or use of the imported product within the meaning of Article III:4 of the GATT 1994. As pointed out by the panel in *EEC – Parts and Components* the fact that a Member treats imported parts as not being "in free circulation" cannot support the conclusion that duties are levied "in connection with importation" within the meaning of Article II:1 (b) of the GATT. This reasoning must apply *a fortiori* in the context where a Member claims that the duties are levied "on importation", which is a narrower concept than "in connection with importation". The mere description or categorization of a charge or a procedure under the domestic law of a Member cannot be relevant for determining the issue of whether the Measure is subject to Article III or II of the GATT 1994 (see paragraph 5.7. of the panel report in *EEC – Parts and Components*).

Response of the United States (WT/DS340)

182. Yes. First of all, "importation" must be interpreted consistently with the ordinary meaning of that term. Please see the US response to question No. 191 in this regard. In addition, if no limits were placed on what may constitute "importation," the distinction between Articles II and III would be eviscerated.

Response of Canada (WT/DS342)

183. Canada submits that ordinary customs duties must crystallize based upon the status of goods the moment they enter the territory of a Member, although procedures relating to determining that liability (e.g., testing, valuation, administrative review of classification) may occur later. For more detail, see Canada's second written submission, Section II. B generally and in particular paragraphs 27 to 32 regarding the "process" of importation that applies for certain charges (but not ordinary customs duties). Canada would in particular like to draw the Panel's attention to paragraph 31, which indicates when the process of importation is over.

[37] *EC - Chicken Cuts*, at paragraph 246.

Comments by the European Communities on China's response to question 189

184. Since the European Communities is of the view that the measures breach Article 2 of the *TRIMs Agremeent* and Article III of the GATT, it is clear that the European Communities disagrees with China's apparent position that the measures are genuinely necessary to clear the products through the customs. The European Communities has also explained in its reply to question 189 why the measures have nothing to do with normal customs procedures (see paragraph 9) and China itself acknowledges in its reply to question 185 (a) that the measures are not part of the regular and normal customs process.

190. (*United States*) Please clarify whether it is the Unites States' position that the Article III:2 "internal charge" is the 15 per cent additional charge paid once the auto parts imported under the measures have been assembled into a complete vehicle?

Response of the United States (WT/DS340)

185. As a legal matter, the United States considers that the entire charge imposed by China's measures is an internal charge subject to Article III:2. The internal charge is the 25% charge on imported parts, as indicated in paragraph 83 of the first US submission. As a practical matter, however, if the measures at issue were to disappear, China could collect a 10% duty (generally speaking) on the parts under its general customs procedures, so that as an economic matter the additional charge on parts imposed by the measures amounts to 15%.

191. (*United States*) The United States, in paragraph 19 of its second oral statement, says that the only sensible way to view "imported" is with its normal meaning, that is "the time when the product enters the Member's customs territory." Can the United States please explain how it has determined that this is the ordinary meaning of the word "imported".

Response of the United States (WT/DS340)

186. The ordinary meaning of "imported" or "importation" refers to the movement of a product from outside a territory to inside that territory. The *New Shorter Oxford English Dictionary* defines "import" as "bring or introduce from an external source or from one use etc. to another; *spec*. bring in (goods etc.) from another country." Similarly *Merriam-Webster's Collegiate Dictionary* defines "import" as "to bring from a foreign or external source; *esp*: to bring (as merchandise) into a place or country from another country." And *Blacks's Law Dictionary* defines "importation" as "the act of bringing goods and merchandise into a country from a foreign country." (Exhibit US-7)

187. It is also important to note that the language in Article II:1(b) of the GATT refers to "importation *into the territory* to which the Schedule relates" (emphasis added), also linking importation directly to the concept of territory.

188. China also recognizes the common meaning of "imported." In its response to Panel question No. 37, China states:

> A basic feature of the customs process that China has adopted to give effect to this interpretation of the term "motor vehicles" is to defer the completion of customs formalities in respect of parts that are declared as parts of registered vehicle models until the auto manufacturer *has imported* and assembled all of the *imported* parts and components that it will use to assemble that vehicle model. Until this process is complete, the *imported* parts and components are subject to a customs bond and

> remain under customs control in accordance with the customs laws of China. (emphasis added).

Thus while asserting that a part is not "imported" until all customs formalities are completed, China nonetheless acknowledges the ordinary meaning of imported as "bringing into the country."

192. *(Complainants)* In their response to question No. 105, the complainants state that charges under Article 2(2) of Decree 125 appear to be "ordinary customs duties." In its response to that question and question No. 106 the European Communities conditions such characterization to a certain understanding of how charges under Article 2(2) of Decree 125 are assessed. Would China's response to question No. 58 fulfil such conditions? If not, why not?

Response of the European Communities (WT/DS339)

189. Provided none of the procedures of the measures apply and provided the import licence is genuinely automatic, the procedural elements in China's reply to question 58 of the Panel would fulfil the procedural conditions set out in the reply of the European Communities to questions 105 and 106. However, if the "automatic import license" is the one required by Chapter III of Decree 125 (Articles 13 to 16 thereof) and if the self-verification is always required even in situations foreseen by Article 2(2) of Decree 125, the importation of CKD/SKD kits would not be subject to ordinary provisions of the Customs Law of the People's Republic of China.

190. As regards the substantive elements in China's reply to question 58, the European Communities does not agree that CKD/SKD kits can automatically be classified as motor vehicles. In this respect reference should be made e.g. to paragraphs 130 to 132 of the rebuttal submission of the European Communities.

Response of the United States (WT/DS340)

191. In its response to question No. 106, the European Communities conditions its characterization on two factors: (a) that only normal general customs procedures are applied; and (b) that the CKD or SKD kit consists of all the parts necessary to assemble a vehicle presented to customs at the same time and in a single consignment. China's response to question No. 58 would seem to satisfy the first of these conditions. China's response also seems to indicate that the entire kit would be imported simultaneously in a single shipment. If so, that would satisfy the second condition. Whether the kit was properly classified as a whole vehicle would still need to be assessed on a case-by-case basis, including an assessment of whether only assembly (as opposed to other operations) were required to produce a complete vehicle from the kit.

Response of Canada (WT/DS342)

192. China's response to Question 58 is consistent with Canada's understanding, discussed in more detail in response to Question 184, that Article 2(2) of Decree 125 applies ordinary customs duties to "true" CKDs/SKDs.

193. *(China)* In its response to question No. 15 China clarifies that all imports of CKD and SKD kits into China kits have been made under Article 2(2) of Decree 125. As a matter of law, if a manufacturer or supplier opts not to import CKD and SKD kits under of Art. 2(2) of Decree 125, would it have to follow the same regular procedures applicable to the importation of other auto parts? Please, explain in detail?

Response of China

193. Article 2(2) of Decree 125 states that to import CKD and SKD kits, the importer shall make customs clearance at the Customs where the auto manufacturer is located and pay import duties. This requirement is to reiterate the normal customs procedure for imports. There are no other procedures for the importation of CKD/SKD kits. Article 21 defines the collections of parts and components that have the essential character of a motor vehicle, which includes CKD/SKD kits. However, CKD/SKD kits are imported as motor vehicles under the ordinary customs procedures for imports.

Comments by the European Communities on China's response to question 193

194. China's reply is manifestly erroneous on the face of the measures and in contradiction with the first explanations provided by China on Article 2(2) of Decree 125.[38] Article 2(2) of Decree 125 provides for an option for the importer, not an obligation. The word "shall" is simply not used in the provision. It states very clearly "may". Article 7 of Decree 125 applies to all auto manufacturers importing auto parts to produce and assemble complete vehicles, and Article 21(1) further clarifies that the measures apply to imports of CKD and SKD kits, unless the option under Article 2(2) of Decree 125 has been exercised.

Comments by the United States on China's response to question 193

195. China's response states that an importer of CKD and SKD kits "shall" follow the normal customs procedures when importing those kits – i.e. shall not follow the special rules created by Decree 125 and Order No. 4. The actual text of Article 2(2) of Decree 125, however, provides that the importer "may" conduct customs clearance through the normal procedures. Thus, on the face of the measures, the selection of import method is optional.

194. (*European Communities*) In its response to question No. 83 China recalls its citation of the EC Anti-dumping anti-circumvention measure in its first written submission (paragraph 125) to make the point that Article 29 serves the same purpose as the "end-user controls" under that EC measure, which aims at importations through suppliers. Please, comment on such statement and its relevance to this present case.

Response of the European Communities (WT/DS339)

196. The example quoted by China concerning bicycle parts is not at all an end use control under the customs law of the European Communities. On the contrary, the system at issue was set up in the framework of the anti-circumvention measures against bicycle parts in the anti-dumping field. The exemption certificates apply for the future and are linked to a specific and well identified importer. Once an importer is exempt under the described anti-circumvention certificate system it can import parts without paying the duty on bicycles (i.e. it is exempt from anti-circumvention measure) up to the time such exemption certificate is withdrawn. In other words, once such a certificate is issued, the

[38] See first written submission of China, paragraph 38: "Because there is no doubt as to the proper tariff classification of CKD/SKD kits, imports of CKD/SKD kits are exempt from the provisions of Decree 125. Article 2 of Decree 125 states that importers of CKD/SKD kits can declare these imports to the relevant Customs authorities, and the provisions of Decree 125 will not apply. Thus, the importer of CKD/SKD kits can declare these imports as complete vehicles at the time of importation, pay the complete vehicle duty rate, and avoid the bonding and record-keeping requirements of Decree 125"; paragraph 195: "Article 2 of Decree 125 exists precisely because there is no doubt as to the proper tariff classification of imported CKD/SKD kits – they are classified as complete vehicles. Manufacturers may therefore import CKD/SKD kits, pay the appropriate motor vehicle duties at the time of importation, and bypass the procedures established under Decree 125."

imports of parts are no longer subject to any further control. In contrast, end-use requirements are by definition linked to the importation of a good only and have no link to a specific and well identified importer. In other words, they apply to all importers importing the goods at issue.

197. The European Communities strongly opposes the argument that anti-circumvention measures in the field of anti-dumping can be equated to ordinary tariff classification matters for the reasons already set forth in previous submissions to the Panel (see in particular replies to questions 86 and 132 of the Panel).

195. (*Complainants*) Do the complainants agree with the concepts and definitions used by China in relation to "customs clearance", in particular its use of the *Kyoto Convention* and the WCO *Glossary of International Customs Terms*? (see China's response to Panel question No. 55). Should the Panel take into consideration these definitions as well as other definitions from the *Kyoto Convention* and the WCO *Glossary* ?

Response of the European Communities (WT/DS339)

198. The Appellate Body in *EC - Chicken Cuts* stated that the HS Nomenclature should be taken into consideration as context while examining the classification of goods in the WTO's schedule of a WTO Member, but it never stated that other international Conventions related to customs law, such as the *Kyoto Convention*, or non-binding instruments, such as the WCO's glossary, are context within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.

199. By combining and misinterpreting the provisions of the Kyoto Convention, which aims at building up minimum standards concerning the simplification and harmonization of customs procedures, with the so-called "WCO glossary" China tries to give the wrong impression that the process of importation can be delayed in time forever at the entire discretion of each WTO member. In other words China's theory would unduly expand the scope of Article II GATT 1994 by rendering Article III meaningless.

200. This being said, the WCO Glossary and in turn General Annex to Chapter 2 of the *Revised Kyoto Convention* simply defines customs clearance as "The accomplishment of the Customs formalities necessary to allow goods to enter home use, to be exported or to be placed under, another Customs procedure" while Specific Annex B to the Revised Kyoto Convention states that "clearance for home use means the Customs procedure which provides that imported goods enter into free circulation in the Customs territory upon the payment of any import duties and taxes chargeable and the accomplishment of all the necessary Customs formalities".

201. It must also be stressed that the design and structure of Chapter 3 of the *Revised Kyoto Convention* concerning "Clearance and other customs formalities" aims at speeding up the importation process at the border level and there is nothing in it that supports China's view about the existence of an almost never ending process of importation and clearance. Indeed, Article 3.30 of the chapter reads as follows: "3.30. Standard Checking the Goods declaration shall be effected at the same time or as soon as possible after the Goods declaration is registered."

Response of the United States (WT/DS340)

202. The definition of "customs clearance" is not relevant to any issue in this dispute, nor is the term "customs clearance" even used in any of the WTO provisions at issue in this dispute. Accordingly, the Panel has no need to consider these definitions that China has presented to the Panel.

203. While the collection of customs duties may not occur until after goods have been imported into the customs territory, the tariff classification and its corresponding duties must not be based upon a change in the condition of the auto part that occurred after its importation. In the United States' rebuttal to China's response to Panel question No. 55, the United States explained that the relevant consideration in this case is whether China's measures enforce the collection of a customs duty under China's tariff schedule for which an auto part was liable when it entered the customs territory of China.

204. The United States also notes that the General Annex of the *Revised Kyoto Convention* (CHI-38) contains certain "Definitions" of customs terms. Chapter 1 of the General Annex contains standards that articulate the general principles for the interpretation of the General Annex. The first standard provides that "[t]he Definitions … in this Annex shall apply to customs procedures and practices specified in this Annex and, insofar as applicable, to procedures and practices in the Specific Annexes." Therefore, the definition of "clearance" as set forth in the Definitions to the General Annex of the *Revised Kyoto Convention* is limited in scope to the provisions of the General Annex and this instrument does not represent itself as setting forth categorical meanings of customs terms.

205. The *WCO's Glossary of International Customs Terms* (CHI-39) is a publication made available to inform the public by the WCO, but it has no formal status under the HS Convention. The Glossary often defines terms by reference to the *Revised Kyoto Convention*, but this approach does not render the Glossary as an authoritative tool in interpreting the Convention.

Response of Canada (WT/DS342)

206. Canada does not take issue with the definitions of "customs clearance" used by China to the extent that they support the conclusion that "customs formalities are routinely concluded after the goods have been released into the customs territory." However, as noted in Canada's second written submission at paragraphs 25 and 26, that term is not useful for interpreting the application of ordinary customs duties under Article II:1(b), first sentence. Further, the *Kyoto Convention* definitions do not support China's measures for several reasons, set out below.

207. As China points out in footnote 12 to its response to Question 55, the *Kyoto Convention* entered into force in 2006, thus, unlike the *Harmonized System Convention*, it cannot form context for the negotiation of China's Schedule. China refers to it as evidence of customs "practice", but practice cannot be based upon a general permissive statement. Practice must be based on what customs authorities actually do, yet China has shown no evidence of practice, much less common and consistent practice, similar to its measures.

208. It is noteworthy that China did not include the whole text of the treaty.[39] While China uses the definition of "customs clearance" to support a trade-restricting customs process, the object and purpose of that treaty is rather to streamline and simplify customs procedures. This is set out in the Preamble's reference to trade promotion:

> ENDEAVOURING to eliminate divergence between the Customs procedures and practices of Contracting Parties that can hamper international trade and other international exchanges,

[39] *International Convention on the Simplification and Harmonization of Customs Procedures* (*Kyoto Convention*), as amended by the Protocol of Amendment, adopted June 1999, entered into force February 3, 2006 (Exhibit CDA-38).

> DESIRING to contribute effectively to the development of such trade and exchanges by simplifying and harmonizing Customs procedures and practices and by fostering international co-operation.

209. Further, China's measures do not comply with requirements of the treaty in other material aspects, such as General Annex Chapter 3 (Clearance and Other Customs Formalities) which provides:

> Examination of the goods
>
> (a) Time required for examination of goods
>
> 3.33. Standard
>
> When the Customs decide that goods declared shall be examined, this examination shall take place as soon as possible after the Goods declaration has been registered.[40]

This is inconsistent with the measures, which provide for verification, not after declaration, but before and after manufacturing in China.

210. Finally, China cites and relies (in Exhibit CHI-38) on Specific Annex B – Chapter 1 for the definitions of "clearance for home use" and "goods in free circulation". But, as set out in Articles 5, 8(3), 8(4) and 9(2) of the *Kyoto Convention*, those specific annexes are subject to separate acceptance by parties to the *Kyoto Convention*, and bind only those that have accepted them. Most Members, including China, have not accepted Specific Annex B1. China has only accepted two Annexes – D1 and G1.[41]

196. (*All parties*) Is "importation" different from the "process of importation"? Please explain.

Response of China

211. China is not aware of any relevant provision of a covered agreement that refers to the "process of importation," and thus is uncertain as to the intention of this question. As China has explained in response to several questions from the Panel, including question 167 above, the term "importation" in Article II:1(b), first sentence, is not defined by reference to the point in time or space at which a charge is collected. Charges may be collected after the point at which goods physically cross the border, so long as the charge is one that the Member is allowed to collect by reason of the importation of the product at issue. This fact necessarily contemplates that there can, and often will be, an importation process that extends beyond the point at which the goods cross the frontier. As China explained in response to question 55 from the Panel, the entire structure of the *Kyoto Convention* supports this conclusion. However, for the reasons that China set forth in response to question 189 above, the existence of such a process does not, by itself, alter a Member's substantive rights and obligations under Article II – any such process must give effect to a condition or charge that the Member is allowed to maintain or impose by reason of the importation of the product.

---

[40] *Kyoto Convention*, General Annex, Chapter 3, "Clearance and Other Customs Formalities", at p. 4 (Exhibit CDA-38).

[41] *Kyoto Convention*, Position as Regards Ratifications and Accessions, Document PG0137E1a, 25 July 2006 (Exhibit CDA-39).

Response of the European Communities (WT/DS339)

212. The European Communities would like to stress that Article II, paragraph 1(b), first sentence of the GATT 1994 refers to ordinary customs duties imposed "on importation". The "process of importation" is not a term used in this provision. China clearly refers to the "process of importation" in order to extend the scope of Article II:1 and render Article III meaningless. In this respect the European Communities refers to its second written submission, paragraphs 42 and 43.

Response of the United States (WT/DS340)

213. Article II of the GATT uses the term "importation", while Article III refers to "imported" goods. The United States is not aware of the use of the term "process of importation" in the GATT. Accordingly, the definition of the phrase "process of importation" is not relevant to any issue in this dispute.

Response of Canada (WT/DS342)

214. Yes, with respect to the imposition of ordinary customs duties under Article II:1(b), first sentence, compared with other charges imposed under Article II in general. See Canada's second written submission, Section II.B for a discussion of the terms "on their importation" in the first sentence of Article II:1(b) in contrast with the broader period (which can be characterized as the "process of importation") relating to other charges governed by Article II.

Comments by the European Communities on China's response to question 196

215. China's reply is illustrative of its tactics in these proceedings. It is China itself that has introduced the notion of "process of importation" in its reply to question 37 of the Panel. Now China claims ignorance of the concept although in its reply to question 37 China stated that "it is the completion of this process that marks the turning point between permissible discrimination under Article II and impermissible discrimination under Article III". China's reply to question 196 provides a completely different position. It is difficult to keep track of the ever changing position of China in this regard. In substance the European Communities refers to its reply to question 196.

197. (*All parties*) Given the statements of the parties in their respective responses and rebuttals, should the Panel be primarily guided by the language of Article II:1(b), *first sentence*, regarding the nature of the measures issue? To what extent can the language of the *second sentence* of Article II:1(b), in particular its additional term "in connection with," define the scope of the first sentence?

Response of China

216. As China explained in response to question 97 from the Panel, the use of the term "in connection with" in Article II:1(b), second sentence, most likely reflects the broader variety of duties or charges that are encompassed by the term "other duties or charges," and the broader variety of events or conditions that could trigger the importer's obligation to pay them. Because of this difference in subject matter, China does not consider that the term "in connection with" in the second sentence can be used to define the scope of the first sentence of Article II:1(b).

Response of the European Communities (WT/DS339)

217. "In connection with" in the second sentence of Article II:1 (b) provides important context for the interpretation of the notion "on importation" in the first sentence of Article II:1 (b) of the GATT 1994. It demonstrates the narrowness of the notion of "on importation", which cannot be extended to any charge or procedure which is applied only "in connection with" importation but not "on" importation (see e.g. the second written submission of the European Communities, paragraphs 44 to 46). In any event, the European Communities is of the view that the procedures and the charges imposed under the measures (with the exception of Article 2(2) of Decree 125) are not even connected with importation but are rather internal.

Response of the United States (WT/DS340)

218. The language of the second sentence of Article II:1(b) provides context for the meaning of the language used in the first sentence. The first sentence of Article II:1(b) links the imposition of "ordinary customs duties" with "on their importation into the territory." The second sentence uses a more expansive set of terms - "all other duties or charges of any kind" and "imposed on or in connection with the importation." The second sentence is thus a broader "catch-all" provision, while the first sentence focuses on a particular charge imposed at a particular point.

Response of Canada (WT/DS342)

219. As set out in Canada's second written submission, Section II.B, the relevant language for interpreting ordinary customs duties is Article II:1(b), first sentence. The second sentence is only applicable to the separate question of "other duties and charges". The Appellate Body's analysis in *Chile – Price Band System* confirms that ordinary customs duties are assessed under the first sentence only, and other duties and charges by the second.[42] As explained in Canada's second written submission at paragraphs 28-29 and the response to Question 186, above, "in connection with" is used because it encompasses both direct charges and other, indirect "duties and charges" that can be applied throughout the process of importation.

Comments by the European Communities on China's response to question 197

220. As stated by the European Communities in its reply to question 197, "in connection with" in the second sentence of Article II:1 (b) provides important context for the interpretation of the narrower notion "on importation" in the first sentence. The European Communities therefore disagrees with the reply of China.

198. (*Complainants*) Is the European Communities' position against "splitting the measures", in particular in relation to Article 29 of Decree 125, in contradiction with the position of the other co-complainants (compare the complainant's respective responses to question No. 101)?

Response of the European Communities (WT/DS339)

221. The European Communities understands that this question is directed mainly at Canada and the United States. However, the European Communities does not see any difference between the complainants on this issue on which the European Communities has perhaps only been more explicit than Canada and the United States. All co-complainants accept that charges under Article 2(2) of Decree 125, i.e. in circumstances where the measures would not apply, could be examined under

[42] See *Chile – Price Band System*, Appellate Body Report, e.g., at paras. 151-157, 281-285.

Article II of the GATT 1994 (US responses to question 101, para. 68, Canada's responses to question 101, para. 1) while all other charges under the measures are internal charges.

Response of the United States (WT/DS340)

222. No. As indicated in the response to question No. 185, the United States does not consider that Article 29 of Decree 125 can be split from the rest of the measures.

Response of Canada (WT/DS342)

223. There is no contradiction between the positions of the complainants on this point.

224. With respect to Article 29 of Decree 125, Canada agrees with the European Communities that it is not possible to separate those aspects of the measures from the aspects that relate to imports of parts directly by vehicle manufacturers. This is so notably because all imported parts (regardless of importer) are considered collectively for purposes of the thresholds under the measures. In any event, Canada reiterates its conclusion, stated in response to Question 101, that charges under the measures are internal (other than charges on CKDs/SKDs, as discussed in response to Question 184).

199. (*China*) China submits that "the delineation between Article II and Article III requires some understanding of what it means for products to have completed the process of importation. It is the completion of this process that marks the turning point between permissible discrimination under Article II and impermissible discrimination under Article III." (China's response to Panel question No. 37) If one were to follow China's reasoning:

(a) Would this mean that it is up to each WTO Member to determine how long the importation process takes within its internal system depending on its own national objectives and purposes?

Response of China

225. No. As China explained in response to question 189, the permissible limits of the importation process are defined by reference to the types of measures or charges that a Member is allowed to maintain or impose in respect of the importation of goods, in accordance with its rights and obligations under Article II. China further explained in response to that question that Members can maintain customs procedures that are germane to the implementation and enforcement of these rights and obligations.

226. This does not mean that a Member can "determine how long the importation process takes within its internal system depending on its own national objectives and purposes." China has consistently explained that it is *not* its position that a Member may defer the "process of importation" as long as it chooses, and impose whatever discriminatory measure or charge it wishes as part of that process.[43] Rather, the question is whether the process gives effect to a measure or charge that the Member is allowed to maintain or collect in accordance with its rights and obligations under Article II. These parameters are defined by the rights and obligations that the Member has negotiated with other WTO Members under Article II, not its "national objectives and purposes."

[43] See, e.g., China rebuttal submission at para. 119; China Answers at 31; China Answers at p. 35; China Answers at p. 105.

Comments by the European Communities on China's response to question 199(a)

227. China's reply is essentially the same as to question 189. It is clear that the European Communities disagrees with China's apparent position that the measures are genuinely necessary to clear the products through the customs. China itself acknowledges in its reply to question 185 (a) that the measures are not part of the regular and normal customs process. As Exhibit EC – 26 demonstrates, the various procedures under the measures can take years before they are completed. This is a prime example of how a Member attempts to bring a discriminatory measure under the scope of Article II through labelling internal procedures as customs procedures.

(b) If yes, would the determination of whether a measure falls within the scope of Article II or Article III depend on each Member's own definition of "importation" and/or domestic regulations on "the completion of the process of importation"? Please explain.

Response of China

228. Please see the response above to question 199(a).

Comments by the United States on China's response to question 199

229. As the United States stated in its response to Panel question No. 196, the United States is not aware of the use of the term "process of importation" in the GATT. China's response to Panel question No. 196 confirms that understanding. In short, "the permissible limits of the importation process" that China refers to is not useful in interpreting the meaning of Article II of the GATT.

200. (*Complainants*) Do you agree with China's statement that "[i]t is simply not the case (...) that "physical segregation" in "sealed containers," (...) is a necessary element of a bonding procedure, either under Chinese law or under international customs practice. Nor is it a necessary element for goods to remain under customs control. Physical segregation is simply one form of customs control procedure, ordinarily used in the case of entry into special areas such as free trade zones." (China's second written submission, footnote 84 to paragraph 117). Please explain.

Response of the European Communities (WT/DS339)

230. Physical segregation in sealed containers or other means of transport is the most common feature and a standard pre-requisite of the customs procedure that China refers to as "bonding procedure" both in the law of the European Communities and in international customs practice. Under EC law this is provided for by Article 357 (1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (Official Journal L 253, 11.10.1993, p. 1–766).

231. The documents and the guarantee or security deposit do not amount to a genuine bonding procedure as the goods do not remain in the physical control of the customs and are used internally in China in the manufacture of vehicles. The elements China is referring to as a "bonding procedure" constitute simply an attempt to create a fiction of ongoing customs procedures.

Response of the United States (WT/DS340)

232. China's argument is an attempt to obfuscate the distinction between two very different customs concepts. One customs concept is the requirement that goods be entered under some sort of

financial guarantee or bond, to ensure the collection of revenue upon the final assessment of duties. The second concept is a customs regime under which goods are maintained under customs control, such as in a "bonded warehouse," so that the goods are limited in how and where they may be transported or used. China's measures are of the first type – a financial guarantee that provides no restrictions on how the goods may be used within China. But, China – in order to attempt to support its argument that its measures do not impose internal charges --would like the Panel to believe that its measures are of the second type (involving customs control on the use of the goods.) But this simply is not true**.**

233. As the United States indicated in its response to Panel question No. 17, the bond referred to by China in Article 12 of Decree 125 is simply a financial guarantee, and does not involve any control by Chinese customs on the disposition of the part after it is imported into China.

234. China's statement is an attempted refutation of Canada's answer to Panel question No. 17. Canada's reference to the "physical segregation" of goods has been taken out of context by China. Canada did not assert that parts imported into China must be physically segregated in order to be bonded. Canada's key point was that the auto parts imported by China and subject to Decree 125 "are not restricted from entering the internal market" by means of physical segregation in a bonded facility, such as a warehouse or free trade zone. Whether the goods enter the customs territory "in bond" (meaning with a "financial guarantee" for the payment of duties owed) does not affect the condition of the goods upon importation for classification purposes.

Response of Canada (WT/DS342)

235. Canada agrees that "physical segregation" is, as described, "simply one form of customs control procedure" and, thus, goods do not necessarily have to be in "sealed containers" at some point in a bonding procedure. However, as Canada described in paragraphs 33, 34, 37 and 38 of its second written submission, goods *must* remain under the physical control of customs, and thus not available for internal use within a Member. This control is exercised both as part of the process of importation generally (i.e., longer than the "snapshot" on which ordinary customs duties must be assessed, as Canada notes in Section II.B.2 of its second written submission) and to maintain control over some or all of the imported product in order to assess the good (in its state as it arrived at the border) for purposes of applying ordinary customs duties (e.g., for testing).

236. The documentary and financial requirements (akin to a "security deposit") under the measures that China refers to as "bonding" are not of the same nature, and do not relate to any of the accepted criteria listed in paragraph 31 of Canada's second written submission. The mere fact that an importer posts security and files documentation in relation to an imported product does not prevent that product from being available for use internally in China. If such requirements were able to accomplish that effect, the protection of Article III:2 against internal charges could be entirely circumvented, as a Member could deem a product under its control and subject to Article II in perpetuity.

201. (*Complainants*) Please indicate, supporting your response with evidence, the reasons why the complainants believe auto parts imported by manufacturers under the measures (i.e., not those imported by suppliers under Article 29 of Decree 125), are *de facto* <u>not</u> under Customs control (see, e.g., European Communities' first written submission, paragraph 54).

Response of the European Communities (WT/DS339)

237. It is not possible to provide documented evidence of the negative. However, China has acknowledged that in reality the alleged bonding status of the goods is limited to providing a financial

guarantee and the customs officials do not, as a matter of fact, follow and control each and every single auto part after they have been imported to China. The actual collection of the charges is due on the imported parts that the manufacturer used in the previous month to produce the relevant vehicle model (Article 31 of Decree 125). This demonstrates that the bonding requirements under the measures are a fiction. This follows also *a contrario* from Article 30 of Decree 125 (see also China's reply to questions 16, 18 and 19 of the Panel), which is the only instance where the goods are genuinely under customs supervision. The European Communities would like to point out in particular that in its reply to question 19 of the Panel, China attempts to use the procedures under Article 30 of Decree to demonstrate the extent of the general customs supervision under the measures. As China itself recognises that Article 30 of Decree 125 is not relevant under the present proceedings, it cannot use the genuine bonding requirements there under to defend the other elements of the measures.

Response of the United States (WT/DS340)

238. The United States indicated in its answer to Panel question No. 17 that the United States understands that China has clarified that the bond requirement is simply a financial guarantee, and does not involve any control by the Chinese Customs on the disposition of the part. In that context, the absence of control by the Chinese Customs on the disposition of the auto part means that the auto part enters the internal market whereupon its condition may be modified through subsequent assembly. China has not asserted that its Customs authorities retain any physical control over the goods once they are imported into the territory of China. To the contrary, in footnote 14 of its first written submission China states that the "bond" requirement is limited to a financial guarantee (at the 10% ad valorem rate) and in paragraph 116 of its second written submission China confirms that the parts are released to the importer. Furthermore, China has not cited to, and cannot cite to, any provision of Decree 125 that imposes any sort of customs control on the use of imported parts under the measure. (In other words, Decree 125 does not prevent the importer from selling the imported parts to other parties, nor does it prevent or limit any possible use or disposition of the part.) Accordingly, imported auto parts are used freely at the manufacturing sites of vehicle and auto parts manufacturers with no restrictions. Indeed the "financial guarantee" is only necessary because the merchandise has entered commerce without any other control.

Response of Canada (WT/DS342)

239. The issue relating to "customs control" is whether the financial and documentary requirements under the measures result in imported products being unavailable for internal use in China. But imported auto parts covered by the measures are available for internal use. They are used in the same way as domestic parts and imported parts not subject to the measures (such as those bought from third parties, which China concedes in response to Questions 20(a) and 83, and in paragraph 116 of its second written submission are not "bonded"). As Canada noted in paragraph 38 of its second written submission, the only imported auto parts under customs control are those excluded from coverage by Article 30 of Decree 125.

202. (*China*) Canada submits that "[w]hen an auto part arrives at China's border, the charge that crystallizes on it at that time, 'on importation', is a charge based upon the proper classification of that part as it physically exists at that point in time – generally 10%. China implicitly recognizes this by imposing a bond based on the 10% parts rate." (Canada's second written submission, paragraph 33 – footnote omitted). Does China agree? Please explain.

Response of China

240. China disagrees. There is no necessary concordance between a bonding rate and the rate of duty at which the article will be assessed, and Canada has not demonstrated otherwise.

Comments by the European Communities on China's response to question 202

241. The European Communities fully agrees with the position of Canada as expressed in the question. Canada has made a valid *prima facie* argument, which China, in its response, cannot simply shrug off by alleging that the burden of proof is still with Canada. It is for China to rebut a *prima facie* argument with something more concrete than a mere assertion.

203. (*All parties*) To what extent is the GATT and WTO jurisprudence on the delineation between Articles XI and III:4 of the GATT relevant to address the issue of the delineation between Articles II and III of the GATT and, in particular, the nature of the measures before the Panel? Please explain, in particular in light of, *inter alia*, *Canada – FIRA* (GATT Panel Report, L/5504 - 30S/140, paragraph 5.14), *India – Autos* (Panel Report, WT/DS146, 175/R, paragraphs 7.217, 7.221-7.224 and 7.257-7.262, including footnote 410 to paragraph 7.221, citing Panel and Appellate Body Reports in *Korea – Various Measures on Beef*), *EC – Asbestos* (Panel Report, WT/DS135/R, paragraphs 8.94-8.95), and *Dominican Republic – Import and Sale of Cigarettes* (Panel Report, WT/DS302/R, paragraphs 7.258-7.260).

Response of China

242. China considers that this jurisprudence is highly relevant, and underscores the importance of the threshold issue in this dispute concerning the classification of the challenged measures in relation to Article II or Article III.

243. As a preliminary matter, it is important to note the textual similarity between Article II:1(b) and Article XI:1. Article II:1(b) applies, in relevant part, to the goods of another Member "on their importation" into the customs territory. Article XI:1 applies to restrictions, *inter alia*, "on the importation" of goods from another Member. The difference between "their" and "the" is simply one of style and conformity with the structure of the respective sentences; there is no substantive difference between the scope of these two provisions.

244. The jurisprudence to which the question refers makes two important points, as relevant to the present dispute. The first is that the scope of Article XI must be interpreted in relation to the scope of Article III so as to maintain the distinction between these separate articles of the GATT, and to avoid reducing either article to superfluity or inutility.[44] Moreover, these provisions must be interpreted to maintain what the Appellate Body has referred to as "the distinction normally made in the GATT between restrictions affecting the importation of products (i.e. border measures) and restrictions affecting imported products (i.e. internal measures)."[45] The panel in *India – Autos* considered that it is only in the context of state trading enterprises that there has been a "blurring of the traditional distinction between measures affecting imported products and measures affecting importation …"[46]

245. This distinction is equally relevant in the relationship between Article II and Article III. As China has explained throughout these proceedings, a discriminatory charge that a Member is allowed

[44] See, e.g., *Canada – FIRA* at para. 5.14.
[45] *India – Autos* (Panel) at para. 7.221 n. 410, quoting *Korea – Various Measures on Beef* at para. 766.
[46] *India – Autos* (Panel) at para. 7.221.

to collect on goods "on their importation" into its customs territory – *i.e.*, a customs duty under Article II – cannot simultaneously be analyzed as an "internal charge" under the disciplines of Article III.[47] This would have the effect of rendering *inutile* a Member's right to impose customs duties in accordance with its Schedule of Concessions. It is precisely for this reason that an evaluation of a measure or charge in relation to Article II must include an assessment of whether the measure or charge is one that the Member is allowed to maintain or impose in respect of imported products under Article II. Such a charge or measure is not subject to the disciplines of Article III.

246. The second important point that this jurisprudence establishes is the interpretation of the term "on." The Panel in *India – Autos* found that "[a]n ordinary meaning of the term '*on*', relevant to a description of the relationship which should exist between the measure and the importation of the product, includes 'with respect to', 'in connection, association or activity with or with regard to.'"[48] This supports China's interpretation of the term "on their importation" to encompass charges that a Member collects by reason of (or "with respect to," or "in connection, association or activity with") the importation of a product, without regard to the exact point in time or space at which the charge is collected.

Response of the European Communities (WT/DS339)

247. The specific paragraphs identified in the jurisprudence referred to in the question address the respective scopes of Article XI and III:4 of the GATT although other aspects such as the relevance of the *Ad* Article III have also been touched upon.

248. The European Communities shares the broad thrust of the analysis in paragraphs 7.221 to 7.224 in *India – Autos* in which the panel considered that "[w]hile other provisions in the WTO Agreement may usefully be considered as part of the context which informs the meaning of a given provision, the scope of a provision should not be assumed *a priori* to vary depending on the mere presence of other provisions which may have some relevance to the situation: the contours of a provision should flow from its terms, as read in context alongside the other provisions of the agreement" (paragraph 7.223). This means that the wording in Article XI must be understood independently in the context of that provision as is the case with Article II.

249. As regards the notion "on importation" in Article XI:1 the panel in *India – Autos* considered that the ordinary meaning of the term "on" (relevant to a description of the relationship which should exist between the measure and the importation of the product) includes "with respect to", "in connection, association or activity with or with regard to".

250. The context of Article II:1(b) is different and points out to a more narrow interpretation of the notion "on importation" because the second sentence of Article II:1(b) explicitly distinguishes between the notions of "on" importation and "in connection with" importation. In this respect the jurisprudence relating to the delineation between Articles XI and III:4 is helpful in demonstrating the narrowness of the notion of "on importation" in Article II:1(b) of the GATT 1994.

251. This case law addresses another important issue, namely the relevance of the text of Note *Ad* Article III. It is important not to be guided by the text of the *Ad* Article to the detriment of the clear text of Article III itself. The Ad Article III addresses the specific issue where an internal tax or other internal charge, or any law, regulation or requirement which in fact 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

[47] See, e.g., China rebuttal submission at para. 124.
[48] *India – Autos* at para. 7.257.

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 of Article III, and is accordingly subject to the provisions of Article III. This is a clarification of a specific situation.

252. It is clear on the face of the text of Article III itself that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale etc. should not be applied to imported or domestic products so as to favour domestic like products. In other words and as already stated by the European Communities in its reply to question 88 from the Panel, the language of Article III does not require that a charge, law, or regulation must apply to both domestic and imported products to be considered internal under Article III of the GATT 1994. If the scope of Article III was limited to situations where internal charges, laws, regulations or requirements are applied to both domestic and imported goods, it would render the most blatant discriminations outside the scope of Article III. In such a case a Member would be allowed to impose an additional internal charge or an additional internal procedure only on imported products. This is the situation with the Chinese measures.

Response of the United States (WT/DS340)

253. The United States has discussed the relationship between Articles II and III of the GATT 1994 in paragraphs 75-80 of its first written submission and in its response to Panel question No. 37. Other provisions of the GATT 1994 may usefully be considered as part of the context which informs the meaning of Articles II and III and their relationship to one another. The meaning of those two articles, however, must be interpreted based on their ordinary meaning, read in context alongside the other provisions of the agreement, and in light of the agreement's object and purpose.[49]

254. The panel and Appellate Body reports referred to in this question provide guidance in the analysis of the relationship between Articles XI and III:4 of the GATT 1994. There are some important differences between Article XI and Article II that affect each article's interrelationship with Article III. First, Article XI speaks in terms of "restrictions . . . on importation" and extends to a broad range of limitations that may be imposed upon the importation of goods. (See the US response to question No. 279). In contrast, the first sentence of Article II:1(b) relates to the imposition of a specific type of charge, ordinary customs duties. The phrase "on importation" may have a narrower scope when it is referring to a specific charge as opposed to restrictions in general. This interpretation is bolstered by the language in the second sentence of Article II:1(b) which contrasts the phrase "imposed on or in connection with the importation" with the use of "on their importation into the territory" in the first sentence. That contrast is not present in Article XI. Accordingly, the guidance provided by the panels in *India – Autos* and and *Dominican Republic – Import and Sale of Cigarettes* regarding the term "on importation" in Article XI [50] is not transferrable to the meaning of "on importation" in Article II.

[49] See *India – Autos* at para. 7.223, "While other provisions of the WTO Agreement may usefully be considered as part of the context which informs the meaning of a given provision, the scope of that provision should not be assumed *a priori* to vary depending on the mere presence of other provisions which may have some relevance to the situation: the contours of a provision should flow from its terms, as read in context alongside the other provisions of the agreement."

[50] *India – Autos* at para. 7.257 and *Dominican Republic – Import and Sale of Cigarettes* at paragraph 7.258.

Response of Canada (WT/DS342)

255. The various provisions of *the WTO Agreement* may provide context for the interpretation of, among others, Articles II and III. It follows that the jurisprudence, in respect of the delineation between Articles XI and III:4, may be relevant for providing context for understanding the process of importation. In particular, Article XI (together with Articles I and III) is relevant to confirm that there is an "importation" stage after which both Article II and Article XI are no longer applicable. For example, the panel in *Canada – FIRA* confirmed that there is a separate, narrow "importation" stage, after which Article XI no longer applies – this is necessary to ensure that Article III requirements are not rendered superfluous. The same logic equally applies to Article II.

256. Canada sets out in Sections II.B.1 and II.B.2 of its second written submission the proper interpretation of when ordinary customs duties may be imposed pursuant to Article II:1(b), first sentence. There is a discrete point in time when a product enters a customs territory when liability for ordinary customs duties crystallizes. There is then a longer general "importation" phase when any charge other than ordinary customs duties under Article II can apply. Similarly, under Article XI, the importation phase is a distinct concept that extends the discipline of the Article to the wide range of possible restrictions or limitations that may be applied in the context of the importation (or exportation) process.

257. However, while Article XI is useful in understanding the general concept of the process of importation, the precise meaning of the words in Article XI must be read in the context of that provision, and may not be precisely the same as the same words in the context of another Article.[51] Article XI relates to qualitative impediments to importation or exportation in general terms. There is a notable difference between Article II and Article XI, in that Article II:1(b) contemplates two separate periods of time ("on their importation" in the first sentence, and "on or in connection with" in the second sentence), whereas Article XI applies generally to prohibit protectionism in the importation stage as a whole throughout both periods. This is analogous to the distinct analysis of likeness that occurs under Articles III:2 and III:4, where both the concept of likeness in the first sentence of Article III:2, and the concept of "directly competitive and substitutable" in the second sentence, are both imputed into the concept of likeness in Article III:4.[52]

258. This was considered in both *India – Autos* and *Dominican Republic – Import and Sale of Cigarettes*. That consideration must be considered not only in the distinct context of Article XI, but also in the context of the measures at issue in those cases. For example, in *India – Autos* the analysis related to a "trade balancing" requirement. That requirement prohibited importation of CKDs by a manufacturer if an equivalent value of automobiles was not also exported. While the measure in question in effect prohibited imports unless certain conditions were met, it was not applied "at the point of importation" because it was applied through agreements with vehicle manufacturers.[53] There was no question that the measures at issue limited imports;[54] the issue was with respect to the relationship in time between physical importation and the time of conclusion of those agreements.[55]

---

[51] *India – Autos*, Panel Report, at para. 7.223.

[52] See, e.g., *EC – Asbestos*, Appellate Body Report, at paras. 99-101. Similarly, in *Dominican Republic – Import and Sale of Cigarettes* the Panel found at paragraph 7.258 that "in the context of Article XI" it may be appropriate to read into "on importation" the phrase "in connection with". See also *India – Autos*, Panel Report, para. 7.257.

[53] *India – Autos*, Panel Report, at paras. 2.1-2.5.

[54] *India – Autos*, Panel Report, at para. 7.278.

[55] Footnote 410 in *India – Autos*, specifically referenced in this question, relates to the special disciplines applicable to state enterprises where Article XVII apply. This situation does not apply here.

259. With respect to paragraphs 8.94 and 8.95 of the Panel Report in *EC – Asbestos*, the only relevance would be to re-affirm that Article III can have broad application and apply at the border. As stated in Canada's response to Question 88, if a charge or law had to apply to both domestic and imported products, this would have the absurd result of allowing measures to violate the national treatment principle so long as they do not apply to domestic products. The statement in paragraph 8.95 is also relevant to support Canada's answer to Question 273, that Article III:4 can apply to customs procedures that are more burdensome than necessary (i.e., as was found in *US – Section 337 Tariff Act*).

Comments by the European Communities on China's response to question 203

260. This case law does not address the relationship between Article II and III of the GATT 1994 as China appears to suggest. As the European Communities stated in its reply to question 203 of the Panel, this case law highlights the important difference in the context of the notion "on importation" under Article II:1 (b) and Article XI of the GATT 1994 respectively. China's reply entirely ignores this fundamentally important context, which demonstrates that the notion of "on importation" is narrower under Article II:1(b) than under Article XI.

Comments by Canada on China's response to question 203

261. Canada would like to emphasize that the Panel's attention to the cited paragraphs demonstrates how China ignores the specific context of importation under GATT Article II and interprets individual words in a mechanistic fashion.

262. China does this by misapplying the logic of the panel in *Dominican Republic – Import and Sale of Cigarettes*. GATT Article XI:1 applies to the *whole* of the importation phase, and to direct and indirect import and export restrictions. Accordingly, it may be appropriate to read into "on importation" the phrase "in connection with" in the context of Article XI, since the latter phrase connotes both a general phase of importation and the application of direct and indirect measures to that importation phase.[56] The distinction between the specific act of importation and the general importation phase is also seen in the different language used in the first and second sentences of Article II:1(b) (i.e., "on or in connection with" in II:1(b), second sentence, refers to the general importation phase).

263. A perfunctory reading of individual words does not satisfy the requirement of the interpreter to consider the language of a treaty provision in context, and the light of its object and purpose, yet this is precisely what China proposes the Panel should do. Given the contextual differences between Article XI and Article II:1(b), the expressions "on their importation" and "on the importation" cannot be read as synonymous by virtue of containing the word "on".

204. (*All parties*) If the Panel were to take into consideration the Panel Report in *EEC – Parts and Components*, should the Panel also take into account the clarifications made by Mr. Groser, member of the Panel, at the GATT Council Meeting of 3 April 1990 (C/M/240, pages 21-23) on the scope and content of the report?

[56] As the panel noted in *Dominican Republic – Import and Sale of Cigarettes*, Panel Report, at para. 7.258.

Response of China

264. China does not consider that the remarks of Mr. Groser before the GATT Council Meeting materially alter the parties' understanding of the panel report in *EEC – Parts and Components*, or its relevance to the present dispute.

265. As China explained in its first written submission, the principal relevance of the panel report in *EEC – Parts and Components* is to highlight the important differences between the measures at issue in that dispute and the measures that the EC subsequently adopted to bring itself into conformity with its GATT obligations.[57] For the reasons that China explained, the measures at issue in the present dispute do not share the flaw that the panel identified in *EEC – Parts and Components*, in that the measures do not impose duties on parts and components after they have entered free circulation in China. Rather, like the revised EC measures, the assessment of duty liability is based on the prior investigation of whether parts and components for a specific vehicle model should be classified as the complete article, and the declaration that the importer makes to customs authorities when the goods enter the customs territory.

Response of the European Communities (WT/DS339)

266. As a matter of principle the European Communities does not believe that statements made by one member of the panel should be taken into account for the purposes of interpreting an adopted panel report. It appears also that the discussion was particularly prompted by preliminary points raised by the losing party i.e. the European Communities, which, as stated on p. 24 of the document, had not yet finalized its position. Subsequently the European Communities accepted to adopt the report. The European Communities does not see anything particularly relevant for the present Panel proceedings in the observations of Mr Groser. In any event, it would seem systemically important not to give weight to *ad hoc* observations made outside the scope of the standard panel proceedings.

Response of the United States (WT/DS340)

267. The Panel Report in *EEC – Parts and Components* should stand on its own and should not be considered to be altered by the subsequent comments of a member of that panel. Mr. Groser noted this himself as the GATT Council Meeting minutes provide: "He stressed, however, that the Panel had completed its work with the circulation of the report and that the Panel's findings should be considered by the Council as they were set out in the report. Nothing which he would say at the present meeting was, therefore, meant to add to, or detract from, the Panel's findings in L/6657." (C/M/240, page 21).

Response of Canada (WT/DS342)

268. The scope and content of the report must be determined on the basis of the report itself, and not subsequent commentary. Canada notes that Mr. Groser's comments (on p. 21) were preceded by the *caveat* that they were not "meant to add to, or detract from, the panel's findings" in *EEC – Parts and Components*.

Comments by the European Communities on China's response to question 204

269. The European Communities agrees with China that the remarks of Mr Groser are not relevant to the present dispute.

[57] See China first written submission at paras. 54-61.

270. China's other remarks in its reply are outside the scope of the question. In this respect it is sufficient to refer to EC's reply to question 132 of the Panel. The European Communities is also puzzled by China's assertion that "the measures at issue in the present dispute do not share the flaw that the Panel identified in *EEC – Parts and Components*, in that the measures do not impose duties on parts and components after they have entered free circulation in China". Under the EC measures condemned in *EEC – Parts and Components*, the parts were not considered in free circulation before being assembled and leaving the assembly or production plant [58]. Thus, the EC measures – just like China claims for its measures – did not "impose duties on parts and components after they have entered free circulation in [the EC]". The panel in *EEC – Parts and Components* explicitly rejected the argument presented by the EEC based on the status of the goods as not being in free circulation (see paragraph 5.7 of the panel report). China's reference to *EEC – Parts and Components* is therefore erroneous.

Comments by the United States on China's response to question 204

271. In its response, China expands upon its argument in paragraphs 54-61 of its first written submission to state that "the measures at issue in the present dispute do not share the flaw that the panel identified in *EEC – Parts and Components*, in that the measures do not impose duties on parts and components after they have entered free circulation in China." China did not in fact argue in its first submission that the EEC measures imposed duties on parts and components after they "entered free circulation." That was probably because the EEC measure at issue expressly provided that the parts could only be considered to be in free circulation "insofar as they will not be used in an assembly or production operation...."[59] Thus under EEC law, the parts were not "in free circulation." That was of course a legal fiction, as is the case with respect to China's measures.

C. GENERAL INTERPRETATIVE RULE 2(A)

205. (*Complainants*) In paragraphs 17 and 29 of its second written submission, China argues that the complainants' position is that China's tariff rates for motor vehicles apply only when the importer imports a completely finished motor vehicle, fully assembled, with absolutely no parts missing based on the complainants' argument that paragraph 93 of the Working Party Report committed China not to apply GIR 2(a) to classify CKD or SKD kits as motor vehicles. Further, China states in footnote 5 that the United States believes that China is not allowed to apply GIR 2(a) under any circumstance.

(a) Do you agree with China's statement above? If not, why not? Under what circumstances, would China be allowed to apply GIR 2(a)?

Response of the European Communities (WT/DS339)

272. As set out by the European Communities in its first written submission, the ordinary meaning, context and object and purpose of headings 87.01 to 87.05 (and in particular headings 87.02 to 87.04) of China's tariff schedule clearly point to complete motor vehicles. As further set out in its first written submission (in particular paragraphs 251 to 253), there are some exceptional situations where the general explanatory note to Chapter 87 of the Harmonized System foresees that an incomplete or unfinished vehicle may be classified as the corresponding complete or finished vehicle provided it has the essential character of the latter. The explanatory note provides as examples "a motor vehicle, not yet fitted with the wheels or tyres and battery" and "a motor vehicle not equipped with its engine or

[58] See *EEC – Parts and Components*, paras 2.5, 2.6, 3.8, 3.22 to 3.26, 3.35 and 5.5.
[59] *EEC – Parts and Components*, BISD 37S/132 at para. 2.5.

with its interior fittings". In all cases where a large collection of automotive parts is presented to customs, the classification must be made on a case by case basis. In the light of the explanatory note to chapter 87, the overwhelming majority of the parts must be present and fitted together in order for the collection of parts to be classifiable as a complete vehicle. As the European Communities has acknowledged in its reply to question 118 of the Panel, it is prepared to accept that an SKD kit or even a CKD kit consisting of all parts necessary to make a complete vehicle could be classified as the complete vehicle provided only assembly operations are involved. However, China's reply to question 71 demonstrates that CKD and SKD kits are often subject to "further working operation for completion into the finished state" (see Note VII to GIR 2 (a)).

Response of the United States (WT/DS340)

273. The United States does not agree with China's statement. Nothing in the position of the United States states or implies that China cannot apply GIR 2(a) to incomplete or unfinished automobiles having the essential character of a complete vehicle, or to automobiles presented unassembled or disassembled. (As the United States has explained, China's measures – if considered to impose regular customs duties – go far beyond GIR 2(a) by classifying bulk shipments of auto parts as complete vehicles.)

274. Contrary to China's contentions, Paragraph 93 of the Working Party Report has nothing to do with GIR 2(a). Paragraph 93 states:

> 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.[60]

China's argument confuses two very different matters – tariff classification, and tariff treatment. The HS Convention governs tariff classification at the 6-digit level, and provides no obligations regarding tariff treatment.[61] In fact, it is common for parties to the HS Convention to have more detailed breakouts (for example, at the 8-digit level) and to use those 8-digit breakouts to provide different tariff treatment to articles that fall under the same 6-digit HS heading. In contrast, Paragraph 93 addresses the tariff treatment of CKDs and SKDs – not their tariff classification.

275. Because the HS Convention addresses tariff classification, and Paragraph 93 addresses the different matter of tariff treatment, China is wrong in arguing that GIR 2(a) somehow presents conflicts between the HS Convention and the Working Party Report. Rather, it is a simple matter for China to act consistently with both. In particular, if China classifies CKDs/SKDs under the HS heading for complete vehicles, it can (and indeed must under its Paragraph 93 obligation) provide a separate tariff breakout under that heading for CKDs/SKDs, and provide a tariff treatment of 10% for the CKD/SKD breakout. As Canada has noted, it in fact is not unusual for countries to provide separate tariff lines for whole vehicles and for CKDs/SKDs.[62]

276. Moreover, the very text of Paragraph 93 refutes China's argument that GIR 2(a) requires that a complete vehicle and articles covered by GIR 2(a) (such as certain CKDs/SKDs) must enter under

[60] WT/ACC/CHN/49 (Ex. JE-26).
[61] HS Convention, Art. 9 (Ex. JE-35).
[62] Second submission of Canada, para. 67.

the exact same tariff line. The text of paragraph 93 explicitly notes the possibility that China might create separate tariff lines: ("If China created such tariff lines ....).

Response of Canada (WT/DS342)

277. No. Canada's position, as stated in paragraph 70 of its second written submission, is that China can only charge the 25% rate on assembled vehicles. But this does not mean that a vehicle can avoid the assembled rate merely by removing a single part (such as wiper blades or tires). Members that have separate lines for CKDs in their national customs tariffs have procedures for such classifications.[63]

278. Canada submits that China's customs authorities have reasonable discretion, in keeping with relevant WTO obligations (e.g., as set out in GATT Article X), to make a determination of whether a product, in the state in which it arrives at China's border, is "assembled" or a CKD/SKD. If it is the latter, even if classified as a whole vehicle, China is obligated to charge no more than a 10% duty in accordance with paragraph 93 of the Working Party Report. Without prejudice to future disputes, Canada illustrates what it submits would be a reasonable approach, in keeping with China's commitments, taking as an example the picture China provided as Exhibit CHI-5, described by China variously as an SKD or a whole vehicle with its tires removed:[64]

- If the shipment is a whole vehicle with only its tires removed, it would be reasonable for China to classify it as an *assembled* whole vehicle and charge the whole vehicle rate.

- If, however, the shipment is only an assembled body with chassis, but all other parts (e.g., engine, transmission, axles, etc.) were shipped unassembled in the same shipment *with* that body and chassis, then China could either classify the constituent parts separately and charge them the appropriate rates (generally 10%), or classify the shipment as an *unassembled* whole vehicle, and charge it at the CKD/SKD rate of 10%.

Comments by China on Complainants' responses to question 205

279. In response to this question, the United States claims that "if China classifies [CKD/SKD kits] under the HS heading for complete vehicles, it can (*and indeed must* under its Paragraph 93 obligation) provide a separate tariff breakout under that heading for [CKD/SKD kits], and provide a tariff treatment of 10% …"[65] Once again, the United States is engaged in a wholesale re-writing of the commitment that China actually made in paragraph 93 of the Working Party Report.

280. All parties agree that, under the Harmonized System Convention, customs authorities *must* apply the General Interpretative Rules in the classification of entries. This requirement is stated in Article 3.1(a)(ii) of the Harmonized System Convention (each Member "shall apply the General Rules for the interpretation of the Harmonized System …"). As a party to the Harmonized System Convention, the classification of CKD/SKD kits as motor vehicles is not optional for China, as the US comment appears to suggest ("if China classifies [CKD/SKD kits under the HS heading for complete

[63] See for example, the *Putale* and *Zyfert* cases, cited by Australia in its oral statement, which decided whether the imported products at issue fell under a particular tariff line in Australia's Customs Tariff for "assembled" motor vehicles.

[64] See paragraph 36 of China's first written submission, describing the shipment as "SKD kits prepared for shipment to China" which "appear" to have only the tyres removed; and paragraph 20 of China's second written submission where it states that Exhibit CHI-5 *is* "a car with its tyres removed".

[65] US answers after second meeting at para. 45 (emphasis added).

vehicles …"). Thus, what the United States is actually claiming is that China *must* create separate tariff lines for CKD/SKD kits with a 10 per cent rate of duty. Indeed, the US must believe that China was required to create these separate time lines *when it acceded to the WTO*, as China was a member of the Harmonized System at that time and was required to apply GIR 2(a) to the classification of CKD/SKD kits.

281. Once again, the United States is trying to re-write a commitment that was expressly conditional ("*if* China created such tariff lines …") into a commitment that was present and unconditional at the time that China joined the WTO ("China *must* create such tariff lines …"). There is simply no basis for this re-writing of the commitment that China actually made.

206. (*China*) Are the complainants required to make a *prima facie* showing that China has misapplied the essential character test under GIR 2(a) to sustain their claims that China has violated Articles II or III of the GATT? Please explain the legal basis for your answer.

Response of China

282. The Appellate Body has explained that a complaining Member must "put forward evidence and legal argument sufficient to demonstrate" that the challenged measures are inconsistent with the relevant provisions of the covered agreements.[66] In the present dispute, the complainants have opted to bring an *as such* challenge to the challenged measures. The Appellate Body has observed that:

> By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will *necessarily* be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims.[67]

283. When challenging a measure *as such*, the complainants "are required to present evidence as to the scope and meaning of the challenged measure, including, for example, the text of the measure supported by evidence of its consistent application."[68] Likewise, "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws …"[69]

284. In respect of the essential character test, the fundamental problem with the complainants' case is that they have failed to present evidence and legal arguments sufficient to identify the specific instances in which the challenged measures will *necessarily* result in a misapplication of this standard. As China explained in its oral statement at the second substantive meeting, the complainants have failed to define the boundaries of the essential character test as it relates to parts and components of motor vehicles under Chapter 87 of the Harmonized System, and to substantiate those boundaries by reference to evidence and legal arguments. Nor have the complainants demonstrated a consistent

[66] *US – Wool Shirts* at p. 16.
[67] *US – Oil Country Tubular Goods Sunset Reviews* at para. 172 (emphasis added).
[68] *US – Oil Country Tubular Goods Sunset Reviews* at para. 257 (emphasis added).
[69] *US – Carbon Steel* at para. 157 (emphasis added).

application of the challenged measures that has resulted in a misapplication of the essential character test to parts and components of motor vehicles. Having failed to meet their burden of proof, the complainants have provided the Panel with no basis to distinguish between those instances, if any, in which the measures will necessarily result in a misapplication of the essential character test, and those instances in which it will not. Therefore, the Panel cannot find that the challenged measures, as such, are inconsistent with the essential character test under GIR 2(a).

Comments by the European Communities on China's response to question 206

285. The European Communities has made a *prima facie* showing that the measures are inconsistent with Article 2 of the *TRIMs Agreement* and Article III of the GATT 1994 and, alternatively, inconsistent with Article II of the GATT 1994. China has referred to the Harmonised System and GIR 2 (a) thereunder as its defence. As a matter of principle it is for China to provide the detailed arguments why GIR 2 (a) justifies its measures. However, as a matter of fact the European Communities has demonstrated that under all the criteria under Articles 21 and 22 of Decree 125, the measures necessarily lead to tariff classification that is not consistent with the essential character test. In this respect the European Communities refers in particular to paragraphs 112 to 117 of its second written submission.

Comments by the United States on China's response to question 206

286. As an initial matter, as the United States has argued elsewhere, GIR 2(a) deals with the proper classification of items under the HS nomenclature and is only relevant in the interpretation of China's schedule of tariff commitments (which in turn is relevant to the alternative claim of a breach of Article II). If a charge is an internal charge and thus subject to Article III:2, then GIR 2(a) is irrelevant. See US response to Panel question No. 187.

287. With respect to an alternative claim under Article II (should the Panel conclude that the charges are "ordinary customs duties"), the United States has made a *prima facie* showing that China has breached its obligations under Article II and China's schedule of tariff commitments. GIR 2(a) is not part of the WTO Agreement, and is not part of the US *prima facie* case. Rather, China has raised arguments based on GIR 2(a) in an attempt to rebut the *prima facie* case.[70] That said, the United States has presented sufficient evidence and argument to sustain its claims on this issue. See e.g., US responses to Panel question Nos. 116, 117, 128, 208, and 209.

207. (*Canada*) Do you agree with China that one of the principal differences between the CBSA determination (on the disassembled furniture case) and Decree 125 is that Decree 125 specifies the precise thresholds at which China will consider a collection of imported auto parts to have the essential character of a motor vehicle and that by doing that, Article 21 of Decree 125 makes these measures *more transparent and predictable* to importers? (China's response to Panel question No. 124)

Response of Canada (WT/DS342)

288. No, Canada does not agree. Canada's Memorandum D10-14-38 Tariff Classification of Furniture Imported in Disassembled Condition ("the Memorandum") only affects those importers where there are proper grounds to suspect that they ordered a finished piece of furniture for retail sale (not where what was actually ordered was parts, unlike the measures), but had the parts shipped separately. Those importers should in any event have based their business decisions on the tariff rate

[70] Rebuttal submission of the United States, paras. 27-31.

for finished furniture since that is what was actually ordered, so the possible application of the Memorandum to the shipment should not make their business any less predictable. They will have no additional administrative burden, nor will their costs increase beyond what they would have projected.

289. In contrast, China's measures provide uncertainty to importers of auto parts. Unlike Canadian practice regarding furniture as set out in the Memorandum, where complete furniture is ordered, here auto parts must be declared as "Deemed Whole Vehicles" in order to receive an import licence. Further, the measures ensure that every importer of auto parts, unless they know that the imported parts will be used for retail sale as spare parts, must take account of the measures. The importer in China may not know who their ultimate customer is, or whether the vehicle that will be produced with the parts has already been found to be subject to charges under the measures. Even if they knew that the ultimate vehicle was not covered by the measures, and thus that imported parts used in it would not be Deemed Whole Vehicles, they do not know if the vehicle will be re-assessed based upon a difference in valuation, or on changes in sourcing (as illustrated in the examples described in the chart in Canada's first written submission, paragraph 65 – notably the third example for changes of sourcing and the fifth example for differences in valuation).

290. The importer's contract with the vehicle manufacturer might in addition impose punitive costs on the importer if domestic-content levels from the parts supplier are not met. Further, even if the importer knows that the parts will not be Deemed Whole Vehicles based upon the model in which they are eventually used, and even if they know that the model will never be reassessed such that the parts become Deemed Whole Vehicles (for example, because the vehicle manufacturer goes to great lengths to ensure that it has more than enough domestic content), the importer still must track the imported content of its parts to comply with the administrative burden imposed by the measures.

208. (*Complainants*) Do you agree that national governments have the discretion, within their obligations under the GATT, in applying their Schedules, to interpret whether a particular shipment of parts of a given product has, on a case-by-case basis, the essential character of the whole?

Response of the European Communities (WT/DS339)

291. The European Communities is of the view that the Harmonised System limits the discretion of the Members in applying their schedules under the GATT. As its name already indicates, the Harmonized System aims at harmonising the tariff classification of goods. However, in view of the variety of different goods in the market and the enormous volumes of trade in goods world-wide, it is not possible to write down exhaustive criteria for all possible situations that customs authorities may be faced with in their daily work. It is therefore necessary to have interpretative rules that apply in those exceptional situations where the nature of the good is not immediately apparent in the light of the headings of the schedules. The customs authorities of the Members do possess this kind of practical and limited discretion, which however is guided by the objective of harmonised tariff classification. In this instance the discretion is limited by the notions of "as presented" and "essential character" and the specific Explanatory Note to chapter 87.

Response of the United States (WT/DS340)

292. The HS nomenclature does not in every instance specify what does or does not constitute the "essential character" of a complete article. However, the HS nomenclature does place limits on the determination. For example, when a less than complete article has its own heading (such as a vehicle chassis), that item must be classified under its specific heading, and cannot be classified as a complete vehicle.

Response of Canada (WT/DS342)

293. Canada agrees that Members generally have the discretion under Article II to apply lower tariff rates than the bound rates set out in their Schedule, as long as that discretion does not violate Article II or other provisions of the *WTO Agreement* (e.g., Most-Favoured-Nation obligations in Article I). Canada also agrees that Members have the discretion to classify parts which have the essential character of the finished good either as parts or as the finished good (as noted in the quotation cited in footnote 77 of Canada's second written submission), in accordance with the rules of the Harmonized System, including GIR 2(a) as appropriate. However, China is not applying its Schedule *within its obligations under the GATT*, but instead acts inconsistently with Article III, and acts as if it is only bound by its WCO obligations, which it erroneously applies.

209. (*Complainants*) If your answer to the previous question was yes – do you believe that this discretion is somehow different if a Member sets forth criteria that it will apply to all shipments of parts of a given product to determine whether they have the essential character of the whole? What is the legal basis for your position?

Response of the European Communities (WT/DS339)

294. China's systematic treatment under the measures of imported goods contrary to their objective characteristics and contrary to the explicit wording of the headings of schedules has nothing to do with discretion. The material conditions set out in Articles 21 and 22 of Decree 125 and their application under the 'multiple shipments' theory of China amounts to tariff classification at will. This is anarchy, not discretion. Any general conditions a Member applies under its schedules should be set out explicitly in the schedules and be otherwise consistent with its WTO obligations (Appellate Body Report in *EC – Export Subsidies on Sugar*, paragraphs 211 to 223).

295. The European Communities accepts that Members may adopt instruments and use documents that guide customs authorities and importers in the context of particular kinds of shipments. However, such guidance must be in accordance with the Harmonised System and the Member's WTO obligations.

Response of the United States (WT/DS340)

296. A Member may set forth criteria that it will apply to all shipments of parts of a given product so long as the criteria set forth are consistent with the Member's obligations under the GATT 1994 and other WTO Agreements and – if the Member is also a party to the Harmonized System Convention – its obligations under the Harmonized System Convention. Article 3(1)(a) of the Harmonized System Convention requires that each Contracting Party is required to undertake that its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:

> (i) it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes;
>
> (ii) it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System; and
>
> (iii) it shall follow the numerical sequence of the Harmonized System.

297. If Decree 125 imposed customs duties, it would be inconsistent with the Harmonized System Convention because it does not apply the General Interpretative Rules and the Section Notes that require goods to be classified in their condition as imported under the heading that most accurately describes the good. If Decree 125 were considered a valid interpretation of the Harmonized System, it would void (empty out) several headings and subheadings that specifically describe automobile assemblies, subassemblies, and parts.

Response of Canada (WT/DS342)

298. Canada does not take issue with Members setting forth guiding criteria to apply to particular shipments of goods to determine their classification. This approach is illustrated with respect to kit cars in Canada (Exhibit CHI-17), and other shipments elsewhere (e.g., EC Regulation 2127/2005, Exhibit CHI-14). However, Canada submits that such criteria must be in accordance with the rules of the Harmonized System and consistent with a Member's WTO obligations. Canada has set out in paragraphs 41-51 of its second written submission why the measures, even if applied to a single shipment of all parts at the border, do not classify in accordance with the requirements of the Harmonized System.

210. China states in paragraph 43 of its second written submission that "[t]he significance of the WCO's interpretation, as pertinent to this dispute, is that the term "as presented" does not *preclude* the application of GIR 2(a) to multiple shipments of parts and components, whether or not a particular WCO member chooses to apply GIR 2(a) in this manner."

(a) (*China*) Please elaborate on this statement based on the specific language of the HS Committee Decision at issue. In other words, where in the Decision does China find support for such an interpretation?

Response of China

299. The conclusion that the term "as presented" does not preclude the application of GIR 2(a) to multiple shipments of parts and components arises as a necessary implication of the interpretation that the HS Committee adopted. If the term "as presented" were limited to a single shipment (however a "shipment" might be defined), it would not be consistent with this understanding of the term "as presented" to conclude that "the questions of split consignments and the classification of goods assembled from elements originating in or arriving from different countries" were "matters to be settled by each country in accordance with its own national regulations." Both of the circumstances referred to in paragraph 10 of the HS Committee decision *necessarily* entail an application of GIR 2(a) to classify parts and components that arrive in more than one shipment. In finding that these are applications of GIR 2(a) to be determined by each country in accordance with its national laws and regulations, the HS Committee must have considered that the term "as presented" does not preclude these applications of GIR 2(a).

Comments by the European Communities on China's response to question 210(a)

300. Even China acknowledges now that these is nothing in the "decision" of the HS committee that explicitly provides for the unprecedented interpretation that China attempts to give of the notion of "as presented" in GIR 2 (a). China refers to a "necessary implication", which in reality amounts to a mere assertion by China. As the European Communities stated in paragraph 27 of its second oral statement, the phrase "elements originating in or arriving from different countries" in that decision have absolutely nothing to do with the "multiple shipments" theory China has invented for the

purposes of these Panel proceedings. The European Communities also refers to its reply to question 210 (b) and paragraphs 100 to 111 of its second written submission.

Comments by the United States on China's response to question 210(a)

301. China mistakenly asserts in its response to Panel question No. 210(a), that: "Both of the circumstances referred to in paragraph 10 of the HS Committee decision *necessarily* entail an application of GIR 2(a) to classify parts and components that arrive in more than one shipment. In finding that these are applications of GIR 2(a) to be determined by each country in accordance with its national laws and regulations, the HS Committee must have considered that the term 'as presented' does not preclude these applications of GIR 2(a)."

302. This is a mischaracterization of the meaning of the HS Committee "decision"[71] and the proper meaning of the term "as presented" and is inconsistent with the proper interpretation of the Harmonized System. As the complainants have explained, the "decision" does not make findings on this issue, and thus the HS Committee decision repeatedly cited to by China does not stand for the proposition that GIR 2(a) applies to multiple shipments of bulk parts. Rather the "decision" notes that the question of multiple origin is not addressed by GIR 2(a). See WCO Secretariat Response to Panel question 12. See also US Responses to Panel question No. 210, paragraphs 50 and 51.

(b) (*Complainants*) Does the term "as presented", explicitly or implicitly, *preclude* the application of GIR 2(a) to multiple shipments of parts and components, whether or not a particular WCO member chooses to apply GIR 2(a) in this manner? What is the legal basis for your view?

Response of the European Communities (WT/DS339)

303. It is inherent in the ordinary meaning of the words "as presented" that it cannot include multiple shipments of goods presented to customs at different times, different places, from different origins and destined for different importers. As the WCO secretariat has confirmed, "as presented" in GIR 2 (a) "could be understood to mean the moment at which the goods are presented to Customs or other officials with a view to classifying the goods concerned in the Customs tariff or in the trade statistics nomenclatures" (point 1 of the reply from the WCO secretariat). It is clear from the ordinary meaning of the words and the reply from the WCO secretariat that the concept does not and cannot cover 'several moments' and 'several places', which are necessary preconditions for China's position.

304. Furthermore and more fundamentally, the Appellate Body has confirmed that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border" (*EC – Chicken cuts*, paragraph 246). The notion of multiple shipments of products goes directly against this formulation of the Appellate Body as multiple shipments denotes several products that are presented to customs at different times and at different places.

Response of the United States (WT/DS340)

305. The United States interprets the term "as presented" as explicitly precluding the application of GIR 2(a) to shipments of goods that are not imported together. The legal basis for this view is that

[71] It is noteworthy that even the WCO Secretariat's reference to Paragraph 10 is merely a portion of the "Summary Record," and not a *decision* of the Harmonized System Committee. See the WCO Secretariat's response to the Panel's question 11.

contracting parties to the Convention of the Harmonized System are obligated to apply GIR 1 and the relevant section and chapter notes. Under GIR 1, "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 [other GIRs]." Contracting Parties cannot ignore the physical condition of the merchandise and consider what processes the importation will subsequently undergo to determine the classification. In addition, as the United States has explained, this view is based on the plain meaning of "as presented," and the fact that "as presented" replaced "as imported," and is intended to have the same meaning. Finally, the United States has explained that China's interpretation of "as presented" is completely at odds with the object and purpose of the HS Convention of ensuring consistency of import and export statistics and of facilitating trade.

306. The matter of split consignments, which was addressed in the 1995 decision, involves a different issue. Indeed, China acknowledges this: China states in its response to Panel question No. 138, that: "[A] 'consignment' is generally understood to mean a set of goods handed over to the custody of a transport carrier for delivery, whether those goods are packed in one container or in multiple containers. A consignment is 'split' when the carrier breaks the consignment into multiple modes or stages of delivery (e.g., it loads the containers making up the consignment onto two different vessels). There are a variety of reasons why this could occur, such as the need to balance loads (a consideration that is particularly relevant in air transport) or an opportunity to take advantage of costs savings in shipment." Accordingly, the treatment of split consignments mentioned in the HSC decision does not provide support for China's over-reaching measures. The multiple shipments of motor vehicle parts that are deemed to be whole motor vehicles per China's measures are not split consignments, but rather, multiple shipments of goods from different countries that were never consigned for shipment together.

Response of Canada (WT/DS342)

307. Canada does not believe that it is necessary for the Panel to come to a final determination of all the precise situations in which the term "as presented" in the Harmonized System may apply to certain shipments of multiple goods. That would be a matter for the WCO, not the WTO. However, Canada does note, as was explained in the second oral hearing, that "as presented" refers to GIR 2(a) itself, not the peripheral and specific exception referred to in the WCO Decision. The WCO Decision simply referred to previous consideration of this matter, which, as Canada demonstrated in its second written submission,[72] was based upon practice relating to the ability of importers to classify certain products (notably machinery, and *not* motor vehicles) imported in separate shipments as one product. See also Canada's response to Question 224. Moreover, Canada has shown clear subsequent practice that WTO Members who are also WCO members interpret "as presented" to mean classification based on the objective characteristics of a product in a single shipment.[73]

308. China has failed to rebut this direct evidence. Instead, China's sole example was its suggestion that the United States has a rule that "any goods arriving on the same ship, and destined for the same consignee, will ordinarily be classified on a combined basis".[74] Canada defers to its co-complainant on this point, but notes that the text cited in China's oral statement, footnote 15, refers to what needs to be included on "one entry", and "entry" is defined in 19 C.F.R. § 141.0a as "documentation" – it therefore appears to apply to a documentary requirement, not classification.[75] However, in any event, the US rule is not before this Panel, and if a WTO panel were to consider that question it would be

[72] See para. 59, first three bullets.
[73] See above, at fn. 28.
[74] China's second oral statement, at para. 24.
[75] Exhibit CDA-37.

very different since the principal issue in this dispute, the imposition of ordinary customs duties based upon the state of goods after they arrive in a Member's customs territory, would not be at issue.[76]

309. The Panel can easily determine that the plain meaning of the terms of the Harmonized System as a whole, including the term "as presented" as contained in GIR 2(a), does not support China's erroneous interpretation of GIR 2(a) that it may aggregate shipments from different suppliers to different importers at different times from different countries based on the state of those shipments not as they arrive at the border, or as they first arrive at China's customs, but based on their state after manufacturing. Further, as Canada has set out above and in its second written submission,[77] China has not provided any evidence of Member practice showing otherwise.

Comments by China on Complainants' responses to question 210(b)

310. In response to Question 210(b), Canada states it "does not believe that it is necessary for the Panel to come a final determination of all the precise situations in which the term 'as presented' in the Harmonized System may apply to certain shipments of multiple goods. That would be a matter for the WCO, not the WTO."[78] The United States, on the other hand, "interprets the term 'as presented' as explicitly precluding the application of GIR 2(a) to shipments of goods that are not imported together."[79] The EC likewise claims that "[i]t is inherent in the ordinary meaning of the words 'as presented' that it cannot include multiple shipments of goods presented to customs at different times, different places, from different origins …"[80]

311. In point of fact, the WCO has now confirmed that members of the Harmonized System may apply GIR 2(a) to classify multiple shipments of parts and components as a single entity. There is no better evidence of the complainants' inability to define and substantiate their understanding of the term "as presented" than the fact that, at this late stage in the Panel proceedings, one complainant appears to acknowledge the application of GIR 2(a) to multiple shipments, and takes the position that this particular application of GIR 2(a) is a matter for the WCO to resolve, while the other two complainants take the position that the application of GIR 2(a) to multiple shipments is expressly prohibited – in contradiction to the decision of the HS Committee. These positions are simply not consistent with a clear and unambiguous understanding of the term "as presented."

312. As China explained in response to question 228, it is not China's obligation to identify and prove the circumstances in which the challenged measures would necessarily be *consistent* with its WTO obligations. Rather, it is the *complainants'* obligation to identify and prove the circumstances in which the challenged measures would necessarily be *inconsistent* with China's WTO obligations.

(c) (*All parties*) The WCO stated in response to the questions from the Panel (page 4) that "[d]ecisions of the HS Committee, including the Explanatory Notes and any amendments thereto, are not binding (See Article 3.1(a) of the Convention). Contracting Parties to the HS are requested to inform the Secretariat in case they are not able to implement any decision by the HS Committee. The Secretariat has not received such a notification with respect to the decision at hand." In this regard, what are the implications that arise when no contracting

[76] The provision dealing with liability for duties in the part cited by China (at 19 C.F.R. § 141.1) notably emphasizes that, with respect to customs duties, "Duties and liability for their payment accrue upon imported merchandise on arrival of the importing vessel within a Customs port".

[77] At paras. 53, 54 and 57.

[78] Canada answers after second meeting at p. 19.

[79] US answers after second meeting at para. 50.

[80] EC answers after second meeting at para. 44.

parties to the HS have informed the WCO Secretariat that they are not able to implement the HS Committee Decision at issue? Does it mean that the Decision is in fact binding on the Contracting Parties as China submits?

Response of China

313. As China explained in response to question 111, the question of whether the decision of the HS Committee is formally binding on the WCO members is not relevant to the present dispute. As China has explained, in finding that the application of GIR 2(a) to multiple shipments is a matter to be resolved under national laws and regulations, the WCO has necessarily interpreted GIR 2(a) as containing no prohibition on this particular application of the rule, and has found that this application of the rule is not otherwise inconsistent with the Harmonized System. The fact that the WCO Secretariat has received no notifications from WCO members concerning their inability to implement the decision of the HS Committee simply confirms that this decision of the HS Committee has not proven to be particularly controversial or detrimental to the operation of the Harmonized System.

Response of the European Communities (WT/DS339)

314. First of all it should be clarified that, from a technical point of view, the wording "Decision" of the HS Committee covers only the adoption of Explanatory Notes, amendments thereto and Classification opinions. Despite of its heading, the document China is referring to is a working document concerning the result of a technical discussion only. The only legally relevant decision taken was to amend Explanatory Note VII to GIR 2 (a) with respect to the relevant assembly operations.

315. Second, the HS Committee decision is from 1995 while the Recommendation of the Customs Co-operation Council on the Application of the Harmonized Committee Decisions was adopted in June 2003. There is no suggestion that the recommendation is to apply retroactively.

316. Third, both under the Harmonized System Convention and under Community law the WCO's decisions (i.e. Explanatory Notes, amendments thereto and classification opinions) are not binding irrespective of the fact whether the WCO has or has not received a notification from a Member of the HS Convention concerning such decisions. This is confirmed by the secretariat of the WCO in its reply to the Panel.

Response of the United States (WT/DS340)

317. As the United States indicated in its response to Panel question No. 111, in the context of the Harmonized System, a decision taken by the Harmonized System Committee is not legally binding on its members. Decisions of this committee are considered advice and guides to the interpretation of the Harmonized System. US Customs authorities consider that these decisions often provide valuable insight into how the Harmonized System Committee views certain provisions. In rendering its decisions, the Harmonized System Committee "also usually decides whether the decision merits an amendment to the Explanatory Notes, the issuance of a classification opinion to be added to the Compendium, or to merely report the decision in the report of the session. If the decision results in amendments of the Explanatory Note or goes into the Compendium, then it should receive considerable weight ... Decisions of the Harmonized System Committee that are merely given in the report should be given little weight." See Treasury Decision (T.D.) 89-80, which sets forth the US position as to the proper guidance on the use of certain documents for interpretation of the Harmonized System. (Ex. US-4) Since its implementation of the Harmonized System in 1989, the

US Customs administration has cited this Treasury Decision routinely in administrative rulings on tariff classification matters.

318. There were two "decisions" taken by the WCO as reflected in Annex IJ/7 to Doc. 39.600 (HSC/16- Report). The first decision taken was to remove the reference to "simple assembly" from the Explanatory Note to General Interpretative Rule 2(a). With regard to the first "decision," US Customs authorities give this decision considerable weight and have classified in accordance with the WCO's decision to remove the reference of "simple assembly."

319. The second "decision" described in paragraph 10 of Annex IJ/7 to Doc. 39.600 merely indicated that neither the status of split consignments nor the classification of goods assembled from imported goods of various origins is within the jurisdiction of the HS Convention or the HS Committee. The original comment was by the Nomenclature Committee. The Nomenclature Committee was responsible for the interpretation of the Customs Cooperation Council Nomenclature (CCCN), which was predecessor to the Harmonized System. As the "decision" was only reflected in the report of the Committee and no amendments were made to the Explanatory Notes, nor was a Classification Opinion adopted, we find that paragraph 10 has little weight as it is not an enforceable decision of the Harmonized System Committee. Rather, the second "decision" is merely stating that guidance/action is not affirmatively stated by the WCO decision, and accordingly customs administrations have the responsibility to interpret their obligations under the Convention. This does not mean that a member administration can abrogate the requirements of the General Interpretative Rules by regulation at the domestic level.

320. It is not surprising that the WCO Secretariat has not received notification that a Contracting Party has not been able to implement the second "decision." The HS Committee "decision" is not one that could be implemented by the Contracting Parties as it was not a decision but a statement that matters were not within the purview of the Harmonized System. As such, the lack of any notification does not create any legal inference.

Response of Canada (WT/DS342)

321. First, Canada notes that this WCO decision was concluded in November 1995, yet the WCO only issued the *Recommendation of the Customs Co-operation Council on the Application of the Harmonized Committee Decisions* on 30 June 2001.[81] Therefore, any application of the "deemed acceptance" principle could only apply to WCO decisions after this date. There is no mention that it should be applied retroactively. For this reason, the WCO Decision is outside the purview of the deemed acceptance principle.

322. Second, WCO decisions are non-binding, so even a "deemed acceptance" principle cannot render them binding. This would contravene the *Harmonized System Convention*. While Article 8 of the *Convention* provides for acceptance of WCO decisions, this does not change the fact that such decisions, even if accepted, are merely "advisory" and only constitute "guidance" under Article 7. The WCO itself confirmed this in response to Question 5 when it stated "the nature of the commitments posed by explanatory notes, classification opinions and other advice rendered by the Committee, *even when specifically approved by the Council pursuant to Article 8 of the HS Convention, is in the nature of advisory rather than conventional*" [emphasis added].

[81] Customs Co-operation Council, *Recommendation on the Application of the Harmonized System Committee Decisions*, 30 June 2001 (Exhibit CDA-40).

323. Third, as previously noted to the Panel, this WCO decision has been taken out of context by China. Its focus is with respect to assembly operations; a decision subsequently reflected in Explanatory Note VII. The split shipment issue was peripheral and never incorporated into an explanatory note. Further, as noted in Question 210(b), above, the reference to split or multiple shipments in the Committee Decision in question did not require a particular classification practice. It simply referred to previous consideration of this matter, which, as Canada demonstrated in its second written submission,[82] was based upon practice relating to the ability of importers to classify certain products (notably machinery, and *not* motor vehicles) imported in separate shipments as one product.[83] Motor vehicles were excluded from the list of products in the original Combined Customs Nomenclature decision.

324. Last, Canada would point out that the situation might be different in the case of HS Committee decisions that require a certain practice to be followed. Those decisions are not binding, but are usually followed by WCO members in order to maintain consistent trade and classification practices. The obligation to inform the Committee is independent from the non-binding nature of the decision.

Comments by the European Communities on China's response to question 210(c)

325. The only legally relevant decision under GIR 2 (a) taken by the HS committee was to amend Explanatory Note VII to GIR 2 (a) with respect to relevant assembly operations. The European Communities refers to its reply to question 210 (c).

Comments by the United States on China's response to question 210(c)

326. In its response to Panel question No. 210(c), China interprets the WCO "decision" as dealing with the "finding that the application of GIR 2(a) to multiple shipments is a matter to be resolved under national laws and regulations, the WCO has necessarily interpreted GIR 2(a) as containing no prohibition on this particular application of the rule, and has found that this application of the rule is not otherwise inconsistent with the Harmonized System." However, the HS Committee did not address the question of "multiple shipments". Instead, the HS Committee discussed the question of "split consignments" and the determination of "origin" of goods from different countries. See First Response of WCO Secretariat, page 1, para. 4, and US Responses to Panel question No. 210(c), which explains this point in greater detail.

211. (*European Communities*) The European Communities states in paragraph 78 of its second written submission that "in this case, the classification of auto parts can be determined on the basis of the terms of the headings" and in paragraph 93 that "GIR 2(a) is of extremely limited relevance for the present case."

Can the classification of auto parts under China's Schedule be determined on the basis of the terms of the headings only? If yes, what would be the relevance of the General Explanatory Note to Chapter 87, which explicitly refers to GIR 2(a), to the interpretation of the products falling under Chapter 87?

[82] See para. 59, first three bullets.
[83] This practice is discussed in more detail in response to Panel Question 224.

Response of the European Communities (WT/DS339)

327. As the European Communities has pointed out *inter alia* in paragraph 94 of its second written submission (see also paragraphs 251 to 253 of its first written submission), recourse to GIR 2(a) can only be relevant in very specific individual cases as presented to customs and not at the level of China's tariff schedules generally as China insists. Chapter 87 of China's tariff schedules contains no additional condition. As the European Communities has stated *inter alia* in its reply to question 139, GIR 2 (a) is not relevant in interpreting a Member's schedule generally unless one assumes a very specific product or a combination of products that are presented to customs at the same time. General Explanatory note to Chapter 87, which is a particular application of GIR 2 (a) in the context of Chapter 87, provides for a tool in exceptional borderline situations to be applied on a case by case basis. Therefore, and as stated *inter alia* in paragraph 91 of the European Communities' second written submission, in the overwhelming majority of cases it is a simple task to interpret the notions of 'motor vehicle' and 'parts' of such motor vehicles. Therefore, the General Explanatory Note to Chapter 87 is relevant in the exceptional individual situations foreseen by the examples of that note.

328. To put the question in context, the classification of a brake cylinder, or of a product fulfilling the conditions of heading 87.06 "chassis fitted with engines" would not necessitate recourse to GIR 2 (a) and the General Explanatory note to Chapter 87 because the classification of the product would be clear on the basis of the heading.

212. (*All parties*) Do "split consignment" and "elements originating in or arriving from different countries" mentioned in paragraph 10 of the HS Committee Decision refer to the same situation or two different situations?

Response of China

329. As China discussed in response to question 138 from the Panel, paragraph 10 of the HS Committee Decision refers to two different circumstances. This is evident from the sentence itself, which refers to the "*questions* of split consignments *and* the classification of goods assembled from elements originating in or arriving from different countries." The sentence concludes that these are "*matters* to be settled by each country in accordance with its own national regulations." The plural structure of the sentence clearly indicates that the paragraph refers to two different circumstances.

Response of the European Communities (WT/DS339)

330. The European Communities refers to its reply to question 138, where it stated that these are inter-related issues that concern trade facilitation. In the context of some very large or complex machinery that are difficult to transport in one single consignment, the importer may wish to declare the product as a single product irrespective of the fact that the elements of the product are split into different consignments for transportation purposes. The latter part of the sentence referring to "elements originating in or arriving from different countries" refers in this context to rules of origin as clarified by the secretariat of the WCO.

Response of the United States (WT/DS340)

331. The terms "split consignments" and "elements originating in or arriving from different countries" as mentioned in paragraph 10 of the Harmonized System Committee decision (CHI-29) refer to two separate situations.

332. First, with respect to "split consignments," a "consignment" consists of a set of goods handed over to the custody of a carrier for delivery, whether those goods are packed in one container or in multiple containers. A consignment is "split" when the carrier breaks the consignment into multiple deliveries (e.g., it ships the containers making up the consignment on different vessels).

333. Second, with respect to "elements originating in or arriving from different countries," the United States believes that this is a reference to the determination of the country of origin of imported goods that consist of parts originating from more than one country. The United States does not agree with China's manipulation of the definition of "goods assembled from elements originating in or arriving from different countries, "as explained in United States' rebuttal to China's response to Panel question No. 138. China has asserted that this phrase means "the classification of goods assembled from imported parts and components (or 'elements') that arrive in the customs territory in multiple shipments." China's self-serving definition is mere conjecture given that the decision identified in paragraph 10 does not include a definition of this phrase and China has not identified any other documents promulgated by the HS Committee that would support its interpretation.

334. Furthermore, China's interpretation also disregards the HS Committee's reference to "different countries," as China asserts that this reference "cannot mean that the decision of the HS Committee applies only in the case of goods assembled from more than one exporting country" because this issue would be relevant only in the context of the application of the Rules of Origin. The United States' interpretation is supported by the letter dated 20 June 2007 from the Secretary General of the WCO in response to the Panel's request for technical advice.[84] In that letter, the Secretary General states that "[t]he phrase 'elements originating in or arriving from different countries' encompasses the possibility of goods being of (preferential o[r] non-preferential) origin from the country of shipment or from another country." (emphasis in original).

Response of Canada (WT/DS342)

335. Canada believes that the reference is to two different concepts. The first, as discussed in more detail in response to Question 224, refers to practices relating to allowing importers to classify certain separate shipments of a single product as one item. The second refers to the situation where a particular shipment may have elements of different origin, in accordance with particular rules of origin.

Comments by the European Communities on China's response to question 212

336. As explained by the European Communities in paragraph 106 of its second written submission, China's position on this issue has evolved throughout these Panel proceedings. This in itself demonstrates that China has entirely invented the "multiple shipments theory". The secretariat of the WCO was very clear in its reply when stating that "the phrase 'elements originating in or arriving from different countries' encompasses the possibility of goods being of (preferential or non-preferential) origin from the country of shipment or from another country" (emphasis in the original). The textual arguments provided in China's reply to question 212 ignore the fact that paragraph 10 of

[84] As the United States noted at the second substantive meeting, the WCO Secretariat has no legal mandate under the HS Convention to issue authoritative interpretations of the HS Convention. Accordingly, statements from the WCO Secretariat are only informative to the extent that such statements provide reasoning , documents, or information that the Panel might find helpful in interpreting the HS Convention. Thus, in each and every case in this submission where the United States refers to a response of the WCO Secretariat, it is only because the United States views that particular response as being helpful in understanding the HS Convention, and not because the United States views the WCO Secretariat statements as being authoritative interpretations of the Convention.

the decision makes a passing reference to these 'matters' in one single sentence. Had there been two genuinely separate issues at stake, the text of the decision would have made that very clear.

213. (*China*) Where does China consider a multiple shipment situation encompassed by China's measures falls under, "split consignments" *or* "elements originating in or arriving from different countries" in paragraph 10 of the HS Committee Decision? Please explain your response in detail with supporting evidence.

Response of China

337. In practice, Decree 125 could apply to either circumstance, although it will generally apply to the second circumstance referred to in paragraph 10 of the HS Committee Decision. An auto manufacturer could, for example, import parts and components for a registered model as part of a single consignment, but split that single consignment into multiple shipments. Decree 125 would apply to this circumstance in the same manner as it applies to parts and components for a registered vehicle model that enter China under multiple consignments. Decree 125 does not distinguish between these two circumstances, and thus China cannot provide the Panel with a specific estimate of the prevalence of these two circumstances. However, China expects that most auto parts and components for registered vehicle models enter China under multiple consignments.

Comments by the European Communities on China's response to question 213

338. As explained by the European Communities in paragraph 106 of its second written submission, China's position on this issue has evolved throughout these Panel proceedings. As China's reply demonstrates, its position is still not entirely clear. Reply to question 213 provides for another attempt by China to establish its position. The European Communities notes that China does not provide any evidence despite the question explicitly requiring so.

214. (*All parties*) Regarding the meaning of "elements originating in or arriving from different countries" mentioned in paragraph 10 of the HS Committee Decision, the WCO responded that "it encompasses the possibility of goods being of (preferential or non-preferential) origin from the country of shipment or from another country." What are the parties' views on the WCO's response?

Response of China

339. China does not fully understand the basis for the WCO's statement, as it is well established that the classification of an article is unrelated to the determination of its origin.[85] The HS Committee has no responsibility for matters pertaining to Rules of Origin; this is the responsibility of the WCO Technical Committee on Rules of Origin. While there is some discussion in the HS Committee Decision concerning the relationship between GIR 2(a) and Rules of Origin, the decision notes the views of several delegates "who felt that the Rules of Origin had nothing to do with the General Interpretative Rules which provide solely for the classification of goods in the Harmonized System."[86]

340. The lack of any relationship between GIR 2(a) and Rules of Origin may explain why the WCO Secretariat stated only that the second circumstance described in paragraph 10 of the HS Committee Decision "*encompasses* the *possibility* of goods being of (preferential or non-preferential) origin from the country of shipment or from another country." The WCO Secretariat did not state that

[85] See, e.g., CDA-18 at p. 4 ("The origin never affects classification.").
[86] CHI-29.

this was the exclusive circumstance or concern underlying the HS Committee's reference to "goods assembled from elements originating in or arriving from different countries."

Response of the European Communities (WT/DS339)

341. The European Communities agrees with the reply of the WCO secretariat. This notion refers to rules of origin in the context of a split shipment.

Response of the United States (WT/DS340)

342. According to the WCO Secretariat, the phrase "elements originating in or arriving from different countries" as set forth in paragraph 10 of the HS Committee's Report in CHI-29 encompasses the possibility of goods being of (preferential o[r] non-preferential) origin from the country of shipment or from another country." (emphasis in original). The United States agrees with this statement. In this context, the United States believes that the issue of determining origin is beyond the scope of GIR 2(a) and is a matter to be resolved by national laws in accordance with any other appropriate international standards.

343. The United States is also of the view that the WCO Secretariat's response undermines China's interpretation of the phrase "elements originating in or arriving from different countries" as "the WCO's official interpretation of GIR 2(a) as applied to the classification of articles that are assembled from multiple shipments of parts and components." (See China's response to Panel question No. 111.) China has not identified any evidence that would support its interpretation that multiple importations of parts and components from a single exporting country are involved in this scenario. (See China's response to Panel question No. 138.) China's interpretation also disregards the Committee's specific reference to "different countries" in paragraph 10 and argues that this reference "cannot mean that the decision of the HS Committee applies only in the case of goods assembled from more than one exporting country" because this issue would be relevant only in the context of the application of the Rules of Origin. However, the WCO Secretariat's response (as cited above) helps demonstrate that the issue is only relevant to the determination of origin.

Response of Canada (WT/DS342)

344. As noted in response to Question 212, above, Canada agrees with the WCO that the reference is to elements of a shipment that may be of different origin.

Comments by the European Communities on China's response to question 214

345. The European Communities understands the reply of China as disagreeing with the reply of the WCO secretariat. The last sentence of China's reply amounts to stating that since the WCO secretariat did not explicitly state that its reply is exhaustive, there must be something more to the 'decision' and that 'something more' must be China's position in this dispute. It goes without saying that the European Communities respectfully disagrees.

Comments by the United States on China's response to question 214

346. The crux of China's view on the WCO Secretariat's response is that the Committee did not state that the Rules of Origin were "the exclusive circumstance or concern underlying the HS Committee's reference to 'goods assembled from elements originating in or arriving from different countries.'" As the United States has explained in its response to Panel question No. 214, however, the phrase "elements originating in or arriving from different countries" mentioned in paragraph 10 of the

HS "decision" is intended to convey that "the issue of determining origin is beyond the scope of GIR 2(a) and is a matter to be resolved by national laws in accordance with any other appropriate international standards." The United States also notes that the WCO Secretariat did not identify *any other circumstances or concerns* in this context.

347. The United States notes the WCO Secretariat's response to Panel question No. 11, wherein the WCO Secretariat indicated its belief that the phrase "the classification of goods assembled from elements originating in or arriving from different countries" is a reflection of "the Committee's view that the determination whether multiplicity of origin shall affect applicability of GIR 2(a) is a matter left to each CP [Contracting Party to the HS Convention]."[87] Because GIR 2(a) only applies to goods in their condition when imported, the implication of this position is that when an importation contains goods of various origins that could be classified together as incomplete/unfinished or unassembled/disassembled under GIR 2(a), it is at the discretion of the national customs authorities as to whether that classification is permissible. This understanding is consistent with the WCO Secretariat's statement (in response to Panel question No. 11) that "[t]he HS does not direct [Contracting Parties] to classify entries differently or alike at the HS level on the basis of single origin as opposed to multiple origin."

215. Paragraph 10 of the HS Committee Decision refers to, *inter alia*, "classification of *goods assembled* from elements originating in or arriving from different countries."

(a) (*Complainants*) Does "goods assembled" in paragraph 10 refer to "goods that arrive already assembled or goods that are to be assembled in the importing country"? What is the legal basis for your position?

Response of the European Communities (WT/DS339)

348. The European Communities does not believe that this aspect was considered by the HS committee in the decision. However, in view of the fact that requests for treating split consignments as a single entry (see last sentence under point 2 of the reply of the WCO secretariat) are normally made in the interest of facilitating transport of complex and large machinery, it is reasonable to expect that the good has been disassembled for the purposes of transportation.

Response of the United States (WT/DS340)

349. The United States believes that the phrase "goods assembled" refers to both situations, *i.e.* goods that arrive already assembled and goods that are to be assembled. The basis for this conclusion is the ordinary meaning of the text.

Response of Canada (WT/DS342)

350. Canada's understanding is that the term refers to goods that are to be assembled in the importing country. This understanding is based upon consultation with Canadian representatives on the HS Committee. However, a plain reading of the phrase might suggest that it refers to goods already assembled when they arrive. In any event, as Canada notes in response to Question 210(c), what is significant is that the reference does not provide evidence of practice consistent with the measures.

[87] The WCO bases its belief upon a very limited context, that being only the "sole guidance" of the Summary Record. In this particular instance, then, the WCO Secretariat's response to Question 11 is conjecture rather than an official interpretation.

(b) (*China*) In this connection, China states in its response to Panel question No. 110 that "the term 'as presented' must be interpreted to allow national customs authorities to apply the principles of GIR 2(a) to goods that are *assembled domestically* from multiple shipments of imported parts and components." Could China please provide any evidence supporting its position that "goods assembled" in paragraph 10 of this Decision refers to "goods assembled domestically".

Response of China

351. The decision of the HS Committee would not make sense if it referred to "goods that arrive already assembled." The HS Committee Decision at issue is an interpretation of GIR 2(a). As the references to split consignments and "goods assembled from elements originating in or arriving from different countries" make clear, paragraph 10 of the HS Committee Decision relates to the second sentence of GIR 2(a), concerning goods that are presented *unassembled* or *disassembled*. GIR 2(a) is not relevant to the classification of goods that arrive *already assembled*, and thus there would be no reason for the HS Committee to adopt an interpretation of GIR 2(a) as it relates to the classification of such goods.

352. More generally, GIR 2(a), by its very nature, concerns the classification of goods that are assembled domestically. When customs authorities apply the second sentence of GIR 2(a) to classify unassembled or disassembled goods that have the essential character of the complete article, the presumption is that those goods will be assembled domestically after importation. GIR 2(a) directs customs authorities to classify unassembled or disassembled parts and components as the complete article precisely because those parts and components are susceptible to assembly into the complete article after importation. In this context, it is not surprising that the HS Committee is discussing goods that will be assembled domestically from multiple shipments of parts and components, as this is consistent with the general subject matter of GIR 2(a).

Comments by the European Communities on China's response to question 215(b)

353. Contrary to China's position in the reply, the European Communities is of the view that paragraph 10 of the 'decision' did not consider the notion of "as presented" in GIR 2 (a).

Comments by the United States on China's response to question 215(b)

354. China asserts that, as GIR 2(a) refers to goods that arrived unassembled or disassembled, the "decision" of the HS Committee would not make sense if it referred to goods that arrive already assembled. China's CKD kit example in its response to Panel question No. 175, however, provides an example of how an entry covered by GIR 2(a) could be assembled before it arrives at the border. The example involved a CKD kit that, as China puts it, was "assembled" in Germany from parts produced in Germany and in other countries. Thus in that circumstance there would be a CKD kit *assembled* in Germany which, if the kit were sufficiently developed, could be classified as an *unassembled* "whole vehicle" upon its arrival in China.

355. More importantly, China bases its response to this question on the premise that the "HS Committee Decision at issue is an interpretation of GIR 2(a)." However, this is not an accurate description of the text cited by China, as that portion of the discussion by the HS Committee was not about the interpretation or application of GIR 2(a), but the treatment of split consignments and the treatment of goods *for origin purposes*. A fuller explanation of the proper interpretation of the HS Committee discussion can be found in the US Response to Panel question No. 212. The United States would note that this interpretation is supported by the WCO Secretariat's response to Panel

question 11 in which the WCO Secretariat confirms that the passage cited is referring to origin and not classification and that the determination of origin being affected by application of GIR 2(a) is a matter left to each Contracting Party.

216. In response to Panel question No. 121, the complainants have expressed, in essence, a view that China's illustration in paragraph 97 of its first written submission is overly simplified and alien to reality.

(a) (*Complainants*) In particular, the European Communities states that "different auto parts are manufactured in different parts of the world and are genuinely shipped to the customers in separate shipments," and Canada states that "in normal manufacturing, parts are shipped at different times from different suppliers and undergo complex manufacturing processes at different plants in China or abroad before they are ready to be incorporated into a motor vehicle." Could the complainants please point to any evidence that can support this commercial reality of automobile manufacturers in the parties' exhibits submitted so far to the Panel or otherwise, please provide such evidence.

Response of the European Communities (WT/DS339)

356. The European Communities refers in particular to Exhibits EC - 3 and EC - 4 that provide examples of different parts manufacturers in different parts of the world in supplying the parts of a given vehicle. Further illustrations of the global strategy for the supply of auto parts are submitted in Exhibits EC – 27 to 33[88].

Response of the United States (WT/DS340)

357. Please refer to the United States' response to Panel question No. 176. In addition, Exhibit US- 8 provides examples of the number and variety of different parts and component manufacturers supplying parts to a particular vehicle. JE-4 (pages 19-22) and JE-5 (pages 30-34) include lists of a number a major component suppliers operating in China.

Response of Canada (WT/DS342)

358. Canada has presented evidence relating to the commercial reality to which Canada refers, both in the existing evidence and in additional references, in response to Question 176(b), above.

(b) (*European Communities*) The European Communities also states in its response that "to suggest that the manufacturer orders all of the parts from one company, then separates the parts into different containers in order to benefit from the lower duty rates in China for parts is completely alien to reality. However, even if such practices would exist, they would not circumvent the rules on customs classification." Could the European Communities elaborate on this statement, including the basis for its position that such practices would not circumvent the rules on customs classifications.

Response of the European Communities (WT/DS339)

[88] See for e.g., in "DaimlerChrysler AG Recognises Winners of the 2006 Global Supplier Award" (Exhibit EC-32, downloaded at www.ai-online.com): "Reflecting the trend of an automotive industry that still continues to become more global and interconnected every year, the 2006 award recipients truly earn the description "globe trotter." With headquarters either in Asia, Europe or North America, each of the supplier companies represent the growing global presence of the auto industry's supply base."

359. Even in an entirely hypothetical situation where a vehicle is built, then disassembled, transported into China in several shipments and assembled again into a complete vehicle, the objective characteristics of the products presented for classification at the border consist of those entries that are presented to customs on a shipment by shipment basis. Unless all the parts are presented to customs at the same time and place, the goods would be classified as parts or, depending on the state of assembly, possibly as an intermediary category such as "chassis fitted with engines" (heading 87.06) or "body without a cab" (heading 87.07). This is normal under the Harmonized System and entirely normal and legal under Article II of the GATT 1994. Tariff differences and the risk of circumvention are irrelevant.

360. In the real world of the automotive industry such operations would in any event be far too costly as the disassembly and reassembly together with the costs involved in multiple and overlapping transport operations and complex logistics would very quickly outweigh any tariff differential between complete vehicles and parts.

(c) (*Other parties*) Do the other parties agree with the European Communities' statement quoted above in (b)?

Response of China

361. For the reasons that China has previously explained, China does not agree with the EC statement quoted in part (b) of this question. China considers that the EC position allows form to prevail over substance in the classification of parts and components. China further considers that the EC position is antithetical to the function that GIR 2(a) serves within the Harmonized System to distinguish between complete articles and parts of those articles. If this delineation were entirely at the discretion of the importer through the manner in which it structures and documents its imports, there would be no purpose in defining the circumstances under which customs authorities may classify unassembled or disassembled parts and components as equivalent to the complete article.

362. Under the EC's apparent interpretation, an importer could enter the same collection of parts and components on the same ship, at the same port, and on the same day, and yet obtain a different customs classification merely by separating the parts and components into "different containers." This position would leave customs authorities utterly without recourse to define and enforce the boundaries between complete articles and parts of those articles. Any set of tariff provisions that established different rates for a complete article and the parts and components of that article would be inherently unenforceable, because any rational importer would simply organize its containers so as to benefit from whichever tariff rate was lower. The tariff provision with the higher rate of duty would be automatically *inutile.*

363. The EC's extreme form-over-substance position sharply highlights the complainants' failure to articulate and substantiate an interpretation of GIR 2(a) and the term "as presented." The EC has repeatedly advanced extreme (and, in China's view, absurd) positions on key terms in this dispute, such as the term "as presented," without offering the slightest substantiation for these positions based on customary rules of public international law. As China discusses in response to question 228, the complainants' failure to present evidence and legal arguments to support these positions means that they have failed to meet their burden of proof in bringing as such claims against the challenged measures.

Response of the United States (WT/DS340)

364. If a manufacturer were to order all of the parts from one company and then, in order to obtain a lower duty, separate the parts into different containers and make separate entry of each shipment, the United States would not find it to circumvent the rules on customs classification. See Exhibits US-9 and US-10 for examples of such a determination.

Response of Canada (WT/DS342)

365. Canada agrees with the European Communities' statement.

Comments by the United States on China's response to question 216(c)

366. In response to Panel question 216(c), China asserts that: "[u]nder the EC's apparent interpretation, an importer could enter the same collection of parts and components on the same ship, at the same port, and on the same day, and yet obtain a different customs classification merely by separating the parts and components into 'different containers.' This position would leave customs authorities utterly without recourse to define and enforce the boundaries between complete articles and parts of those articles." China's interpretation that customs authorities are utterly without recourse is incorrect. As more fully explained in the US Responses to Panel question Nos. 221 and 223, customs authorities must classify a good in its condition as imported.

367. Further in its response to Panel question No. 216(c), China asserts that: "The EC's extreme form-over-substance position sharply highlights the complainants' failure to articulate and substantiate an interpretation of GIR 2(a) and the term 'as presented.'" The US has submitted in response to several questions (See, e.g., US responses to Panel question Nos. 210, 216(c), 218, 233, 236, 237) that the term "as presented" is clearly and uniformly understood by different customs authorities as meaning the condition of the good at the time of importation. This view was also expressed by the WCO Secretariat's first response to questions posed by the Panel on page 1, 5th paragraph.

Comments by China on Complainants' responses to question 216(c)

368. In response to question 216(c), Canada agrees with the EC's statement that it "would not circumvent the rules on customs classification" for an importer to order a collection of parts from one company, and then separate the parts into separate shipments in order to obtain a lower rate of duty. China notes that Canada's agreement with the EC cannot be reconciled with the CBSA determination concerning disassembled furniture. If importers are entitled to break a collection of parts into separate shipments in order to benefit from lower duty rates that apply to parts, then the CBSA determination is inconsistent with this principle. The CBSA determination is plainly applied against the interests of the importer and contrary to the manner in which the importer chose to structure its importation of parts. The CBSA determination does this in order to ensure the collection of the higher duty rate that applies to complete furniture.

(d) (*United States*) Does the United States believe that it would be proper for customs authorities to investigate whether a manufacturer is splitting a CKD shipment into two or more separate boxes, thereby evading the higher duty rate that would apply to the complete article? Should an identical CKD kit be classified differently if it arrives in multiple shipments?

Response of the United States (WT/DS340)

369. Under both the WTO Agreement and the Harmonized System, a good should be classified in its condition as imported. Assuming that an imported CKD is a complete vehicle unassembled, it would be classified differently than the auto parts included in such kits if such auto parts were to be imported separately. Consistent with GIR 1,[89] when an imported auto part is specifically described by a heading of the tariff schedule, it is classifiable under that heading notwithstanding that, post importation, the auto part may be used in the assembly of a complete automobile. Any measure that compels an auto manufacturer to provide proof of the post-importation assembly of many different imported parts, in their entirety, into a complete automobile does not retroactively confer to those parts at the time of importation the "essential character" of an automobile. The United States does not investigate whether a manufacturer may be arranging multiple shipments in order to obtain lower duty payments, and does not consider such practice to constitute "circumvention."

217. (*European Communities*) In response to Panel question No. 8, the European Communities stated that 30 per cent to 35 per cent of parts are common to different models:

(a) (*European Communities*) Please provide documentary evidence to support this assertion.

Response of the European Communities (WT/DS339)

370. This question is closely linked to question 176 b). As stated in the reply to that question, the economic reality of the automotive industry is well illustrated by the notion of an "automobile platform", which is a shared set of components common to a number of different automobiles.

371. The figure used by the European Communities in response to question 8 is a very cautious one as depending on the vehicle category and the use of the "platform" the figure may be considerably higher. Of course a very specific model in the upper end of the price range ("the Ferrari range") may also have clearly less than 30 % of common parts but the average given by confidential industry sources is in the range of 30 to 35 %. This is confirmed by information found on the internet stressing that for Honda "commonality between different models built on a platform is only 20 – 40 % (30-40 % between cars and 20 % between cars and SUVs"[90]. Exhibits EC – 12 to 25 demonstrate how the industry is increasingly using such platforms common to many vehicle models in order to cut costs.

(b) (*China*) If a particular part is used in the manufacturing of a registered vehicle model that is a "deemed whole vehicle" and is also used in the manufacturing of a registered vehicle model that is not a "deemed whole vehicle," when a shipment of those parts is presented to China's customs authorities, how is it classified?

Response of China

372. As stated in Article 15 of Decree 125, "[t]he automobile parts of each vehicle model shall be declared on a separate form." Thus, if a part is common to a registered vehicle model and a non-

[89] For an explanation of GIR 1, see the United States' rebuttal to China's response to Panel question 13(b).

[90] Platform politics: Japanese automakers vary on their definitions of what constitutes a vehicle platform, Automotive Industries, January 2004 in Exhibit EC - 23, emphasis added.

registered vehicle model, the importer will file separate declarations for imports of that part that are for use in a registered vehicle model.

Comments by the European Communities on China's response to question 217(b)

373. China's reply demonstrates very concretely that the classification of a product depends on its internal use in China.

Comments by the United States on China's response to question 217(b)

374. China's response provides another example of how its measures, if they are viewed as imposing customs duties, classify parts with complete disregard of their physical characteristics. The parts in this example are imported together and are physically identical and yet will be charged at different rates based solely on their purported end use. The United States notes that the division of parts into separate declarations will be totally arbitrary, as the parts are the same and thus interchangeable. Indeed, it is likely that once entered into China the parts will be treated interchangeably by the manufacturer, as maintaining the artificial division would create logistical difficulties.

218. (*All parties*) Does the term "presented" referred to in "as presented" and "presented unassembled or disassembled" respectively in the first and second sentences of GIR 2(a) have the same meaning? If not, why not? Does the term "presented" referred to in the first sentence of GIR 2(a) (as in "as presented") mean "as presented *assembled*"?
Response of China

375. China does not perceive any reason why the meaning of "presented" would differ between the first and second sentence of GIR 2(a). By implication, the first sentence of GIR 2(a) concerns incomplete or unfinished articles that are presented *assembled* and that have the essential character of the complete article.

Response of the European Communities (WT/DS339)

376. The European Communities is of the view that these notions denote the same meaning in time. In this respect reference is made to the reply to question 210 (b).

377. The first sentence of GIR 2(a) lays down the general rule without considering whether the good has been assembled. The second sentence addresses the question of assembly. These two sentences have separate Explanatory Notes that guide their interpretation. However, chapter 87 contains a "*lex specialis*" in the form of an Explanatory note under GIR 2 (a). Under this "*lex specialis"* the conditions of GIR 2 (a) are clearly more likely fulfilled in an individual case if the goods are presented in an advanced stage of assembly since the notion of "fitting" is used in the examples.

Response of the United States (WT/DS340)

378. The term "presented" has the same meaning in the first and second sentences of GIR 2(a). The term "presented" refers to the condition of the merchandise at the time of importation. It is at the time of importation that merchandise is presented to national Customs authorities for tariff classification and the assessment of duties, which are necessary prerequisites to clear Customs.

379. The first sentence of GIR 2(a) provides that "[a]ny 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." The usage of the term "as presented" in this sentence refers to the condition of an incomplete or unfinished article at the time of importation. This sentence does not suggest that the article must be "assembled" at the time of importation in order to be classified in accordance with its having the essential character of the complete or finished article.

Response of Canada (WT/DS342)

380. Yes, they have the same meaning and refer to a point in time when the product is "presented" to customs. The first reference to "as presented" allows consideration of the article if it arrives at the border assembled, unassembled or disassembled, as long as it is *incomplete or unfinished* (and meets the essential character criterion). In the second sentence, "as presented" refers to the same point in time but to an article having different characteristics than in the first sentence, i.e., being *complete or finished* and "arriving at the border" unassembled or disassembled. Obviously in the case that a product is both complete or finished and assembled, GIR 2(a) is not applicable – the product would simply be classified in accordance with GIR 1.

219. (*China*) China contends that part of the condition of the auto parts "as presented" at the border is the importer's declaration that the parts will be assembled, with other imported auto parts, into a complete vehicle. How does China respond to Canada's contention at paragraph 32 of its oral statement that the importers do not voluntarily submit this documentation, but are required to do so as a means to obtain an import licence?

Response of China

381. China does not understand the relevance of this assertion. There is nothing in the Harmonized System, or international customs practice generally, that prohibits customs authorities from requiring importers to submit certain documentation to ensure the correct classification of an import entry. Underlying Canada's statement in paragraph 32 of its oral statement is the presumption that GIR 2(a) exists solely to benefit the importer, a presumption for which it has provided no interpretive basis.

382. As for Canada's assertion that the importer provides the customs declaration in order to obtain an import licence, this is incorrect. The import licence is obtained prior to the entry of the goods at issue, and is presented *together with* the customs declaration when the goods are entered. In any event, as China pointed out at the second substantive meeting of the Panel, Article 2:2(a)(i) of the *Agreement on Import Licensing Procedures* plainly contemplates that customs authorities can require compliance with national customs laws as a condition to the issuance of an automatic import licence. This would include laws that are necessary to ensure the proper classification of entries.

Comments by the United States on China's response to question 219

383. Underlying China's response to the Panel's question is the presumption that its requirement that importers make a declaration regarding the post-importation usage of their imported merchandise is a law that is "necessary to ensure the proper classification of entries." The United States disagrees. As explained in the US rebuttal to China's response to Panel question No. 134, China's process of "establish[ing] the relationship among multiple shipments of parts and components for assessing duties that apply to the completed article" is impermissible for purposes of classification under GIR 2(a). In this context, the identity of the good that is imported must be demonstrable by the good

in its condition "as presented" for entry into the customs territory, that is, at the time of importation. Separate importations of other parts and components (including by other importers) with which the good will be assembled in the importing country cannot be considered in the classification of the good.

Comments by Canada on China's response to question 219

384. China confuses the clear message of paragraphs 31 and 32 of Canada's second oral statement. In paragraph 31, Canada made the point that China only looks to the customs declaration at the border. Further, Canada was referring to two types of documentation – the customs declaration and the documentation necessary to obtain the import licence itself – that work together to ensure that any import licence is conditional on a prior determination of future liability under the measures. An importer cannot import auto parts until it has satisfied the requirement of the measures to account for imported content; any self-declaration that concludes that imported auto parts are not "Deemed Whole Vehicles" leads to a customs audit.

220. (*China*) In paragraph 11 of its oral statement, China claims that the crucial issue is the interpretation of the term "as presented" that defines the extent to which China can classify a shipment of auto parts and components based on the evidence that it is one of a series of shipments of parts and components that are *susceptible* to being assembled into a complete vehicle. Is being *susceptible* to being assembled into a complete vehicle different than *comprising the essential character of a complete vehicle*? If so, how? If not, why not?

Response of China

385. The WCO noted in its response to the first set of questions from the Panel that GIR 2(a) "call[s] for an analysis of the susceptibility of the subject collection of parts to be assembled in accordance with the guidelines set forth in paragraph (VII) of the Explanatory Notes," *i.e.*, in accordance with the types of assembly operations specified therein. The methods of assembly specified by GIR 2(a) are distinct from the question of whether a collection of parts (whether assembled or unassembled) has the essential character of the complete article. Thus, they are not the same inquiry, although they are both necessary inquiries under the second sentence of GIR 2(a) – the parts and components must be capable of assembly ("susceptible" to assembly) within the assembly parameters of GIR 2(a), and must have the essential character of the complete article.

Comments by the European Communities on China's response to question 220

386. The European Communities points out to the Explanatory Note to chapter 87 of the HS nomenclature. The examples provided therein demonstrate that "fitting" is an important element in deciding whether a given collection of auto parts presented to customs at the same time have the essential character of the complete vehicle. China's claim in its reply to the question that the methods of assembly are distinct from the question whether a collection of parts has the essential character of the complete vehicle is therefore incorrect.

Comments by the United States on China's response to question 220

387. China asserts that: "[t]he methods of assembly specified by GIR 2(a) are distinct from the question of whether a collection of parts (whether assembled or unassembled) has the essential character of the complete article. Thus, they are not the same inquiry, although they are both necessary inquiries under the second sentence of GIR 2(a) – the parts and components must be capable of assembly ('susceptible' to assembly) within the assembly parameters of GIR 2(a), and must

have the essential character of the complete article." China's response is based on the faulty premise that GIR 2(a) covers the aggregation of multiple shipments from multiple destinations. As the United States has previously indicated, GIR 2(a) cannot be utilized by the methods described by China which ignore fundamental classification principles as set forth in the Harmonized System. By its very nature, the Harmonized System is divided into categories or product headings beginning with crude and natural products and continuing in further degrees of complexity through advanced manufactured goods. Furthermore, China's proposed interpretation of GIR 2(a) is completely incompatible with the HS Convention's object and purpose of ensuring the consistency of import and export statistics maintained by parties to the Convention.

388. Contracting parties to the Convention of the Harmonized System are obligated to apply GIR 1 and the relevant section and chapter notes. Under GIR 1, "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings do not otherwise require, according to the [other GIRs]." Contracting Parties cannot ignore the physical condition of the merchandise and consider what processes the importation will subsequently undergo to determine the classification. This is what China claims it has a right to do and it is, therefore, in breach of its obligations under Article 3 of the Harmonized System Convention. For further details about the proper scope and meaning of GIR 2(a) as it relates to "as presented" and "multiple shipments", we refer the Panel to the US Responses to Panel question Nos. 210(b) and 223.

221. (*United States*) Please comment on China's argument in paragraph 24 (citing 19 CFR § 141.51) of its second oral statement that any goods arriving on the same ship and destined for the same consignee will ordinarily be classified on a combined basis. Please explain what the phrase "on one entry" means.

Response of the United States (WT/DS340)

389. China's argument in paragraph 24 of its second oral statement mischaracterizes the United States regulation. According to China, the United States "takes the position that any goods arriving on the same ship, and destined for the same consignee, will ordinarily be classified on a combined basis." The legal basis for this assertion is 19 C.F.R. § 141.51, which provides, in relevant part, that "[a]ll merchandise arriving on one conveyance and consigned to one consignee must be included on one entry." (emphasis added) (Exhibit US-11) The inclusion of merchandise on one entry, however, is not the same as what China ambiguously describes as "classifi[cation] on a combined basis."

390. The phrase "on one entry" refers how the importer must present its customs documents. An "entry" is "that documentation required by § 142.3 of this chapter [Chapter 19 of the Code of Federal Regulations] to be filed with the appropriate Customs officer to secure the release of imported merchandise from Customs custody." That documentation includes certain Customs forms, evidence of the right to make entry, commercial invoices, packing lists, etc. 19 C.F.R. § 142.3. (Exhibit US-12) The requirement that merchandise imported by the same importer on the same conveyance must be included "on one entry" means only that all of this documentation must be included together. Contrary to China's argument, section 141.51 does not require that every article included in the documentation must be classified under a single heading. Instead, the relevant Customs entry form would contain a listing of each and every type of merchandise imported on the conveyance and their separate corresponding tariff classifications. Thus, the United States regulation 19 C.F.R. § 141.51 does not (as China argues) draw the line between the "form and substance" of an importation. This regulation is merely a requirement involving the paperwork submitted by an importer.

Comments by China on Complainants' responses to question 221

391. In responding to this question, the United States has misstated the relevance of its "one entry" regulation, found at 19 C.F.R. § 141.51. China never argued that this regulation "require[s] that every article included in the documentation must be classified under a *single heading*."[91] Clearly, if the importer imports tennis shoes and circuit breakers on the same ship, those articles will never be classified under a "single heading." China's point was that if the importer enters parts and components that have the essential character of the complete article on the same ship, it must "present" those parts and components as a single entry. The necessary consequence, which the United States does not deny, is that those parts and components will be classified as the complete article in accordance with GIR 2(a). In other words, the importer does *not* have the option of declaring those parts and components as "separate" entries and obtaining a preferable classification and tariff result on that basis.

392. In the context of the present dispute, the relevance of the US regulation is that the application of GIR 2(a) to parts and components is not at the discretion of the importer. As the United States itself explains, the regulation concerns the manner in which the importer "must present" articles that arrive on the same ship.[92] Contrary to the US denial, this regulation does, in fact, draw a line between the form and substance of what the importer imports – whatever arrives on the same ship, on the same day, is classified as if it were "presented" together, no matter how the importer might otherwise choose to declare and "present" the various containers that it has placed on that ship. As China explained in its oral statement to the Panel, this is simply where *the United States* has chosen to draw the line between form and substance, but it is not a result that is prescribed either by the ordinary meaning of the term "as presented" or by the rules of the Harmonized System, as the WCO itself has made clear.[93]

222. (*All parties*) We note that the General Explanatory Notes to Chapter 87 refer to GIR 2(a). Please point to any other chapters in the Harmonized System where a reference is made to GIR 2(a).

Response of China

393. GIR 2(a) is also referred to in the General Explanatory Notes to Section XVI, and also in the Explanatory Notes to Chapter 90.

Response of the European Communities (WT/DS339)

394. In accordance with Explanatory Notes IV and VIII to GIR 2 (a), cases covered by the Rule (or different aspects thereof) are cited at least in the General Explanatory Notes to Section XVI and chapters 44, 61, 62, 86, 89 and 90.

Response of the United States (WT/DS340)

395. Reference to General Interpretative Rule 2(a) can also be found in General Explanatory Notes (III), (IV) and (V) to Section XVI which covers chapters 84 and 85 of the Harmonized System and in General Explanatory Note (II) to Chapter 90.

[91] US answers after second meeting at para. 69 (emphasis added).
[92] US answers after second meeting at para. 69.
[93] China oral statement at second substantive meeting at para. 25.

Response of Canada (WT/DS342)

396. Other areas of the Nomenclature that have references to GIR 2(a) in their Explanatory Notes are Section XVI generally (Machinery and Mechanical Appliances, *etc*.),[94] and in Chapter 44 (Wood and Articles of Wood)[95] in Section IX. Within Section XVII (Vehicles, Aircraft, Vessels and Associated Transport Equipment), Chapters 86 (Railway or Tramway Locomotives, etc.),[96] 87 and 89 (Ships, boats and floating structures) all refer to GIR 2(a).[97]

Comments by the European Communities on China's response to question 222

397. The European Communities refers to its reply to question 222, which is more complete than the reply of China.

223. (*Complainants*) China stated at the second substantive meeting that "the complainants appear to believe that the term 'as presented' means that importers can 'present' parts and components of an article in whatever form they wish. In their view, the manner in which the importer 'presents' a collection of parts and components determines their customs classification. Thus, for example, if an importer declares a collection of parts and components as 'separate' shipments, customs authorities must give effect to this declaration even if the parts and components arrive at the same port, on the same day, and have the essential character of the complete article." (paragraph 21 of China's second oral statement) Do you agree with China's description of the complainants' position above? If so, what is the basis for such an interpretation?

Response of the European Communities (WT/DS339)

398. There is a very important difference between China's measures and the very specific example it refers to. The example of separate customs declarations concerning a collection of parts and components that arrive at the same port and on the same day and which would, if assembled together, have the essential character of the complete article has nothing to do with the Chinese measures. The measures impose a 25 % charge after parts that have arrived at different times, at different places, from different origins and which do not have the essential character of a complete vehicle even when

[94] See Note (IV) ("Incomplete Machines") and (V) ("Unassembled Machines").

[95] See Headings 44.15 and 44.16.

[96] The relevant text is as follows:

Incomplete or unfinished vehicles are classified with the corresponding complete or finished vehicles, provided they have the essential character thereof. Such vehicles may include:

(1)Locomotives or motorised railway or tramway coaches, not fitted with a power unit, measuring instruments, safety apparatus or service equipment.

(2)Passenger coaches not fitted with seats.

(3)Truck underframes complete with suspension and wheels.

On the other hand, bodies of motorised railway or tramway coaches, of vans, wagons or trucks or of tenders, not mounted on underframes, are classified as parts of railway or tramway locomotives or rolling-stock (heading 86.07).

[97] The relevant text is as follows:

The Chapter also includes:

(A)Unfinished or incomplete vessels (e.g., those not equipped with their propelling machinery, navigational instruments, lifting or handling machinery or interior furnishings).

(B)Hulls of any material.

Complete vessels presented unassembled or disassembled, and hulls, unfinished or incomplete vessels (whether assembled or not), are classified as vessels of a particular kind, if they have the essential character of that kind of vessel. In other cases, such goods are classified under heading 89.06.

fitted together just because the final vehicle does not have a sufficient proportion of domestic parts. China is simply using examples that are entirely alien to its measures.

399. As a matter of principle customs have to classify the product according to its objective characteristics when presented for classification at the border. However, the customs authorities have the right and obligation to verify whether the declaration is correct. Under some circumstances the example provided by China could amount to a false customs declaration.

400. The European Communities does not agree with the presentation of the problem by China, which is giving the impression that importers are infringing the rules by changing the presentation of the parts. There is nothing illegal in importing the parts separately. As illustrated by the European Court of Justice in Case C-35/93 (Dr. Eisbein), the second sentence of Rule 2(a) must be interpreted as meaning that an article is to be considered to be imported unassembled or disassembled where the component parts, that is the parts which may be identified as components intended to make up the finished product, are all presented for customs clearance at the same time (Exhibit EC – 34, paragraph 19).

Response of the United States (WT/DS340)

401. It is not the position of the United States that the usage of the term "as presented" means that customs authorities must give effect to every declaration made by an importer. Rather, customs authorities classify goods based upon their condition upon importation. GIR Rule 2(a) requires that customs officials make a determination as to whether components presented together impart the essential character of a complete or finished article. If not, then the components are to be individually classified. This view is supported by the structure of the Harmonized System itself, which specifically names certain parts in their own headings (e.g., spark-ignition reciprocating or rotary internal combustion piston engines of heading 84.07, transmission shafts of heading 84.83, chassis fitted with engines of heading 87.06, bodies (including cabs) of heading 87.07) and contains headings for parts suitable for use solely or principally with motor vehicles (e.g., heading 87.08 which provides for parts and accessories of the motor vehicles of headings 87.01 to 87.05). To classify all parts eventually incorporated into complete motor vehicles as finished motor vehicles, per China's Decree 125, would empty many headings and subheadings of the goods specified therein.

Response of Canada (WT/DS342)

402. Canada does not agree with China's description of the complainants' position. As Canada noted in its second written submission at paragraphs 18-26, the principal term at issue for the application of ordinary customs duties is "on their importation", which refers to the physical point at which products enter the customs territory of a Member. Nevertheless, as Canada set out in paragraph 23 of its second written submission, the term "as presented" refers to the same concept of the state of a good at the point at which a Member's customs authority receives it (rather than its state at any point so long as "customs procedures" still apply to the good, as China suggests), since those words were introduced "to make it quite clear that the provisions of the [GIRs] concerned applied to a given article *in the state in which it is presented for Customs clearance*." Canada again refers to the response of the WCO Secretariat to Question 1, regarding the meaning of "as presented".

Comments by China on Complainants' responses to question 223

403. What is most revealing about the complainants' responses to this question is their failure to answer it. The complainants simply do not explain whether parts and components that arrive at the same port, on the same day, and that have the essential character of the complete article, must

nonetheless be classified as "parts" if this is how the importer chooses to "present" them. Having failed to take a position on this issue, they necessarily fail to provide any basis for such an interpretation of the term "as presented".

404. The EC comes closest to answering the question, asserting that "[t]he example of separate customs declarations concerning a collection of parts and components that arrive at the same port and on the same day and which would, if assembled together, have the essential character of the complete has nothing to do with the Chinese measures."[98] The EC nonetheless offers that "[u]nder some circumstances the example provided by China could amount to a false customs declaration."[99]

405. The EC does not explain why the example posed by this question "has nothing to do with" the challenged measures. The challenged measures do, in fact, apply to the circumstance in which parts and components arrive at the same port, on the same day, and have the essential character of a motor vehicle. The EC's answer appears to suggest that, *as applied to this circumstance*, the challenged measures would be based on a proper understanding of the term "as presented." Moreover, the EC's answer appears to suggest that the challenged measures respond to a circumstance that "could amount to a false customs declaration" if the parts and components were not declared as a single entry.

406. Once again, the complainants' answers highlight their inability to articulate and substantiate an interpretation of the term "as presented," and to define the circumstances under which the challenged measures are *necessarily* inconsistent with a proper understanding of this term. We now have (1) the United States with its "same ship, same day" regulation; (2) the EC's possible support for a "same *port*, same day" rule; and (3) Canada's view that the application of GIR 2(a) to multiple shipments is a matter for the WCO to resolve. What the complainants have failed to provide is a consistent interpretation of the term "as presented," supported by customary principles of international law, with which the challenged measures are necessarily inconsistent. For the reasons that China has explained, this means that the complainants have failed to meet their burden of proof.

224. (*Complainants*) Is it the complainants' view that GIR 2(a) exists solely to benefit the importer? If not, are there circumstances in which customs authorities, not importers, should or can determine the manner in which goods are presented in accordance with the principle of GIR 2(a)? Please explain in detail.

Response of the European Communities (WT/DS339)

407. No, GIR 2 (a) is a general rule for the interpretation of the Harmonized System although as Explanatory Note V to GIR 2 (a) points out, the second part of the rule relating to unassembled or disassembled articles covers particularly situations where the unassembled state is due to reasons such as requirements or convenience of packing, handling or transport. The question of the classification of split consignments is in the view of the European Communities a matter to be considered exclusively on the basis of a request from the importer. This position is shared by the secretariat of the WCO (see point 2, last sentence of the reply of the WCO secretariat).

Response of the United States (WT/DS340)

408. It is not the United States' view that GIR 2(a) exists solely to benefit the importer. It is likely that this characterization stems from a previous discussion wherein the United States explained that 19 C.F.R. § 141.57 is a regulation for the benefit of importers who intended their goods to have been

[98] EC answers after second meeting at para. 62.
[99] EC answers after second meeting at para. 63.

accommodated on a single conveyance for arrival in the United States as a single shipment, but which were split after consignment to the carrier. Under the regulation, single entry treatment for split shipments is limited to very narrow circumstances, at the election of the importer, and certification that the entry was split at the election of the importer must be made when the goods are imported. This single entry treatment permits the classification of the split ships as a single importation.

409. This aforementioned regulation is consistent with paragraph 10 of the HS Committee's inclusion of a prior decision of the Nomenclature Committee in its Report (CHI-29), which indicates that questions of "split consignments … [are] to be settled by each country in accordance with its own national regulations."

410. Under the Harmonized System, consistent with Article 3 of the HS Convention, classification is based on the Contracting Party's obligation to use all of the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes; and to apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter, and Subheading Notes. Article 3 specifically provides that the Contracting Parties shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System. Accordingly, both importers and Customs authorities are legally obligated to classify imported merchandise pursuant to GIR 2(a) when applicable to importations of incomplete, unfinished, unassembled, or disassembled articles.

Response of Canada (WT/DS342)

411. Canada does not believe that GIR 2(a) exists solely to benefit the importer. Canada has only argued, and shown, that the reference in the WCO Decision to separate shipments that China treats as paramount was intended for the benefit of importers, not GIR 2(a) itself, despite China's repeated efforts to stretch the complainants' arguments on this point to GIR 2(a).

412. GIR 2(a) permits customs authorities to determine whether a good, based upon its state as it arrives at the border, has the essential character of a finished product. This involves elements such as visual inspection, reference to documents, and if necessary further testing or analysis (based upon the state of the good as it passed the border). Discretion for the importer mostly exists in the case of split shipments, where a single item is ordered but delivered in separate shipments because of the nature of the product (such as the "Functional Units" concept in Canada's customs practice, to which Canada referred in the second oral hearing*;* the EC law cited in China's first written submission, at para. 125 (Exhibit CHI-24) and Japan's customs practice with respect to machinery cited by Japan in response to Question 2). As Canada noted in footnote 69 to its second written submission, these sorts of practices formed the basis of the comment relating to split shipments in 1963, to which the 1995 HS Committee Decision referred.

225. (*Canada*) Canada states in paragraph 13 of its second oral statement that "China even ignores the fact reflected in paragraph 11 of the WCO's reply to this Panel's questions, that GIR 2(a) has nothing to do with customs duties – that, in effect, China is standing the correct assessment of duties under Article II on its head." Is it Canada's view that GIR 2(a) has nothing with do with customs duties? If so, what is the relevance of GIR 2(a) to the interpretation of China's tariff Schedule?

Response of Canada (WT/DS342)

413. The reference in Canada's second oral statement to GIR 2(a) having "nothing to do with" customs duties refers to the fact that GIR 2(a) is a rule for the classification of goods. China attempts

to turn a WTO dispute into a WCO dispute, and also ignores proper classification, starting with GIR 1. Canada has pointed out (see paragraph 44 of its second written submission) that classification is a prerequisite for assessment of duties, but, as the WCO points out in response to Questions 5 and 11, "[t]he application of customs duties is outside the legal purview of the WCO". This connects with the point that Canada makes in Section II.E of its second written submission that China is required by paragraph 93 of the Working Party Report on its accession to provide a 10% rate of duty on CKDs and SKDs regardless of classification.

D. ARTICLE II OF THE GATT 1994

226. (*United States*) Should the assembly of "separately organized and shipped 'knock down kits'" be in any manner distinguished from other regular bulk shipments of parts for assembly purposes?

Response of the United States (WT/DS340)

414. The United States is not clear on what is encompassed by the phrase "separately organized and shipped knock down kits." Nonetheless, the general rule for importations of auto parts is that unless they are presented as unassembled or disassembled vehicles under GIR 2(a), they would not be treated any differently than bulk importation of parts for assembly purposes.

227. (*Canada*) Please elaborate on your response to Panel question No. 13(a), in particular your statement that "in the context of Article II, charges must be internal in order for this concept of 'circumvention' to apply."

Response of Canada (WT/DS342)

415. As Canada has argued, ordinary customs duties must be imposed based upon the state of goods as they arrive at the border. China's measures do not do that. Instead, China imposes charges based upon the state of the good at a point in time well after they arrive at the border – when those goods are later aggregated with other parts in a manufactured vehicle. Thus, for the concept of circumvention even to exist, it must apply to behaviour after the border once the goods are in the hands of manufacturers in the internal market.

416. China's theory of circumvention is illustrated in Slide 1 of Canada's second oral statement. There is no evidence that such a simplistic scenario would ever occur, but let us assume that it does for the sake of illustration. If China imposed a charge on the vehicle manufacturer that had imported a set of parts in two shipments on the basis that it had "circumvented" appropriate tariff duties, this would not be an ordinary customs duty, as the charge would not be imposed on the parts "on their importation". It would be an internal charge, as it is imposed within China, and is neither an ordinary customs duty nor any other "border" charge permitted by GATT Article II. That internal charge might, in principle, be justified under Article XX(d) as necessary to enforce customs duties – an issue discussed further in response to Question 284 – but it could not properly be characterized as the imposition of an ordinary customs duty.

228. (*China*) In order for a certain measure to be found "as such" inconsistent with the WTO Agreement, does the measure have to be proved to always violate the WTO Agreement? Please provide legal support for your answer.

Response of China

417. As noted in response to question 206, the Appellate Body has found that "[b]y definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will *necessarily* be inconsistent with that Member's WTO obligations."[100] It is not clear from this statement, or from the jurisprudence concerning "as such" claims more generally, whether the measure must be shown to *always* violate the WTO Agreement. But it is clear that, at a minimum, a party bringing an as such claim against a measure must identify and prove the specific circumstances in which the measure "will necessarily be inconsistent" with the responding Member's WTO obligations.

418. The complainants' burden of proof, in this respect, is directly related to the function of the Panel under Article 19.1 of the DSU. When a panel concludes that a measure is inconsistent with a covered agreement, "it shall recommend that the Member concerned bring the measure into conformity with that agreement." The measures at issue in the present dispute apply to a wide array of factual circumstances, including, for example, with respect to the application of the essential character test under GIR 2(a) and the manner in which specific collections of auto parts and components are presented to Chinese customs authorities. In the absence of a clear delineation of the circumstances in which the challenged measures will *necessarily* be inconsistent with China's WTO obligations, the Panel would have no basis to identify the specific respects in which China must bring the measures into conformity with its WTO obligations. It is for this reason that the complainants bear the burden of identifying and proving the specific circumstances in which the measures will necessarily violate China's WTO obligations.

419. As China explained in its oral statement to the Panel at the second substantive meeting, the complainants' failure to meet their burden of proof in respect of their claims against the challenged measures is endemic to their entire case. The complainants have alleged, for example, that any charges collected as a result of the application of Decree 125 are not ordinary customs duties because they are not based on the condition or status of goods "as presented" at the border. Yet the complainants have failed to provide a specific interpretation of the term "as presented" and to substantiate that interpretation in accordance with customary principles of international law. At the second substantive meeting, China repeatedly challenged the complainants to define and substantiate their understanding of this term. The Panel will recall that their response, in effect, was that whatever the term "as presented" might mean, and whatever ambiguity might exist in the understanding of this term, the challenged measures "go beyond" what the *complainants* believe to be proper understanding of this term.

420. This is a perfect illustration of the basic flaw underlying the complainants' as such claims against the challenged measures. As shown above, the complainants bear the burden of proving the specific circumstances in which the challenged measures will necessarily be inconsistent with China's WTO obligations. What, then, are the specific circumstances in which the challenged measures will *not* be based on the condition or status of goods "as presented" at the border? Is there a distinction, for example, between parts and components that arrive on the same ship but under different consignments, as compared to parts and components that arrive on different ships but under the same consignment? Is there a distinction between parts and components that a manufacturer imports from its own affiliates in multiple shipments, as compared to parts and components that a manufacturer imports from unaffiliated suppliers in multiple shipments? The challenged measures apply to all of these circumstances, and others. Yet the complainants have offered nothing that would allow the

[100] *US – Oil Country Tubular Goods Sunset Reviews* at para. 172.

Panel the distinguish among these or other circumstances, and to identify the specific circumstances in which the challenged measures would necessarily be inconsistent with a proper understanding of the term "as presented."

421. It is not *China's* obligation to identify and prove the circumstances in which the challenged measures would necessarily be *consistent* with its WTO obligations. It is the complainants who opted to bring an as such case against the challenged measures, including, *inter alia*, their claim that the measures are necessarily inconsistent with China's tariff commitments under Article II. In so doing, the complainants plainly recognized that this dispute implicated the proper classification and tariff treatment of motor vehicles and parts and components of motor vehicles. For the reasons that China has explained, the complainants must demonstrate that the charges that China collects pursuant to Decree 125 are not the ordinary customs duties that China is allowed to collect under its Schedule of Concessions. But they have failed to meet their burden of demonstrating the specific circumstances in which the challenged measures will necessarily result in the collection of charges that China is not allowed to collect under its Schedule of Concessions, whether it is as a result of a misapplication of the essential character test, an improper understanding of the term "as presented", or otherwise. For these reasons, China considers that the complainants have failed to meet their burden of proof.

Comments by the European Communities on China's response to question 228

422. The European Communities and its co-complainants have established in detail why the measures are "as such" in violation of Article 2 of the *TRIMs Agreement* and Article III, paragraphs 2, 4 and 5 of the GATT together with a number of commitments relating to these agreements in China's Accession Protocol to the WTO. China has not even attempted to rebut the *prima facie* case brought against it under the *TRIMs Agreement* and Article III of the GATT 1994.

423. Were the Panel to examine the measures only under Article II of the GATT 1994 (*quod non*), the European Communities has established that the measures are as such necessarily inconsistent with Article II as under all the criteria used under Articles 21 and 22 of Decree 125, the measures require imported auto parts to be characterised (i.e. 'classified' if examined under Article II) as complete vehicles, which triggers customs duties in excess of the ones applying to parts. Furthermore, the mere fact that Articles 21 and 22 of Decree 125 consider 'multiple shipments' of parts originating from different countries, and arriving to China at different times and at different places necessarily means that the measures are as such inconsistent with Article II. This is because the classification of the product subject to ordinary customs duties on importation is not based on "the objective characteristics of the product in question when presented for classification at the border" (Appellate Body in *EC – Chicken Cuts*, paragraph 246).

424. Even if the relevant parts are presented to customs at the same time and place in accordance with the standard principles of customs administration, the criteria under Articles 21 and 22 of Decree 125 would still necessarily lead to incorrect classification as set out more in detail in paragraphs 112 to 117 and 130 to 135 of the European Communities' second written submission and replies to questions 117 and 233 of the Panel. The mere fact that in some exceptional circumstances the deeming or classification of a large collection of auto parts as the complete vehicle under the substantive criteria of Article 21(1) and 21(2) of Decree 125 would be consistent with the rules of the Harmonised System is irrelevant for a finding of an "as such" inconsistency under Article II of the GATT 1994.

425. Furthermore, it is China that has pleaded GIR 2 (a) in its defence. As a matter of principle, it is China's burden of proof to demonstrate that the various assertions and theories it has developed around GIR 2 (a) are in any way relevant to the case. As the European Communities has demonstrated

in particular in its second written submission (paragraphs 92 to 132), China's arguments relating to GIR 2 (a) are entirely without merit.

Comments by Canada on China's response to question 228

426. The burden of proof in respect of China's GIR 2(a) defence rests with China, not the complainants. Canada has shown that the measures, on their face, prescribe violations of Article III of the GATT. Canada does not need to show "specific circumstances" of the *application* of the measures being inconsistent with China's WTO obligations, although it has done so. In all cases, the measures establish domestic-content requirements in violation of Article III. Even if aspects of this dispute were found to be subject to the disciplines under Article II, the measures "as such" violate Article II by always subjecting auto parts to the motor vehicle rate if the thresholds are exceeded. It is irrelevant to the analysis of Article II that, in rare instances, a collection of assembled parts large enough to constitute an assembled vehicle under Article 21 of Decree 125 may properly be classified as whole vehicles under the Harmonized System.

229. (*All parties*) During the course of this proceeding, the parties have referred to the notions of "tariff arbitrage", "tariff evasion" or "tariff circumvention". Please explain where such notions can be found in the WTO Agreement and how it is relevant to the present dispute.

Response of China

427. As China explained in response to questions 9 and 13 from the Panel, China considers that the issue of circumvention in this case, or what one might otherwise call tariff arbitrage or tariff evasion, concerns the proper tariff classification of parts and components that have the essential character of a motor vehicle. The need to ensure the proper classification of imports is inherent in every Member's Schedule of Concessions, which is incorporated into the WTO Agreement. As China explained in response to question 68 from the Panel, the Appellate Body has repeatedly affirmed the importance of the Harmonized System in interpreting a Member's Schedule of Concessions. Thus, the question of ensuring the proper classification of imports, and thereby preventing the circumvention or evasion of the importer's obligation to pay duties, is governed by the classification rules of the Harmonized System.

Response of the European Communities (WT/DS339)

428. The European Communities does not believe that it has used these notions in this dispute except when countering China's arguments relating to "tariff circumvention". These notions are not used under EC law or in the WTO Agreements. "Tariff arbitrage" is generally a more neutral concept, whereas "tariff evasion" and "tariff circumvention" are notions with a more negative connotation. The concepts relate to the allegation made by China that vehicle manufacturers are shipping parts in multiple shipments in order to avoid paying the duty on complete vehicles.

Response of the United States (WT/DS340)

429. Such notions are not found in the WTO Agreement.

430. The *prima facie* case presented by the United States is based on China's obligations under the WTO Agreement, as applied to the measures that China has actually adopted. Nothing in the evaluation of the *prima facie* case presented by the United States involves any such notions of "tariff arbitrage", "tariff evasion" or "tariff circumvention".

431. China in its defense has raised "tariff evasion" or "tariff circumvention" as the justification for its measures, and it is therefore China's burden to explain precisely what China means, and to explain how the concepts defined by China are relevant to any possible defense to the breaches of China's WTO obligations that the United States has shown to exist. China has failed to do so.

432. As the United States set out in its opening statement at the second meeting, China in fact uses these phrases to represent two very different concepts. Neither of those concepts could serve as a defense to China's breaches of its WTO obligations.

433. First, China uses this language of "circumvention" to mean that under its domestic tariff schedule, China is to charge a whole-vehicle rate of duty on any imported part, regardless of any actual intent on behalf of the manufacturer to "circumvent" or "evade" tariffs, so long as that part is used to manufacture within China a vehicle with a foreign content that exceeds the thresholds under China's measures. As the United States has explained, there is no possible interpretation of China's WTO obligations that would allow for China to impose a 25 per cent tax on bulk shipments of parts imported for manufacturing purposes.

434. Second, China uses the same notions of "evasion" and "circumvention" to mean that China must be able to address certain limited, though still hypothetical, examples, such as the case of a CKD split into two separate shipments. China, however, has failed to show a single instance where any importer ever engaged in the specific practices identified by China. Moreover, China's asserted rationale does not match the scope of China's measures. To the contrary, China's measures sweep broadly to cover all imports of bulk parts for manufacturing purposes, not just instances of CKDs split into two separate shipments.

Response of Canada (WT/DS342)

435. Those notions are not found in the *WTO Agreement*. As discussed in response to Question 227, above, China's unsupported assertion is that vehicle manufacturers are shipping all parts necessary to assemble a vehicle in two or more shipments in order to avoid paying the whole-vehicle rate of duty (although, as Canada argues, even if those parts were shipped together the proper rate of duty would be 10% – see response to Question 205). If this ever happened, it could be characterized neutrally as "tariff arbitrage" or "tariff avoidance", or characterized more negatively as "tariff evasion" or "tariff circumvention". If there were evidence that this were happening, and if the measures were targeted to address this practice, then the legal issue for the present dispute would be whether Article XX(d) is available to counter such a practice.

230. (*United States*) China submits that the United States concedes that "there might be a few combinations" of auto parts under Decree 125 that could conceivably properly be classified under the HS as whole vehicles. Do you agree with this statement? If not, why? If yes, please explain such combinations of auto parts.

Response of the United States (WT/DS340)

436. As the United States has explained, a CKD or SKD kit containing all of the parts necessary to assemble a complete vehicle could conceivably be classified as a complete vehicle, assuming all the requirements of GIR 2(a) had been met. (Under Paragraph 93 of the Working Party Report, however, the kit would nonetheless have to receive a tariff treatment of no greater than 10 per cent.) Other than this, the United States is not aware of what China is referring to with respect to this alleged "concession."

231. China submits that as a matter of tariff classification, there is necessarily a continuum between the parts of an article and the complete article in its finished form:

(a) (*Complainants*) Do you agree with China?

Response of the European Communities (WT/DS339)

437. No, the European Communities is of the view that at the level of China's tariff schedules there are clear distinctions between motor vehicles (headings 87.01 to 87.05), parts thereof (in particular heading 87.08) and the intermediary categories between motor vehicles and parts (headings 87.06 and 87.07).

438. The fact that there are instances where a given consignment as presented to customs that is not a complete or finished motor vehicle but might have the essential character of a complete or finished vehicle does not suggest a continuum in China's schedule. It refers to an instance where China's schedule must be applied to a given borderline situation.

Response of the United States (WT/DS340)

439. In paragraph 12 of its rebuttal Submission, China asserts that "GIR 2(a) necessarily gives rise to a continuum of circumstances under which customs authorities will classify parts and components as equivalent to complete articles, regardless of their state of assembly or disassembly." China is attempting to blur the distinction between complete vehicles and auto parts by relying on a condition of goods that will not be achieved until after the goods have been imported into China (where they undergo assembly with other separately imported parts).

440. Per the United States' response to Panel question No. 145, we disagree with China's characterization of a "continuum" for the classification of motor vehicles. This characterization is contrary to the structure of the Harmonized System. The Harmonized System is made up of 96 chapters grouped into 21 sections consisting of approximately 5,000 article descriptions in the headings and subheadings. The Harmonized System is divided into categories or product headings beginning with crude and natural products and continuing in further degrees of complexity through advanced manufactured goods.

441. Consistent with GIR 1, when an imported motor vehicle part is specifically described by a heading of the tariff schedule, it must be classified under that heading. GIR 2(a) requires that customs officials make a determination as to whether motor vehicle parts imported together impart the essential character of a complete or finished article. If not, then the motor vehicle parts are to be individually classified. These GIRs do not create a "continuum" for the classification of automotive parts. The determination of the "essential character" must be based upon the condition of the goods at the time of importation.

442. This view is supported by the structure of the Harmonized System, which names certain parts in their own headings (e.g., spark-ignition reciprocating or rotary internal combustion piston engines of heading 84.07, transmission shafts of heading 84.83, chassis fitted with engines of heading 87.06, bodies (including cabs) of heading 87.07) or the creation of parts headings (e.g., heading 87.08 which provides for parts and accessories of the motor vehicles of headings 87.01 to 87.05). Under China's "continuum" characterization, the classification of all imported motor vehicle parts eventually incorporated into complete motor vehicles (in the domestic market) as motor vehicles would empty many headings and subheadings of the goods specified therein.

Response of Canada (WT/DS342)

443. No. See reply to paragraph (b), below.

(b) (*All parties*) Assuming that there is such continuum, where should the line be drawn between complete vehicles and parts and components of complete vehicles?

Response of China

444. Consistent with GIR 2(a), the line between complete vehicles and parts and components of motor vehicles must be drawn in accordance with the essential character test.

Response of the European Communities (WT/DS339)

445. In an individual case of classification, the General Explanatory Note to Chapter 87 provides for clear and specific guidance. Reference is also made to the reply to question 211. Chapter 87 contains also very important intermediary categories between complete vehicles and parts and components of complete vehicles. In particular, heading 87.06 demonstrates clearly that a motor vehicle without its body is to be classified as a "chassis fitted with engines", not as a motor vehicle.

Response of the United States (WT/DS340)

446. The line must be drawn based upon the condition of the goods when they are imported. To permit classification based on any other condition would destroy the predictability of the application of the Harmonized System and preclude its stated purposes of tracking the identity of goods that are crossing international borders and promoting as close a correlation as possible between import and export trade statistics and production statistics. See Preamble to the International Convention on the Harmonized Commodity Description and Coding System.

Response of Canada (WT/DS342)

447. Canada, in its second written submission at paragraphs 41-52 (including the chart), sets out the appropriate lines to be drawn between various headings in Chapter 87 of the Harmonized System. The emphasis on headings covering intermediate categories (notably 87.06 – chassis with engine) is supported by the WCO Secretariat, which in its response to the Panel's questions highlighted the need to consider such categories for classification.[101]

Comments by the European Communities on China's response to question 231(b)

448. China's mere reference to the "essential character" test in GIR 2 (a) ignores entirely the fact that in the context of chapter 87 of the HS system the overwhelming majority of situations can be decided on the basis of GIR 1, which means that there is no continuum in which a line should be drawn. In those exceptional cases where GIR 1 does not provide the answer and a line must therefore be drawn because of a large collection of parts being presented to customs at the same time, Chapter 87 of the HS nomenclature provides for very specific examples that guide classification. In this respect the European Communities refers *inter alia* to its second written submission under paragraphs 75 to 98 and 112 to 117.

[101] See, e.g., the response to Question 3, noting that Chapter 87 "also provides a separate heading for motor vehicle chassis fitted with engines (heading 87.06) and a heading for motor vehicle bodies (including cabs) (heading 87.07)".

232. (*China*) China submits that the complainants acknowledge that customs authorities can undertake "investigations," and consider "evidence," to determine whether multiple shipments of parts and components have the essential character of the complete article. Could China please explain where and how the complainants acknowledge this.

Response of China

449. China discussed this point in detail in paragraphs 53 through 64 of its second written submission. To summarize:

450. Canada first referred to "investigations" and "evidence" in its oral statement to the Panel at the first substantive meeting.[102] One of the factors that Canada cited in support of its claim that the challenged measures are inconsistent with Article III was its assertion that the measures "are not based on an earlier *investigation*."[103] Canada further asserted that China had "offer[ed] no *evidence* concerning the timing of shipments, or their frequency, or anything else that relates to the core issue of the condition of goods on presentation at the border."[104]

451. In response to question 82(b) from the Panel, the United States stated that "nothing in China's measures is limited to, or targeted at, some hypothetical manufacturer who is splitting a CKD shipment into two or more separate boxes."[105] The United States stated that "if a Customs authority were involved in an investigation as to whether an importer was engaged in such a practice," it might examine the factors to which Canada had referred in its oral statement at the first substantive meeting, and which the Panel had summarized in question 82(b), i.e., the origin of imported parts, who purchases the parts, whether there was an earlier investigation, and the timing of shipments or their frequency.

452. In response to question 124 from the Panel, concerning Canada's classification of unassembled or disassembled furniture, Canada asserted that, under this measure, "[t]here is no assumption of a violation: if an importer declares that it is importing furniture parts, in the absence of contrary evidence obtained by Canadian customs officials, they are charged at the parts rate."[106] As China noted in paragraph 59 of its second written submission, Canada did not explain how Canadian customs officials would "obtain contrary evidence," but presumably it would be through the results of an investigation.

453. For the reasons that China set forth in paragraph 64 of its second written submission, the necessary implication of these statements by the United States and Canada is that there are circumstances under which customs authorities can apply GIR 2(a) to multiple shipments of parts and components to prevent the evasion of duties that apply to the complete article. Thus, the issue is *when* and *how* customs authorities may do this, and, in particular, what sorts of factors and evidence the customs authorities may take into account in making these determinations.

Comments by the European Communities on China's response to question 232

454. China's reply does not identify any instances where the European Communities would have "acknowledged that customs authorities can undertake 'investigations' and consider 'evidence', to

[102] Canada oral statement at first substantive meeting at paras. 24, 34.
[103] Canada oral statement at first substantive meeting at para. 24 (emphasis added).
[104] Canada oral statement at first substantive meeting at para. 34 (emphasis added).
[105] US answers at para. 49.
[106] Canada answers at p. 32.

determine whether multiple shipments of parts and components have the essential character of the complete article". The European Communities has not acknowledged anything of the kind.

Comments by the United States on China's response to question 232

455. China alleges that there are three instances where the complainants acknowledge that investigations may be conducted to determine whether multiple shipments of parts and components have the essential character of the complete article. The first instance involves Canada's oral statement at the first substantive meeting. The United States has already addressed the context of Canada's comments in its response to Panel question No. 82(b), and for the reasons set forth in its response, the United States does not believe that Canada's comments in any way provide support for the Chinese measures at issue.

456. The second instance also involves the United States' response to Panel question No. 82(b). In that response, the United States is merely hypothesizing about an investigation involving the splitting of a CKD shipment into two or more boxes." The response does not indicate that the United States believes such an investigation would be appropriate. The United States is rather pointing out that *if* the intent of China's measures was to address such practices, *then* the measures would look quite different than they do. China's investigations involve evidence of domestic assembly, and such assembly is not a basis for classification under the Harmonized System. See, e.g., US response to Panel question No. 116.

457. The third instance involves a Canadian classification decision on unassembled or disassembled furniture. The context of that decision is clearly distinguishable from the Chinese measures at issue in this case. For a more detailed explanation, see the US rebuttal to China's answer to Panel question No. 238(b).

233. (*Complainants*) Do you agree with China's submission in paragraph 25 of its second written submission that the complainants have failed to make a *prima facie* case showing that China has misapplied the essential character test under GIR 2(a).

Response of the European Communities (WT/DS339)

458. No. The European Communities has demonstrated under its alternative Article II GATT 1994 claim that in all cases foreseen under Article 21 of Decree 125, the measures require to classify auto parts as complete vehicles in violation of the HS nomenclature and, as a result, to impose on auto parts the higher 25 % duty on complete vehicles instead of the bound duty rate of 10 % or less for auto parts. Reference is also made to paragraphs 112 to 117 and 130 to 135 of the European Communities' second written submission and reply to question 117 of the Panel. Furthermore, the mere fact that China is applying its measures under the premise of combining the entries from multiple shipments is in itself sufficient to make an as such finding of inconsistency under Article II of the GATT because such a rule departs from the fundamental premise of tariff classification as confirmed by the Appellate Body in paragraph 246 of *EC – Chicken Cuts* and leads necessarily and systematically to erroneous tariff classification.

Response of the United States (WT/DS340)

459. No, the United States does not agree with China.

460. As an initial matter, the United States does not agree that it is the complainants' burden to make such a prima facie case. In the event that China's measures were found to impose ordinary

customs duties instead of internal charges, the United States has shown that China's measures – which impose a 25 per cent duty on auto parts imported for manufacturing purposes – are inconsistent on their face with China's commitment to impose a maximum of a 10 per cent duty on auto parts. GIR 2(a) is not an element of the prima facie case of the breach of China's tariff commitment on auto parts. Rather, it is China that has introduced this language from outside the WTO Agreement in an attempt to argue that its WTO commitments allows for such tariff treatment.

461. Furthermore, regardless of any question of burden of proof, the United States has in fact shown that China's measures are not consistent with any possible reading of GIR 2(a). As the United States has explained, the HS Convention and the Harmonized System of tariff nomenclature must be read in its entirety. GIR 1 requires that articles be classified in accordance with their headings. When an auto part has its own heading under the HS, it may not – consistent with the HS – be considered as an incomplete automobile having the essential character of a complete automobile. Because China's measures classify bulk shipments of parts as having the essential character of a complete vehicle, the measures ignore the specific headings for such parts set out in the HS, and thus cannot be considered as having the essential character of a complete vehicle.

462. Although China talks about a "prima facie" case, what China has demanded is something different: namely, that the complainants must define the line between the collections of parts that do and do not have the "essential character" of a complete vehicle. Such line drawing, however, would amount to advisory opinions on measures that are not at issue in this dispute. Rather, the function of dispute settlement is to determine whether the measure in dispute – that is, the measure China has actually adopted – is consistent with China's WTO obligations. And, regardless of the exact demarcation between collections of parts having the essential character of a complete vehicle and collections of parts not having such character, China's measures in this dispute are far outside any possible interpretation of GIR 2(a).

Response of Canada (WT/DS342)

463. No, Canada does not agree. First, Canada's claim is that China's measures violate GATT Article III and the *TRIMs Agreement*. That claim does not require a consideration of GIR 2(a). China has presented a defence that the measures only impose ordinary customs duties (as repeatedly noted by Canada, and not refuted by China, a defence which they effectively concede applies only to parts imported directly by vehicle manufacturers). The inapplicability of that defence, in light of the proper interpretation of the wording of Article II of GATT is set out in Section II.B of Canada's second written submission.

464. As context for interpreting Article II, the Harmonized System as it was used in negotiating China's Schedule is relevant, but as Canada demonstrated in Section II.C and D of its second written submission China has not properly applied that system, and has presented no common and consistent subsequent practice demonstrating that the GATT obligations at issue in this dispute (notably Articles II and III) have been accepted by WTO Members to allow measures of the sort that China has imposed. In contrast, Canada has shown the GATT, WTO jurisprudence and WCO documents cannot support China's misapplication. In addition, Canada has shown subsequent practice that all complainants, third parties and other WTO Members classify based on the state of a product at the border in a single shipment.

Comments by China on Complainants' responses to question 233

465. The EC asserts that it "has demonstrated under its alternative Article II GATT 1994 claim that *in all cases foreseen under Article 21 of Decree 125*, the measures require to classify [*sic*] auto parts

as complete vehicles in violation of the HS nomenclature …"[107] The EC has demonstrated no such thing. The criteria set forth in Article 21 encompass collections of parts and components that unquestionably have the essential character of a motor vehicle; even the United States concedes that "there might be a few combinations" of auto parts under Decree 125 "that could conceivably properly be classified under the Harmonized System as whole vehicles."[108] The EC simply has no basis to assert that Decree 125 is inconsistent with the essential character test in all circumstances to which it might be applied.

466. The United States, for its part, claims that "GIR 2(a) is not an element of the prima facie case of the breach of China's tariff commitment on auto parts."[109] China does not understand the basis for this claim. In order for the United States to demonstrate that the challenged measures are inconsistent with China's Schedule of Concessions, the United States must demonstrate that the measures are not based on a proper interpretation of the terms in China's Schedule of Concessions. Whether it was China or the complainants that first raised the application of GIR 2(a) to the interpretation of China's Schedule of Concessions is irrelevant; the question is whether the complainants have made a *prima facie* case that the challenged measures are inconsistent with China's tariff provisions for motor vehicles, as interpreted in the context of the rules of the Harmonized System.

234. (*China*) In paragraph 41 of its oral statement, China argues that it has articulated an understanding of the term "as presented" in GIR 2(a) that supports its position that the challenged measures are consistent with China's rights and obligations under Article II:

(a) Please explain the legal basis for the argument that being consistent with GIR 2(a) means being consistent with Article II;

Response of China

467. The interpretive issue under Article II is whether the challenged measures implement and give effect to a proper understanding of the term "motor vehicles" in China's Schedule of Concessions. As the Appellate Body has found in *EC – Computer Equipment* and *EC – Chicken Cuts*, the Harmonized System, including the General Interpretative Rules, provide relevant context for the interpretation of a Member's Schedule of Concessions.

468. As China has explained at length, GIR 2(a) is the rule within the Harmonized System that addresses the tariff classification relationship between complete articles and the parts and components of those articles. Under the second sentence of GIR 2(a), customs authorities classify parts and components of an article as the complete article if they are "presented unassembled or disassembled", have the essential character of the complete article, and are capable of assembly within the parameters of assembly operations set forth in Paragraph (VII) of the Explanatory Notes to GIR 2(a).

469. To the extent that the challenged measures correctly classify auto parts and components under GIR 2(a), including the manner in which the parts and components are "presented", they implement and give effect to a proper interpretation of the term "motor vehicles" in China's Schedule of Concessions. As China discussed in response to question 186, if the challenged measures result in a correct classification of auto parts and components that have the essential character of a motor vehicle, the measures collect a valid customs duty on auto parts and components, and are consistent with China's rights and obligations under Article II. As China also discussed in response to questions

[107] EC answers after second meeting at para. 70.
[108] US answers after first meeting at para. 89.
[109] US answers after second meeting at para. 89.

167 and 203, a charge is imposed on goods "on their importation" into the customs territory if the Member imposes the charge by reason of, or in relation to, the importation of goods into its customs territory.

470. The challenged measures are consistent with China's rights and obligations under Article II because they classify parts and components based on the manner in which the parts and components are presented to Chinese customs authorities – i.e., as one of a series of shipments that are related to each other through their common assembly into a single article, as evidenced by the customs declaration – and because they result in the collection of a duty liability that arose by reason of the importation of auto parts and components that have the essential character of a motor vehicle. This duty liability is set forth in China's Schedule of Concessions, and the measures properly interpret and implement the relevant provisions of China's Schedule of Concessions in accordance with the rules of Harmonized System.

(b) Please explain whether your understanding of the term "as presented" also means that China's measures are consistent with Articles III and XI of GATT 1994 as well as Article 2 of the TRIMs Agreement and the relevant provisions of the SCM Agreement.

Response of China

471. China has previously discussed the legal basis for its position that Article II and Article III are binary in nature, most recently in response to question 167(a) and question 203. As China has explained, an ordinary customs duty that a Member is allowed to collect in accordance with its rights and obligations under Article II cannot be analysed as an internal charge under Article III. This conclusion is strongly reinforced by the jurisprudence referred to in question 203. Thus, to the extent that the challenged measures collect an ordinary customs duty that China is allowed to collect under its Schedule of Concessions, as interpreted in accordance with GIR 2(a) and the term "as presented", these are not measures or charges that can be analyzed under Article III. For the same reason, to the extent that the measures collect an ordinary customs duty in accordance with Article II, they cannot be analyzed within the scope of Article XI, which relates only to "prohibitions or restrictions *other than duties*, taxes or other charges."

472. In respect of the *TRIMs Agreement*, China explained in paragraphs 132 to 137 of its second written submission that the collection of an ordinary customs duty does not fall within the scope of Article 2 of the *TRIMs Agreement*, as an ordinary customs duty is not "inconsistent with the provisions of Article III or Article XI of GATT 1994" for the reasons just explained. Moreover, as China discussed in footnote 97, however one characterizes the purpose of the Illustrative List in relation to Article III and Article XI of the GATT, it is evident that the Illustrative List concerns the types of measures that fall within the scope of these provisions, i.e., internal measures and import restrictions. An ordinary customs duty is not of either type.

473. Finally, in respect of the *SCM Agreement*, China has explained in paragraphs 156 to 160 of its second written submission that the proper classification of imports, and the collection of the ordinary customs duties that arise under a Member's Schedule of Concessions, cannot result in revenue foregone within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*.

Comments by the United States on China's response to question 234

474. China's analysis is essentially backwards: It starts with a purported interpretation of China's Schedule then moves to an analysis of Article II stating that if there is any "relation to importation," then Article II applies to the exclusion of Article III. As the United States noted in its comments to

China's response to Panel question No. 179, this mode of argumentation is based on the false premise that Article II (and a Member's schedule) "allows" departures from other obligations under the WTO Agreement, and essentially renders Article III meaningless.

475. The US position on these issues is discussed in, *inter alia*, its first written submission, and in its responses to Panel question Nos. 37 and 187.

235. (*Complainants*) Do you agree with China's argument that the complainants' claim against the challenged measures must be that China has drawn the line between parts and wholes in the *wrong place* rather than *whether* China can classify multiple shipments of parts and components on the basis of their common assembly?

Response of the European Communities (WT/DS339)

476. As set out in detail in all of its submissions, the European Communities is of the view that the measures are inconsistent with Article 2 of the *TRIMs Agreement* and Article III, paragraphs 2, 4 and 5 of the GATT 1994.

477. In respect of its alternative claim under Article II of the GATT 1994, the European Communities has demonstrated that the measures and in particular Articles 21 and 22 of Decree 125 require the classification of auto parts as complete vehicles in blatant violation of its tariff schedules. This is further aggravated by the application of these criteria under the "multiple shipments" theory by China which has no basis in law and leads to tariff classification at will.

478. China's argument referred to in the question is nothing but an attempt to blur the issues before the Panel in order to draw attention away from the main claims of the complainants.

Response of the United States (WT/DS340)

479. No, the United States does not agree.

480. In the event that China's measures were found to impose ordinary customs duties instead of internal charges, China's duties would be inconsistent with its obligations under its schedule of tariff commitments because China imposes a 25 per cent duty on bulk shipments of auto parts. As the United States has explained, there is no issue of "line drawing" under the HS Convention when an auto part or an auto assembly or subassembly has its own tariff heading. In those cases, as required under a plain reading of China's WTO Schedule of tariff commitments (and as confirmed by GIR 1 of the HS Convention) the heading must be used. The issue of line drawing raised by China – that is, between incomplete vehicles having or not having the essential character of a complete vehicle – only applies to incomplete vehicles or such incomplete vehicles presented unassembled or disassembled. Bulk shipments of manufacturing parts, however, are not "incomplete vehicles presented unassembled or disassembled."

481. In other words, China only gets to its issue of "line drawing" by creating a fictitious article consisting of bulk shipments of auto parts from different sources, by different importers, at different times, and in different quantities. Furthermore, because of the realities of automobile production, one cannot determine what parts will actually be used in any particular vehicle until the vehicle is actually manufactured. Such measures are inconsistent with China's WTO obligations because China – instead of basing its charges (be they internal charges or customs duties) on the article that is actually imported – in fact bases the level of its charges on the article as manufactured within China.

Response of Canada (WT/DS342)

482. No. As discussed in response to Questions 180 and 181, China does not impose ordinary customs duties on products "on their importation". Instead, China says it can classify "multiple shipments" together for the purposes of imposing greater duties. As Canada demonstrated in response to Question 210 and in Section II.D of its second written submission, China has no support in law or practice for this position.

483. It is, however, true that Canada *also* takes issue with where China has "drawn the line", even assuming all the parts in question arrive together at the border in one shipment. See Canada's response to Question 209 and 231(b).

236. (*Complainants*) Do the complainants agree with China that the specific issue presented in this dispute in relation to the application of GIR 2(a) to multiple shipments is the meaning of the term "as presented" in GIR 2(a)?

Response of the European Communities (WT/DS339)

484. To the extent that GIR 2 (a) is relevant at all to the dispute in these Panel proceedings, there are two general elements of GIR 2 (a) on which the European Communities entirely disagrees with China: the interpretation of the notions "essential character" and "as presented". The arguments of the European Communities in relation to GIR 2 (a) have been set out in detail in paragraphs 92 to 132 of its second written submission.

Response of the United States (WT/DS340)

485. No, the United States does not agree. While the phrase "as presented" or "presented", as used in GIR 2(a) is relevant – the language helps confirm that China's interpretation is untenable – the ordinary meaning of "as presented" is not the only consideration. Rather, the term "as presented" has to be considered in context of the rest of GIR 2(a) and the entire HS Convention, and in light of the object and purpose of that international agreement.

486. Furthermore, in evaluating China's argument, it is important to precisely define what is meant by a "multiple shipment." If China is referring to China's hypothetical scenario of a CKD kit split into two separate boxes, so that each box contains multiple parts of a single unassembled vehicle, then the question is rather narrow, and that question more likely may turn on the precise meaning of "as presented."

487. As the United States has explained, however, China's measures go far beyond China's example of a split CKD kit. Rather, China's measures create fictitious combinations of separate importations of bulk manufacturing parts, and apply increased charges to those parts if and only if they are used in the manufacture within China of a vehicle that exceeds China's thresholds for foreign content. If this is what China means by "multiple shipments," then <u>much more</u> than the definition of "as presented" is involved.

488. The specific language of GIR 2(a) is:

> "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 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."[110]

In China's example of a CKD kit entered in a single box, the factual scenario falls within the realm of 2(a) (though all of the specific requirements may or may not be met, such as the requirement that only "assembly" is allowed) because the kit would contain all of the parts used in the assembly of a single article.

489. However, in the scenario actually covered by China's measures – which includes bulk shipments of parts to be used for manufacturing and other purposes – there is not in fact the importation of an article unassembled or disassembled. That article – the fictitious "kit" artificially created by China's measures – does not actually exist until after all of the various parts from different sources are actually used on the assembly line to create a complete vehicle. Thus, in the scenario involving the normal importation of bulk parts from different sources, the language of GIR 2(a) does not fit — regardless of the precise meaning of "as imported."

490. Put another way, China would read GIR 2(a) not to cover unassembled "articles," but instead to cover parts used in the assembly of articles. Thus, China would read the second sentence of GIR 2(a) to mean: "[Any reference in a heading to an article'] shall also include a reference to parts of an article used after importation to produce that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented in kits or in separate bulk shipments." But this is a very different rule from the actual GIR 2(a), and there is no way to interpret the actual language of GIR 2(a) in this manner.

491. Moreover, in accordance with the principles of interpretation reflected in Article 31(1) of the Vienna Convention, China's argument must be evaluated not on the text of GIR 2(a) in isolation, but also taking into account the other GIRs, the HS Convention – including the specific headings for auto parts, assemblies, and subassemblies – and the object and purpose of the HS Convention. As the United States has explained, China's interpretation of GIR 2(a) is untenable for a number of reasons, including that it does not fit with GIR 1's requirement to use the headings set out in the HS, and the fact that China's interpretation of GIR 2(a) is completely inconsistent with the object and purpose of the HS Convention to promote uniformity and consistency of import, export and production statistics.

492. For these reasons, China's argument about the classification under the HS Convention of "multiple shipments" involves a consideration of much more than just the meaning of "as presented" under GIR 2(a).

Response of Canada (WT/DS342)

493. No. As set forth in a number of questions above, and in Canada's second written submission in Section II generally, the issue in this dispute is whether China's measures violate GATT Article III and Article 2 of the *TRIMs Agreement*, and whether China can defend such a violation on the basis that the measures are imposing ordinary customs duties within the meaning of Article II:1(b), first sentence. In the context of interpreting a Member's Schedule under Article II:1(b), as Canada notes in paragraph 42 of its second written submission and in response to Question 187, the Harmonized System is to be taken into account as context to determine the concessions at the time they were negotiated, not for re-classification at a later date as China now attempts to do. However, that interpretation requires a consideration of the Harmonized System as a whole, starting with GIR 1 and the Explanatory Note to 87.06.

[110] Exhibit CHI-15.

237. (*Complainants*) Do the complainants agree with China that importers are not necessarily entitled to obtain a lower rate of duty merely by restructuring their imports of parts and components, or documenting these imports as "separate" shipments. Please, explain.

Response of the European Communities (WT/DS339)

494. China has not provided any evidence that importers even try to restructure their imports in order to benefit from a lower duty rate. However, even if there would be such evidence the Appellate Body has stated that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border" (*EC – Chicken Cuts*, paragraph 246). In the absence of any conditions in the applicable tariff schedules, importers are entitled to structure their imports according to their preferences and the priorities of their manufacturing plans. Even in the hypothetical situation where a product is genuinely split into different shipments for the mere purpose of benefiting a lower tariff rate, the classification of the product for the purposes of Article II of the GATT 1994 must be made in accordance with the 'objective characteristics' of the product in question when presented for classification at the border.

Response of the United States (WT/DS340)

495. The United States is of the position that the condition of the goods as imported controls classification. Accordingly, an importer is not entitled to misrepresent the condition of the goods when imported in order to obtain a lower rate of duty. China presents two scenarios in which it believes that importers are not entitled to obtain the lower duty rates for auto parts in lieu of paying the higher rate of duty for complete motor vehicles.

496. The first scenario involves the "restructuring" of the importations of parts and components. It is not apparent in what way the transactions are being restructured in the context of this scenario. However, the presumed context is that parts that were previously imported together on the same conveyance are now shipped in multiple conveyances on multiple dates to multiple ports. Presuming that, alone, none of the parts has the essential character of a complete motor vehicle, then an importer would be entitled to obtain the rate of duty applicable to the parts (and not complete motor vehicles) when the parts are separately imported. Please see the US response to Panel question No. 216(c).

497. In its rebuttal to China's response to Panel question No. 134, the United States' explained that manufacturing a relationship among multiple importations of parts and components for the purpose of assessing duties that apply to the completed article is impermissible for purposes of classification under GIR 2(a). In this context, the identity of the good that is imported must be demonstrable by the good in its condition "as presented" for entry into the customs territory, that is, at the time of importation. Separate importations of other parts and components with which the good will be assembled in the importing country's internal market cannot be considered in the classification of the good because there is no assembly of the good and the other parts and components at the time that the good is imported. Activities occurring after the imported goods have entered the country's customs territory are not a basis for classification under the Harmonized System.

498. The second scenario involves an importer's submission of paperwork claiming that parts imported together are "separate shipments." The contents of the paperwork does not turn such a collection of parts into multiple importations. As noted above, an importer is not entitled to misrepresent the condition of the goods when imported in order to obtain a lower rate of duty. For these reasons, the United States disagrees with paragraph 40 of China's rebuttal Submission in which

China asserts that "evading the boundary between parts and wholes under GIR 2(a) would be a simple matter of paperwork" unless China's views are accepted.

Response of Canada (WT/DS342)

499. There is no evidence to suggest that any companies are or ever have sought to obtain a lower rate of duty merely by documenting their imports as "separate" shipments. As set out in response to Question 224, above, customs authorities determine appropriate classification of goods based upon their state as they arrive at the border, which includes (but is not limited to) the declaration. As Canada discussed in response to Question 229, even if China's theory of "tariff circumvention" were supported by evidence, the measures impose internal charges that would have to be justified under GATT Article XX(d) as taken to enforce customs duties.

Comments by China on Complainants' responses to question 237

500. In response to the question of whether an importer could submit separate customs documentation for parts and components that have the essential character of the complete article, and thereby obtain a different classification and tariff result, the United States responds that "the contents of the paperwork does [*sic*] not turn such a collection of parts into multiple importations."[111] The United States further states that "an importer is not entitled to misrepresent the condition of the goods when imported in order to obtain a lower rate of duty."[112] The United States does not explain how these conclusions follow from its understanding of the term "as presented." These assertions by the United States may reflect its "same ship, same day" rule, as set forth in 19 C.F.R. 141.51. That is, the US statements may reflect its understanding that the manner in which the importer documents a group of parts and components is irrelevant, provided that they arrive on the same ship, on the same day. However, as discussed in reference to question 221 above, the United States has not explained why this result is prescribed by its interpretation of the term "as presented" or by the rules of the Harmonized System.

238. The United Statement submits that if China is right in arguing that GIR 2(a) provides for the classification of bulk auto parts used in manufacturing as the complete, manufactured product, and that the application of the GRI is obligatory, then the obligation to classify parts in this manner would apply to each and every party to the Convention.

(a) (*China*) Please comment on the United States' view.

Response of China

501. This is incorrect. The WCO stated in response to the Panel's first set of questions that the HS Committee has not adopted a specific interpretation of the term "as presented" in GIR 2(a). As it notes, the Harmonized System is "silent on this point."[113] The potential range of the application of GIR 2(a) to multiple shipments of parts and components is embodied in the term "as presented". In the absence of a specific interpretation of this term by the WCO, there is necessarily some amount of discretion among WCO members in deciding whether and how to apply GIR 2(a) to multiple shipments, including multiple shipments of what the United States refers to as "bulk auto parts." This conclusion is supported by the HS Committee Decision at CHI-29, which states that the application of

[111] US answers after second meeting at para. 106.
[112] US answers after second meeting at para. 106.
[113] WCO Response at para. 1.

GIR 2(a) to "goods assembled from elements originating in or arriving from different countries" is a matter "to be settled by each country in accordance with its own national regulations."

Comments by the European Communities on China's response to question 238(a)

502. As the European Communities has argued in detail, the "multiple shipments theory" presented by China goes against the very basis principles of the Harmonised System. In this respect reference is made in particular to paragraphs 100 to 111 of the second written submission of the European Communities.

Comments by the United States on China's response to question 238(a)

503. China's interpretation of the Harmonized System and the purported "decision" taken by the HS Committee is limited by the very terms of the Harmonized System Convention itself. While the WCO Secretariat is correct to point out that the HS Committee has not adopted a specific interpretation of the term "as presented" in GIR 2(a), it does not give a Contracting Party the right to develop an interpretation that is incompatible with the object and purpose of the Convention, and that abrogates its obligations under the Convention to apply GIR 1 and the terms of the headings and the relevant section and chapter notes.

504. China's interpretation of GIR 2(a) exceeds the discretion a Contracting Party has to interpret the GIRs as it eliminates from consideration several headings within the Harmonized System such as headings 87.06 and 87.07, which deal with sub-assemblies as well as specific headings that name particular goods such as headings 84.07 and 84.08. This view is supported by the WCO Secretariat's response to Question 6 submitted by the Panel, which states in relevant part, that: "a heading providing specifically for a collection of unassembled parts or an incomplete article would prevail by application of GIR 1 because GIR 2 would not apply (that is, because such headings or Notes ... otherwise require.) Examples of such are headings 87.06 and 87.07". For further discussion on the discretion a Contracting Party has under the Harmonized System Convention, we refer the Panel to the US Responses to Panel question Nos. 209, 210, and 224.

(b) (*China*) Could China provide any evidence that any other party to the Convention has adopted measures comparable to China's measures at issue in this case. Please do not repeat the individual customs cases that China has cited as comparable to its own measures in its written submissions and responses to the Panel questions so far.

Response of China

505. Other than the customs decisions, regulations, and practices to which China has already referred in its submissions, China is not aware of any measure adopted by another party to the Harmonized System Convention that is directly comparable to the measures at issue in this dispute. There are two important points to note, in this regard.

506. First, as China has explained, the need for this type of measure only arises where there is (1) a significant difference in duty rates between an article and the parts of that article; and (2) the article at issue is capable of assembly within the parameters set forth in GIR 2(a). China does not consider that this is a common circumstance. This conclusion is supported by the response of the WCO to the Panel's first set of questions, which observed that Chapter 87 of the Harmonized System presents "unique classification challenges" in light of its complex array of provisions for motor vehicles and

for parts and components of motor vehicles.[114] Seen in this light, the need for a measure of this type would principally arise where a country maintains a significant difference in duty rates between motor vehicles and parts and components of motor vehicles.

507. Secondly, it is important to note that there are 124 Contracting Parties to the Harmonized System Convention, representing over 200 countries and customs unions. It is not possible for China to undertake a comprehensive review of all the national laws and regulations of these countries that are comparable to the measures at issue in this dispute. In addition to the scale of such an exercise, the national customs laws and decisions of many countries are not readily available for research purposes (even if one were able to overcome the barrier presented by the fact that they appear in many different languages). China notes, in this connection, that it was able to identify a very recent Canadian customs determination – the CBSA determination on furniture that appears at CHI-15 – that it considers to be directly comparable to the measures at issue in this dispute. Canada is a developed country with a highly sophisticated system for making customs laws and regulations available on the Internet. It is entirely possible that there are other countries that have adopted similar measures to deal with the same basic problem of the tariff relationship between complete articles and parts of those articles, in the presence of a significant difference in duty rates.

Comments by the European Communities on China's response to question 238(b)

508. The European Communities notes that China is not able to present any evidence of comparable measures in other countries, as it was not able to point to any evidence of comparable measures in China applied in other sectors (see China's reply to question 57 of the Panel). This is not surprising in view of the unprecedented position of China on customs classification. The necessary implication therefore must be that China recognises that it is not able to provide any evidence of international customs practice that could sustain its position.

509. It should also be noted that China once again confuses the interpretation of a general rule with the fiscal consequences of a tariff difference between parts and complete products. A rule cannot be applied differently just because the consequences of its application may be more significant.

Comments by the United States on China's response to question 238(b)

510. China attempts to justify its measure based on what the WCO Secretariat identified as the "unique classification challenges" in the structure of Chapter 87 of the nomenclature. This is a *non sequitur*. Those "unique classification challenges" relate to the classification of certain assemblies – as presented at the border – and not to the classification of bulk shipments of parts for manufacturing. Indeed, the classification of such parts is a simple matter – a radiator falls under the heading for radiators, a brake falls under the heading for brakes, and so on.

(c) (*China*) If not, does China think that every party to the Convention (and China itself with respect to all goods except auto parts) is acting inconsistently with the obligations under the Convention to apply GRI 2(a)?

Response of China

511. No. See China's response to question 238(a) above.

[114] WCO response at para. 3.

239. (*China*) In relation to China's position that the measures at issue are border measures, could China please answer the following:

(a) In China's tariff Schedule, are there any conditions attached to the importation of automobiles or parts thereof?

Response of China

512. No. As China explained in response to questions 27 and 54 from the Panel, China was not required to inscribe any condition in its Schedule of Concessions in order to interpret and enforce its Schedule of Concessions in accordance with the rules of the Harmonized System.

Comments by the European Communities on China's response to question 239(a)

513. In the light of the previous submissions, it is clear that the European Communities fundamentally disagrees with China. However, it should be noted that even if China had included the general conditions that form its defence in this case into its schedules, such conditions would still violate Article 2 of the *TRIMs Agreement* and Article III of the GATT 1994 in accordance with the jurisprudence of the Appellate Body in *EC – Export Subsidies on Sugar*, paragraphs 211 – 223, and Article 3 of the *SCM Agreement*.

(b) At the time of China's accession to the WTO, was there any understanding between negotiating Members that there should be any condition attached to that part of the Schedule?

Response of China

514. No.

Comments by the European Communities on China's response to question 239(b)

515. There was no such understanding between the negotiating Members at the time of China's accession to the WTO.

(c) When a shipment of parts and components of complete vehicles is presented to China's customs authorities, what do China's customs authorities do if an automatic licence for such importation is not presented?

Response of China

516. If the imported auto parts are subject to an automatic import license requirement, the Customs will not accept the import declaration if it is not accompanied by the import license. It is highly uncommon for entries to be presented without a required automatic import license, because (1) the importer can obtain the automatic import license with essentially no administrative burden or delay; and (2) the importer would have to pay warehousing fees to hold the goods at the point of entry while it obtained the necessary import license.

Comments by the European Communities on China's response to question 239(c)

517. Before the "automatic" import licence can be granted allegedly "with essentially no administrative burden and delay", the automobile manufacturer is obliged to carry out the self-verification foreseen in Article 7 of Decree 125 and Article 6 of Announcement 4. If the conclusion of

the self-verification is that the model contains sufficient local content, the manufacturer is obliged to provide also the review report from customs.

518. China's reply makes it clear that the import licence is far from automatic as the manufacturer is obliged to go through cumbersome and lengthy procedures before the licence is granted.

519. Reference is also made to the observations made above to China's reply to question 173 (a).

Comments by the United States on China's response to question 239(c)

520. In its response to part (c) of this question, China asserts that an importer "can obtain the automatic import license with essentially no administrative burden or delay." To the contrary, under Article 7 of Decree 125, a manufacturer must complete a self-assessment before obtaining an import license. To complete the self-assessment, a manufacturer must (1) catalogue all the parts *of each model* it manufacturers, (2) determine whether, under the measures, the parts are foreign or domestic, and (3) calculate the thresholds for each assembly system and the overall price percentage of imported parts in the model. The determination of the source of the parts extends to secondary suppliers and may involve an analysis of whether the parts have undergone a "substantial processing" in China within the meaning of Article 24 of Decree 125 and Article 18 or Order No. 4. Then there are the filing requirements of Article 9 of Decree 125, should a filing be required. These requirements can hardly be described as "essentially no administrative burden or delay."

240. (*Canada*) With respect to the CBSA's decision on disassembled furniture imports,

(a) Please elaborate on why because a finished product was "purchased at the retail level", that decision should be distinguished from the measures at issue?

Response of Canada (WT/DS342)

521. Canada emphasizes that the Memorandum is not the subject of the present dispute. As such, the Memorandum is relevant only for purposes of determining whether there is common and consistent practice accepted by WTO Members related to the interpretation of Members' Schedules. On that point, as it did in paragraph 3 of its response to Question 116, Canada emphasizes that China has not shown any other such examples in the practice of WTO Members that is even similar to the Memorandum.

522. In any event, Canada has shown that the Memorandum applies only where finished furniture is purchased at the retail level but shipped separately so as to be classified as parts. This is analogous to the practice of allowing importers to classify as one product split shipments of a single product (see response to Question 224, above). It is *not* analogous to the measures. Further, unlike the measures, the Memorandum does not require importers to declare parts as a finished product in order to obtain an import licence. Last, Canadian customs has discretion whether to investigate individual instances where it suspects whole furniture is being imported, whereas, under the measures, all parts that exceed the thresholds under Article 21 of Decree 125 are *presumed* to evade auto part duties.

(b) Following on Canada's response to Panel question No. 124 and as pointed out by China in paragraph 59 of its second written submission, could Canada please elaborate on what "contrary evidence obtained by the Canadian customs officials" means and what documents were examined by the Canadian customs officials;

Response of Canada (WT/DS342)

523. Based on historical compliance records, Canadian customs authorities have found that the overwhelming majority of importers are honest and comply with all import requirements. This would include those importers specified in the Memorandum. Consequently, the documentation and classification provided by the importer at the time of importation are accepted at face value.

524. However, Canada from time to time does conduct routine compliance verification audits on importers. Such audits include reviewing whether importers properly declared origin, value and classification of imported goods. Customs officials review documents such as the purchase order, sales contract, confirmation order, purchase agreement and correspondence files. If, in the course of such an audit of a furniture retailer, a customs official determines that the Memorandum applies, then the retailer makes an amendment to the original importation documents that would include a change in tariff classification.

(c) Canada mentions that Canadian customs officials are not *required* to classify furniture parts as finished furniture but, instead, are afforded *discretion* to determine whether such a classification is warranted. Please elaborate on this statement. Also, please comment on whether, and if so, how the fact that such discretion is afforded to customs officials is relevant to distinguishing this decision from China's measures;

Response of Canada (WT/DS342)

525. China's measures presume that any time the volume or value thresholds for imported parts in those measures are exceeded the imported parts should be classified as whole vehicles. This is on the presumption that any time such parts are imported, and by whomever they are imported, the purpose is to "circumvent" tariffs. Further, vehicle manufacturers are forced to call parts "Deemed Whole Vehicles" to obtain an import licence. There is no discretion for China's customs authorities to consider the commercial reality (discussed in response to Question 176) that most parts would have been imported by independent third parties for their own commercial purposes – in other words, there is no discretion in customs authorities to apply the measures only for the purposes that China says the measures are required – to prevent tariff "circumvention" (see response to Question 229 for a discussion of the relevance of this concept more generally).

526. In contrast, the Canadian practice relating to classification of furniture is directed at the discrete situation of when an item of furniture (not parts for the furniture) is purchased by a retailer but shipped separately as parts. At the time of importation, customs officials do not generally check if the imported furniture parts are classified as finished furniture. Any verification generally takes place later, as noted in response to paragraph (b), above, as part of a routine compliance verification audit. Further there is no requirement for importers to maintain and report to Canadian authorities on a parts audit trail, which is required under the measures, nor is there a system to require pre-determination of the destination of imported furniture parts, as contemplated for auto parts in the measures.

527. The importance of discretion can be illustrated by an example. Suppose there is a situation where a furniture retailer imports 100 table tops and 400 table legs from the same exporter, and those shipments occur separately but close in time. Based on those facts it might appear that the importer had purchased 100 tables from the exporter, and the Memorandum would apply. However, an examination of the documentation by a customs official might confirm that the table tops were purchased and invoiced separately from the table legs and that the table legs were of a different style than the table top. The customs official would then have the discretion, under Canada's practice, to make a determination that the Memorandum did not apply and classify the goods as parts. This aspect

of the Memorandum is one of many elements that distinguish the Canadian practice from the measures. Also, an importer has the right to appeal this decision at the Canadian International Trade Tribunal ("CITT").

(d) Does Canada believe, as China contends in paragraph 61 of its second written submission, that if the accompanying documentation (or other "evidence") supports the conclusion that [a] shipment of parts and components is one of a series of related shipments that it is proper to classify that shipment as the complete article in accordance with GIR 2(a)?

Response of Canada (WT/DS342)

528. Canada does not agree with China. "Documentation" is only one element of assessing the objective characteristics of the product. This is made clear in Answer 1 from the WCO to questions from the panel in *EC – Chicken Cuts*, where it stated "the determination of the essential character of a product can be done in several ways. The most obvious is through a visual inspection of the product… Reference can also be made to accompanying documents". The use of documentation in the Memorandum is based on a presumption of honesty among importers who have voluntarily declared they are ordering complete furniture. This is in contrast to the *presumed* dishonesty of importers under the measures, who are not truly ordering complete vehicles but must declare so on documentation, or they are otherwise barred from obtaining an import licence necessary to import the parts.

529. Further, Canada has described its position on China's theory of classification of "multiple shipments", for example in response to Question 237, above. The Canadian practice of classification of furniture in the Memorandum, which is not being challenged in this dispute, and which as discussed above is very different from the measures, does not establish subsequent practice for the general rule contended by China in paragraph 61 of its second written submission.

(e) Is it Canada's position that the essential character test under GIR 2(a) should be based only on the objective characteristics of the good and any information provided by the importer with respect to that good? If so, should it be understood that Canada's customs authorities do give consideration to other shipments with which the product later may be incorporated as argued by China in its second written submission paragraph 60?

Response of Canada (WT/DS342)

530. Canada's position is that ordinary customs duties under Article II:1(b), first sentence, can only be imposed on products "on their importation". Canada, in response to Question 187, has provided its position on the relevance of GIR 2(a) to this dispute, and in response to Question 210 has discussed the limited extent to which the meaning of GIR 2(a) needs to be interpreted for the purposes of this dispute. With respect to the Memorandum, see the response to paragraph (a) and (c), above.

241. (*Canada*) The CBSA's decision in Exhibit CHI-17 on tariff classification of kit cars states in paragraph 3 that "[i]t should be noted that the tariff classification of the third type of kit is based on the decision rendered on June 11, 1990 by the Canadian International Trade Tribunal in Appeal AP-89-228."

(a) In light of this statement and given that the tariff headings that were at issue in that decision are the same as those in this case, could Canada please elaborate on how the CBSA decision in Exhibit CHI-17 should be distinguished from the measures at issue to the extent that they affect the tariff classification of CKD or SKD kits.

Response of Canada (WT/DS342)

531. Canada does not seek to distinguish the memorandum in Exhibit CHI-17 from tariff classification generally, although as Canada noted in response to Question 60, that memorandum deals with a different type of product than is at issue in this case. As Canada has repeatedly noted (most recently in paragraph 17 of its second oral statement), it has always accepted that parts that have the essential character of a finished vehicle may be classified as such, so long as they are contained in a single shipment.

532. Canada does say that there should be an assessment of what exactly is in a kit (which Exhibit CHI-17 does) rather than an assumption that what is described as a CKD or SKD has the essential character of a whole vehicle. For example, as illustrated in the CITT decision discussed in paragraph (b), below, it is quite possible that a "kit" could properly be classified as a body and parts rather than a whole vehicle. And, of course, Canada repeats that even if a CKD or SKD contains parts with the essential character of a whole vehicle, China is obliged by paragraph 93 of the Working Party Report to charge no more than 10%.

(b) Please explain the relevance and/or significance of "the decision rendered on June 11, 1990 by the Canadian International Trade Tribunal in Appeal AP-89-228" in relation to tariff classification decisions to be made by the Canadian customs authorities concerning the third type of kits referred in that decision. Please also provide a copy of this decision.

Response of Canada (WT/DS342)

533. That decision related to a determination of whether an imported Mercedes replica assembly kit (which included most parts, but not the power train, suspension or engine) qualified for duty exemption on the basis that it was either a motor vehicles manufactured more than 25 years earlier or parts to be used on such a vehicle.[115] The CITT concluded that while the kit replicated an older Mercedes, the parts were designed to be mounted on a power train, suspension and engine less than 15 years old, and that therefore the parts did not qualify for the duty exemption. The CITT also accepted that GIR 2(a) applied such that the parts had the essential character of a vehicle body, with some other parts that were not part of the body, and that therefore the kit was properly classified as a body (8707.10.90) and parts (8708.70.90, 8708.92.90, 8708.94.90 and 8708.99.99).

(c) Is that decision binding on Canadian customs authorities?

Response of Canada (WT/DS342)

534. In this case, as in most appeals to the CITT, the appeal was transaction-based (*i.e.*, based on a particular import) and the decision only applied to the goods under appeal (and not to all similar goods imported by all importers). The CBSA then implemented the particular decision by re-determining the tariff classification of the particular goods subject to the appeal.

535. However, while a CITT decision is only binding with respect to the goods that are the subject of review, the CBSA applies the finding of the CITT to similar goods as a matter of policy. This explains the reference in Exhibit CHI-17 to the CITT decision, which reflects CBSA's policy generally to refuse to grant replica assembly kits the duty exemption available for parts for vehicles older than 25 years.

[115] *Bradley v. The Deputy Minister of National Revenue for Customs and Excise*, 1990, CITT, Appeal No. AP-89-228 (Exhibit CDA-41).

242. (*Canada*) In paragraph 26 of its second oral statement, Canada states that there is nothing in the text of Article II to justify China's argument that a brake cylinder once in China may be classified as a motor vehicle by virtue of how it is used in a domestic production process. Is there anything in Article II that precludes it?

Response of Canada (WT/DS342)

536. Yes. As set out in Section II.B of Canada's second written submission, ordinary customs duties may be no greater than the amounts set out in a Member's Schedule for products "on their importation", meaning their physical state as they arrive at the border. A Member is obliged to apply ordinary customs duty within the rates set out in its Schedule. Imposing an ordinary customs duty greater than that amount is a violation of Article II:1(b), first sentence. While Canada submits that the measures impose internal charges, and thus Article II is not engaged, even if the measures are ordinary customs duties, the bound rate for brake cylinders in China's Schedule is 10%, while China imposes a charge of 25%.

243. (*China*) Please comment on the United States' argument in paragraph 19 of its second oral statement that if China's position were adopted "a Member could avoid its Article III disciplines by the simple ruse of structuring its customs laws so that no product is actually "imported" until after discriminatory internal charges and other discriminatory measure had been applied." The Panel is not asking China to comment on whether its measures actually do this, but rather on the interpretative question presented by the United States in the general sense.

Response of China

537. China has responded to this assertion on multiple occasions.[116] The United States apparently believes that, through the constant repetition of the same point, it can avoid the fact that China has already addressed this concern in detail.

538. As China has most recently explained in response to questions 189 and 199 above, it is not China's position that a Member can structure its customs laws to defer the point at which goods are considered imported, and thereby impose whatever discriminatory charges or measures it wishes. The question in relation to a particular customs process is whether it gives effect to a measure or charge that a Member is allowed to maintain or collect by reason of, or in relation to, the entry of goods into its customs territory. Thus, a Member may not, under the guise of a customs process, maintain a measure or collect a charge in respect of goods from another Member that it is not allowed to maintain or collect under its WTO commitments.

539. To be perfectly clear, the Member's characterization under its municipal law of when a good has been "imported" does not define the scope of its rights and obligations in respect of Article II and Article III. As China explained in response to question 37 from the Panel, China considers that goods have been imported "once the national customs authorities have completed the administrative processes that are necessary for the imposition and assessment of the specific border charges that the Member is *allowed* to impose in respect of the imports at issue, and the imports are no longer subject to customs control."[117] Whatever those administrative processes entail, they cannot involve forms of discrimination that are not specifically countenanced by the Member's rights and obligations under

[116] See, e.g., China rebuttal submission at para. 119; China answers at 31; China answers at p. 35; China answers at p. 105.

[117] China answers at p. 31.

Article II. Therefore, these customs processes cannot provide a "ruse" for discriminating against goods from another Member in respects that are inconsistent with the disciplines of Article III. This is an objective standard, not a standard that leaves the boundaries between a Member's Article II and Article III obligations subject to its own discretion and national laws.

Comments by the European Communities on China's response to question 243

540. China's reply is circular. On the one hand China considers that Members cannot defer the point at which goods are considered imported through the structuring of their customs laws. On the other hand China is of the view that goods have been imported "once the national customs authorities have completed the administrative processes that are necessary for the imposition and assessment of the specific border charges that the Member is allowed to impose in respect of the imports at issue, and the import are no longer subject to customs control". This test suggested by China provides that through the structuring of customs laws a Member can in fact defer the point at which goods are considered imported. The European Communities fundamentally disagrees with this position, which was also specifically addressed by the panel in *EEC – Parts and Components*. For analysis, the European Communities refers *inter alia* to paragraphs 48 and 49 of its second written submission.

Comments by the United States on China's response to question 243

541. China's response is entirely based on the false premise that Article II and China's schedule give China the "right" to define a "customs duty" however China sees fit and to adopt measures inconsistent with Article III in order to collect such supposed "customs duties". To the contrary, Article II imposes obligations on Members that choose to impose customs duties. Article II does not provide that Members may choose to define "customs duties" however they see fit, and Article II does not give Members any "right" to breach Article III (or other WTO obligations) by adopted measures addressed to the collection of such self-defined "customs duties." If China were correct that Article II provided such "rights" to WTO Members, then, indeed, as the United States has explained, Article III could be rendered a nullity through the ruse of defining internal charges as "customs duties".

244. (*United States*) The United States, in paragraph 19 of its second oral statement, states that the only sensible way to view "imported" in this context is with its normal meaning, that is "the time when the product enters the Member's customs territory." Could the United States please explain how they determined that this was the ordinary meaning of the word "imported".

Response of the United States (WT/DS340)

542. Please see the United States response to Panel question No. 191. The United States also notes that the act of importation should not be confused with subsequent customs procedures and clearance processes. Indeed, the finalization of the collection of duties may not occur until some time after importation. See e.g. the United States response to Panel question No. 32.

245. (*All parties*) The United States mentioned at the second substantive meeting that the HS Committee Decision referred to by China cannot be used as context for the meaning of Article II of the GATT because it postdates that agreement, i.e, a decision from 1995 cannot be used as context for an agreement concluded in 1994. Could the other parties please comment on whether they share this view and why.

Response of China

543. The US position is incorrect, for four reasons. First, as China noted in response to question 186, the meaning of GIR 2(a) is principally relevant to the interpretation of China's Schedule of Concessions, which took effect on 11 December 2001 – six years after the HS Committee Decision. Even if the relative timing of these two events had some bearing upon the significance of the HS Committee Decision, the HS Committee Decision clearly preceded the conclusion of China's Schedule of Concessions.

544. Second, as China explained in response to question 112 from the Panel, the Appellate Body specifically referred in *EC – Chicken Cuts* to the relevance of any interpretations of the GIRs adopted by the WCO and the HS Committee. Nothing in the Appellate Body's statement suggests that this would be limited to interpretations of the GIRs that existed *prior to* the conclusion of the GATT in 1994.

545. Third, as China has previously pointed out, the 1995 HS Committee Decision merely reaffirmed an interpretation of GIR 2(a) that has existed for at least 40 years. When the GATT was concluded in 1994, this interpretation of GIR 2(a) had long been established. Because the interpretation that the HS Committee reaffirmed in 1995 existed in 1994, it provides relevant context for the interpretation of Article II and China's Schedule of Concessions in the same respect as other elements of the Harmonized System.

546. Finally, even if the 1995 decision of the HS Committee did not provide relevant context within the scope of Article 31(2) of the *Vienna Convention*, it would nonetheless constitute a "relevant rule of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the *Vienna Convention*, regardless of when the HS Committee Decision was adopted. It could also constitute a "subsequent agreement among the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the *Vienna Convention*.

547. For these reasons, the 1995 HS Committee Decision is clearly relevant to the interpretation of China's commitments under Article II and its Schedule of Concessions.

Response of the European Communities (WT/DS339)

548. As pointed out in the European Communities' reply to question 114, the Appellate Body has considered in paragraph 199 of *EC – Chicken Cuts* that "the above circumstances confirm that, prior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an "agreement" between WTO Members "relating to" the WTO Agreement that was "made in connection with the conclusion of" that Agreement, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is "context" under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules."

549. In general, the decision of the HS committee referred to in by China can at most be relevant as context for the determination of whether the assembly operations involved in the assembly of a CKD or SKD kit are "further working operations" within the meaning of Explanatory Note VII to

GIR 2 (a). This is the only legally relevant decision taken by HS committee in the context of the 1995 decision.

Response of the United States (WT/DS340)

550. As the question notes, during the second substantive meeting the United States made the above point regarding the time of the 1995 HS Committee Decision as compared to the earlier completion of the Uruguay Round.

551. The United States would also note that this issue of timing is not the only reason that the United States believes that the HS Convention (and *a fortiori* any decisions under the HS Convention) are not context for the purpose of interpreting the WTO Agreement. The United States has also made the more general point that the HS Convention is not context for interpreting the HS Convention because it does not meet the requirements for "context" under customary rules of interpretation of public international law, as reflected in Article 31(2) of the Vienna Convention on the Law of Treaties.[118]

552. The United States also submits that there is a substantial distinction between using the HS Convention as a tool for interpreting the WTO Agreement (including the GATT 1994) as a whole versus using the HS Convention as a tool for interpreting a Member's schedule that was explicitly based on the HS nomenclature. In the latter case, the United States is of the view that the HS Convention may be used as a supplementary means of interpretation of that Member's schedule under the principles reflected in Article 32 of the *Vienna Convention*.

Response of Canada (WT/DS342)

553. Canada agrees that the Harmonized System, as it was used for negotiating China's Schedule, may be relevant as context for interpreting GATT Article II. For the reasons set out in detail in paragraph 59 of Canada's second written submission, the HS Committee discussion referred to by China is not relevant for interpreting that Schedule. China has also presented no practice either before or after accession similar to the measures. Last, China has offered no evidence that a peripheral issue, taken out of context by China, and contained in a non-binding WCO decision was at all relevant to negotiating China's Schedule.

Comments by the United States on China's response to question 245

554. As stated in its response to this question, the United States is of the view the HS Convention may be used as a supplementary means of interpretation of that *Member's schedule* (if based on HS nomenclature) under the principles of interpretation reflected in Article 32 of the *Vienna Convention*.

[118] In particular: (1) the HS Convention is not an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty," because not all Contracting Parties during the Uruguay Round were parties to the HS Convention and because the HS Convention is not an agreement "relating to the conclusion" of the WTO Agreement"; and (2) the HS Convention is not an "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" because the HS Convention was not made in connection with the conclusion of the WTO Agreement, nor was it "accepted by other parties as an instrument related" to the WTO Agreement. The United States refers the Panel to its Second Submission, wherein the United States noted the limited finding in *Chicken Cuts* regarding the HS Convention as context for agricultural products, and the fact that in the *Gambling* dispute, the Appellate Body disagreed with and overturned a panel finding that the UN nomenclature was to be used as context for interpreting Members' GATS schedules.

555. Contrary to China's assertions, the 1995 decision of the HS Committee is not legally binding and therefore does not establish a "rule of international law" or constitute an "agreement" between parties to the HS Convention.

246. (*All parties*) China argues that because its charges relate to a valid customs duty, they fall within the purview of Article II. Could China please explain the legal basis from the text of Article II or other sources, for its understanding that Article II applies to anything that "relates" to a valid customs duty? Could the complainants please indicate whether they agree with China's interpretation of Article II and provide the legal basis for their agreement or disagreement.

Response of China

556. China's responses to question 179 and 203 discuss the legal basis for this conclusion. As explained therein, and in China's other submissions to the Panel, the textual issue within Article II:1(b), first sentence, is the meaning of the term "on their importation." There are two principal sources of interpretation which support the conclusion that charges are imposed on goods "on their importation" into a Member's customs territory if the charges fulfil a valid customs duty, *i.e.*, a customs duty that the Member is allowed to collect in accordance with its Schedule of Concessions.

557. First, as discussed in response to question 179, the term "on their importation" must be interpreted in the light of the consistent and widespread practice among Members of imposing customs-related measures, and collecting customs duties, after goods have crossed the frontier. In the absence of a temporal or geographic limitation on the scope of the term "on their importation," there must be some other principle by which the scope of this term is defined. As China documented in paragraph 103 of its second written submission, the interpretations offered by the parties to this dispute (including the third parties) all point to the *reason* or *event* that triggered the imposition of the charge as the determinative consideration in evaluating whether the charge is within the scope of Article II:1(b).[119] This understanding is consistent with the practice among WTO Members of collecting ordinary customs duties after goods have physically crossed the frontier, provided that the charges relate to a liability that arose by reason of the entry of those goods into its customs territory.

558. The second basis of interpretation is the ordinary meaning of the term "on" in the context of Article II:1(b), first sentence. As discussed in response to question 203, the Panel in *India – Autos* found that "[a]n ordinary meaning of the term '*on*', relevant to a description of the relationship which should exist between the measure and the importation of the product, includes 'with respect to', 'in connection, association or activity with or with regard to.'."[120] This meaning of the term "on" has been adopted by the panels in *EC – Export Subsidies on Sugar* and *Dominican Republic – Import and Sale of Cigarettes*.[121] As the latter panel noted, "the ordinary meaning of the word 'on' suggests that it is a preposition denoting a relation. In that sense, the expression 'on the importation' would be akin to 'with respect to the importation'."[122] This ordinary meaning of the word "on" supports the conclusion that a charge is imposed "on their importation" if the charge relates to, or is in respect of, the importation of the good into the customs territory of the Member imposing the charge.

---

[119] China Rebuttal Submission at para. 103.

[120] *India – Autos* at para. 7.257.

[121] *EC – Export Subsidies on Sugar* (Panel Report) at para. 7.274; *Dominican Republic – Import and Sale of Cigarettes* (Panel Report) at para. 7.258.

[122] *Dominican Republic – Import and Sale of Cigarettes* at para. 7.258 (citing *The New Shorter Oxford English Dictionary* at 1,995-1,996).

Response of the European Communities (WT/DS339)

559. The European Communities does not agree with China. Under Article II:1 (b), first sentence of the GATT 1994, ordinary customs duties can only be imposed on the importation of the product. Other duties or charges may be imposed in connection with importation under Article II:1 (b), second sentence. However, according to paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, "[i]n order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level or 'other duties or charges' levied on bound items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply". Furthermore, the broad purpose of Article III of the GATT 1994 of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement including Article II (Appellate Body Report in *Japan – Alcoholic Beverages II*, p.16).

560. The interpretation by China referred to in the question is one of many different vague formulations that China uses in its attempt to widen the scope of Article II to the detriment of the scope of Article III. There is nothing in law that supports China's position that Article II applies to anything that "relates" to a valid customs duty.

Response of Canada (WT/DS342)

561. Canada has set out in Section II.B of its second written submission its understanding of Article II as it applies to this dispute.

Comments by the European Communities on China's response to question 246

562. Further to its reply to question 246, the European Communities emphasises that China is erroneously using the panel report in *India – Autos* where the panel interpreted the words "on importation" in Article XI of the GATT 1994 and not under Article II:1(b). As pointed out by the European Communities in its reply to question 203 of the Panel, the notion of "on importation" under the latter provision is narrower because Article II:1(b) distinguishes between the notions of "on importation" and "in connection with importation".

Comments by the United States on China's response to question 246

563. China's response conflates the distinct concepts of "imposing" and "collecting" a charge, as discussed in the comments the United States on China's responses to Panel question No. 179.

564. As discussed in its responses to Panel question Nos. 84 and 203, the United States disagrees with China's interpretation of "on their importation."

Comments by China on Complainants' responses to question 246

565. The EC states that "[t]here is nothing in law that supports China's position that Article II applies to anything that 'relates' to a valid customs duty."[123] This is incorrect. Among the other interpretive bases that China has discussed in respect of the interpretation of Article II:1(b), first sentence, China notes that three prior panels have referred to the ordinary meaning of the word "on"

[123] EC answers after second meeting at para. 79.

as including "'with respect to', 'in connection, association or activity with or with regard to'."[124] This interpretation directly supports China's interpretation of the term "on their importation" in Article II:1(b), first sentence, as encompassing charges that a Member collects "in relation to," or "with respect to," the importation of a product, without regard to the exact point in time or space at which the charge is collected.

247. (*Complainants*) Please explain how the complainants classify and treat imported auto parts and automobiles under their respective schedules.

Response of the European Communities (WT/DS339)

566. Classification of goods in the EC nomenclature is guided by the principles set up by the General Interpretative Rules.

567. GIR 1 states that the classification shall be determined according to the terms of the headings and any relative section and chapter notes. In a case of incomplete or unfinished articles, or articles presented unassembled or disassembled (if they are complete or finished articles or are falling to be classified as complete or finished articles by virtue of GIR 2 (a)), provided that they, as presented, have the essential character of the complete or finished article.

568. The headings and the corresponding duty rates that merit consideration for the classification of the vehicles and parts of the vehicles are the following:

> Complete vehicles
>
> Heading 87.01 Tractors (various duty rates - duty rate: 3% for pedestrian-controlled tractors, duty rate: 16 % for road tractors for semi-trailers, duty rate: "free" for track-laying tractors, duty rate: "free" for other agricultural tractors, duty rate: 7% for other tractors)
>
> Heading 87.02 Motor vehicles for the transport of ten or more persons, including the driver (duty rate 10% or 16% depending on a type of engine and cylinder capacity)
>
> Heading 87.03 Motor vehicles for the transport of persons (other than those of heading 8702) (generally - duty rate 10%, with the exemption of certain types of vehicles specially designed for travelling on snow, golf cars and similar vehicles with duty rate: 5%)
>
> Heading 87.04 Motor vehicles for the transport of goods (generally duty rates 10% or 16% depending on a gross vehicle weight, type of engine and cylinder capacity, then duty rate free for dumpers designed for off-highway use, duty rate: 3,5% for vehicles specially designed for the transport of highly radioactive materials)
>
> Heading 87.05 Special purpose motor vehicles (duty rate: 3,7%)
>
> Intermediate products (a combination of vehicle elements and/or parts fitted and/or equipped together without being complete vehicles)

[124] *India – Autos* at para. 7.257. This interpretation was adopted by the panels in *EC – Export Subsidies on Sugar* at para. 7.274 and *Dominican Republic – Import and Sale of Cigarettes* at para. 7.258.

> Heading 87.06 Chassis fitted with engines for motor vehicles of headings 8701 to 8705 (various duty rates, namely 4,5 %, 6%, 10% and 19% - depending on what type of vehicle it is intended for)
>
> Heading 87.07 Bodies (including cabs) for motor vehicles for motor vehicles of headings 8701 to 8705 (duty rate: 4,5%)
>
> Parts and accessories of Chapter 87 (heading 87.08) (various duty rates, namely 3%, 3,5%, 4,5% for various parts)
>
> Parts and accessories of motor vehicles classified elsewhere than Chapter 87 (tyres, engines, accumulators). (various duty rates, e.g. heading 4011 New pneumatic tyres, of rubber – duty rate: 4,5%, Engines for motor vehicles – headings 8407 and 8408, duty rate: 2,7 % or 4,2% depending on type and cylinder capacity)

569. The HS Explanatory Notes provide guidance for the classification in order to ensure uniform classification. Classification is done on the basis of the objective characteristics of the product at issue as presented at the border. In essence, the EC classifies the relevant products in the way it argues that China ought to classify the same products since both China and the EC use the HS nomenclature.

Response of the United States (WT/DS340)

570. The United States classifies auto parts and automobiles in their condition as imported under the terms of the Harmonized System. Most auto parts and auto accessories are classified outside of chapter 87 by applying General Interpretative Rule 1 and the relevant Section and Chapter Notes that direct auto parts and auto accessories to headings outside of chapter 87. (For example, see Note 2 to Section XVII which directs parts and accessories to other chapters or sections within the Harmonized System.) Automobiles are classified in chapter 87, specifically under heading 87.03.

Response of Canada (WT/DS342)

571. Assembled vehicles are classified as 87.02-87.05, with specific classification within those headings based on the application of GIR 1, taking into account all relevant Section, Chapter and Explanatory Notes. The MFN tariff rate for all of those headings is 6.1%, except dumpers designed for off-highway use (8704.10), whose MFN rate is 0%.

572. Auto parts that are imported as assembled intermediate categories (*e.g.*, body, chassis with engine, engines) are classified as 84.07, 87.06 or 87.07 based on the application of GIR 1, taking into account all relevant Section, Chapter and Explanatory Notes. The MFN tariff rate for chassis with engines is generally 6.1%, for bodies generally 6%, and for engines generally between 0% and 6%.

573. Auto parts are classified in their appropriate heading (generally 87.08) based on the application of GIR 1, taking into account all relevant Section Notes (in particular Notes 2 and 3 to Section XVII), Chapter Notes and Explanatory Notes (in particular the "parts" Explanatory Notes to Section XVII). With few exceptions (for example, seat covers 8708.29.60, which have an MFN duty rate of 8.5%), the MFN duty rate is either 6% or 0%.

574. If a collection of parts with the essential character of an intermediate category (such as a body, as in the case discussed in the response to Question 241(b), or a chassis with engine) is imported together, the parts would be classified as that intermediate category, in accordance with GIR 2(a).

248. (*Complainants*) Please provide an estimated value of each combination of auto parts as shown in Exhibits EC – 1, 2, 5, 6, 7, 8, 9, 10, 11.

Response of the European Communities (WT/DS339)

575. On average, the percentage of the different whole assemblies in value of a complete vehicle is as follows:

- Body assembly	10%
- Engine assembly	17%
- Transmission assembly	8%
- Drive & non-drive axle assemblies	5%
- Chassis assembly	1%
- Steering system	4%
- Brake system	3%
- Other components	52%

576. These percentages in value of the complete vehicle are generally in line with the data provided by China at paragraph 19 of its first written submission.

577. Using the above percentages and those submitted by China under examples in which whole assemblies would be imported (Exhibits EC-5 to EC-7), the imported parts would represent:

- 27% (using the above percentages) or 29,57% (using the percentages submitted by China) of the value of a complete vehicle for example 3 (Exhibit EC-5);
- 30% (using the above percentages) or 30,67% (using the percentages submitted by China) of the value of a complete vehicle for example 4 (Exhibit EC-6);
- 20% (using the above percentages) or 20,94% (using the percentages submitted by China) of the value of a complete vehicle for example 5 (Exhibit EC-7);

578. In Exhibits EC-1, EC 2 and EC-8 to EC-11, the European Communities presented examples in which key parts of assemblies (and not the whole assemblies) would be imported above the specific thresholds defined in Annex I of Decree 125, thereby deeming the assembly as imported in accordance with Article 22(2) of Decree 125 and Articles 14(2) and 19 of Announcement 4. In the absence of average value for key parts, the European Communities has based its calculations on the average value of the relevant whole assembly. As each "imported" assembly would actually contain domestic parts, the combination of imported key parts would represent necessarily **less than**:

- 27% (using the above percentages) or 29,57% (using the percentages submitted by China) of the value of the vehicle for examples 1 and 2 (Exhibits EC-1 and EC-2);
- 29% (using the above percentages) or 22,08% (using the percentages submitted by China) of the value of the vehicle for example 6 (Exhibit EC-8);
- 20% (using the above percentages) or 20,94% (using the percentages submitted by China) of the value of the vehicle for examples 7 and 9 (Exhibits EC-9 and EC-11);
- 34% (using the above percentages) or 29,68% (using the percentages submitted by China) of the value of the vehicle for example 8 (Exhibit EC-10).

579. The European Communities also refers to paragraphs 66 and 67 of its first oral statement in which it demonstrated that a combination of parts amounting to 17% of the value of a vehicle would be sufficient to classify all imported parts in that vehicle as a complete vehicle.

580. It should also be kept in mind that under Article 22(3) of Decree 125, it is sufficient that 60% of the value of the assembly has been imported in order to deem the assembly imported. And, imported parts as common as bolts, nuts, screws etc. will be included in the calculation of that 60% threshold and classification of imported parts as a complete vehicle[125]. A combination of imported parts representing an even lower percentage than above under paragraph 86 in the value of the vehicle would therefore trigger the classification of imported parts as complete vehicles and the imposition of the 25% charge:

> - 16,2% (using the above percentages) or 17,74% (using the percentages submitted by China) of the value of the vehicle for imports of 60% of the value of the engine and the body (Article 22(2)(a) in combination with Article 22(3) of Decree 125);
> - 9% (using the above percentages) or 11,05% (using the percentages submitted by China) of the value of the vehicle for imports of 60% of the value of the body and 3 other assemblies (Article 22(2)(b) in combination with Article 22(3) of Decree 125);
> - 7,8% (using the above percentages) or 10,76% (using the percentages submitted by China) of the value of the vehicle for imports of 60% of the value of 5 assemblies other than the engine or the body (Article 22(2)(c) in combination with Article 22(3) of Decree 125).
>
> Details of the above calculations are provided as Exhibits EC – 35 and 36.

Response of the United States (WT/DS340)

581. Calculating the estimated value of the groups of parts shown in the EC's exhibits is dependent on a number of assumptions including the model and price of the vehicle and the level of trade (i.e., wholesale, retail, supplier pricing, etc.) at which one captures the pricing of the individual parts. Valuations and ratios will fluctuate from model to model and methodology to methodology. In preparing its response to this question, the United States selected two vehicle models in different price brackets for which information is publicly available – a Cadillac Escalade (US retail base price of $55,000) and a Buick LeSabre (US retail base price of $26,000) – both of which are sold in the Chinese market.[126] The price of the various combinations of parts compared to the price of the complete vehicle is provided in Exhibit US-13. Prices for each part were obtained from www.GMPartsDirect.com. These estimates are not intended to provide the actual cost of these parts in the assembly process, but rather should provide a general estimate of the value of the parts to the overall value of the complete vehicle.

Response of Canada (WT/DS342)

582. Canada is not able to provide estimated values for each of the exhibits listed, as it has been unable to find average pricing for the key parts listed in those exhibits. However, with a view to assisting the Panel, Canada attaches Exhibit CDA-42 (the "Merrill Lynch Report"), which on page 1 reveals information regarding the average pricing for the parts used in various areas of a vehicle, including the number of areas that can be Deemed Imported Assemblies under the measures.[127]

---

[125] Remark 3 in annex 2 of Decree 125: "Connecting parts (such as tube lines, bolts, nuts, screws, clamps and adhesives), sealing parts and fixing parts that make possible the integrity of an Assembly (excluding body and chassis assemblies) or key parts are included as part of the assembly."

[126] For transparency, the vehicles and model years selected were based on the availability of independently-obtained information. Where possible, pricing for individual parts has been presented separately. The Buick LeSabre model is now called the Buick LaCrosse.

[127] Merrill Lynch, *Global Auto Supplier Review: Who Makes the Car*, May 29, 2007 (Exhibit CDA-42).

583. It is possible to use those data directly to calculate the value of exhibits where all the parts for the Assembly in question are present (*i.e.*, where the Assemblies are Deemed Imported under Article 22(1) of Decree 125, in particular Exhibits EC-5, 6 and 7). For the other exhibits, where the Assemblies are Deemed Imported under Article 22(2) of Decree 125 on the basis of the number of key parts, Canada is not able to provide precise information in the absence of pricing for those key parts. However, Article 22(3) (the 60% value threshold) provides a useful substitute. While the values under Article 22(2) may not always be in the same range as the figures cited, Canada suggests that in a number of cases (for example, Exhibit EC-2), the value using Article 22(2) would be *less* than under 22(3) because of the very few key parts necessary for a finding that the Assembly is Deemed Imported (which could not account for 60% of the value of the Assembly). This is also logical, since Article 22(2) would be unnecessary if it only applied where the Assembly was already Deemed Imported under Article 22(3). Applying those data in the chart below, and comparing them to the value of $13,600 for the value of all parts used in a vehicle, reveals that the percentage value of parts in a vehicle required to make the parts Deemed Whole Vehicles under Article 22(3) in the EC examples ranges from 12.6% to 21%, and under Article 22(1) from 21% to 34.7%.

	Body & Structural	Engine Assembly	Transmission Assembly	Axles, Driveshafts, etc. (i.e., Drive and Non-Drive Assemblies)	Braking System	Steering System	THRESHOLD VALUE *	PERCENT OF TOTAL VALUE OF VEHICLE
Value of Assembly	**$2375**	**$2350**	**$1225**	**$810**	**$435**	**$375**		
Threshold for Article 22(3) (60% of above)	**$1425**	**$1410**	**$735**	**$486**	**$261**	**$225**		
EC -1							**$2835**	**20.4%**
EC-2							**$2835**	**20.4%**
EC-5							**$4725**	**34.7%**
EC-6							**$4385**	**32.2%**
EC-7							**$2845**	**21.0%**
EC-8							**$2382**	**17.5%**
EC-9							**$1707**	**12.6%**
EC-10							**$2856**	**21%**
EC-11							**$1707**	**12.6%**

* For Exhibits EC 5, 6 and 7, which describe complete Assemblies, a value of 100% is used, and the box is shaded. For all others, a value of 60% is used, and the box remains unshaded.

249. (*All parties*) What importation documents are generally required by customs authorities? Is there a limit to the extent to which customs authorities can request information from importers?

Response of China

584. According to the *Customs Import and Export Declaration Administration Rules*, when the importer declares the imports to the Customs, it shall provide the import declaration form and the documents required by the import declaration form, including the contract, invoice, packing list, bill of lading, and the legal authorization for the importer's customs agent. Aside from these documents, if the imported product is subject to a license requirement, the importer shall provide the import license.

585. China is not aware of any limit prescribed by international agreement concerning the extent to which customs authorities can request information from importers.

Response of the European Communities (WT/DS339)

586. In the European Communities the importers need to file a SAD (single administrative document) that is a document composed of various pages with various boxes to be filled in concerning information related to the product at issue (description, data concerning the importer, origin, proposed tariff classification, customs value etc.). The importer will of course have to provide commercial documents such as invoices and bills of transport (manifest) mostly in order to check the origin and value of the product for customs purposes. Sometimes the product could also be accompanied by Binding Origin or Tariff Information as well as by a certificate of origin. All the above is to be done when presenting the product at the border.

Response of the United States (WT/DS340)

587. The documents required by Customs authorities vary to some extent in each country. As a general matter, the United States notes the general requirement for the submission of a "Goods declaration," which is defined in Chapter 2 of the General Annex to the Revised Kyoto Convention as "a statement made in the manner prescribed by the Customs, by which the persons concerned indicate the Customs procedure to be applied to the goods and furnish the particulars which the Customs require[s] for its application."

588. Customs authorities can request information from importers to the extent that it is necessary for demonstrating compliance with the Customs laws. Such information may include a number of documents defined in the WCO Glossary of International Customs Terms, including the following: bond, certificate of origin, certified declaration of origin, customs declaration, declaration of origin, and the goods declaration. The United States also notes that some other documents that are commonly provided by importers include the bill of lading, commercial invoice, packing lists, etc.

589. The information that customs authorities can require from importers is also limited by other provisions of the WTO Agreement, including Articles VIII and X of the GATT 1994.

Response of Canada (WT/DS342)

590. At the time of importation the following three documents are required:

- Form B3, Canada Customs Coding Form;[128]
- Form CI1 Canada Customs Invoice;[129] and

[128] Canada Border Services Agency, Canada Customs Coding Form B3-3 (Exhibit CDA-43).

- Commercial invoice.

591. Canadian customs officials can request any other additional information from importers that is required in order to properly classify and value products (with the consequent assessment of duty, if any).[130] However, such additional requests would generally only take place in compliance verification following importation, and would relate only to information required to answer specific questions (*e.g.*, customs officials might request a diagram of a part to substantiate that it is properly classified as a bumper).

Comments by the European Communities on China's response to question 249

592. Further to its reply to question 249, the European Communities considers that such documentation must be proportionate and required for the purposes of genuine customs administration.

250. Canada stated during the second substantive meeting that China does not have the right to withhold a decision on the classification and assessment of imported goods, but it has the right to classify parts that have the essential character of a finished vehicle:

(a) (*Canada*) Please clarify whether it is your view that the assessment of an imported product for tariff classification can take place only at the border.

Response of Canada (WT/DS342)

593. Canada confirms that its position is that tariff classification must be made based upon the state of the product as it arrives at the border. As Canada has explained, for example in response to Questions 32 and 87, procedures may be necessary after that point in order to determine proper classification, such as testing or administrative review procedures, and payment may take place after that point. A Member is not permitted to look to a collection of imports as they are assembled in manufacturing in order to assess duty rates.

(b) (European Communities, United State and China) Please comment on Canada's view.

Response of China

594. China believes that the Panel is referring to the following statement in paragraph 18 of Canada's oral statement: "Let us be very clear: there are parts, and there are parts that have the essential character of a finished vehicle. China is entitled to classify the latter, as they are presented at the border, as a finished vehicle. However, it is *not* China's right to withhold a decision on essential character until it sees fit."

595. As China stated at the second substantive meeting, China considers that this statement by Canada is effectively a concession of its claims under Paragraph 93 of the Working Party Report. Canada has clearly stated that China is entitled to apply GIR 2(a) to classify as a motor vehicle any collection of parts and components that has the essential character of a motor vehicle, provided that they are "presented" to the Chinese customs authorities within Canada's understanding of that term (whatever that might be). Whatever else this might include, it would certainly include a CKD/SKD

[129] Canada Border Services Agency, Canada Customs Invoice Form CI1 (Exhibit CDA-44).

[130] The statutory authority for customs officials to obtain this information is found in Section 13 of the Customs Act for actions at the border, and Section 42(2) for post-importation compliance verifications.

kit that arrives as a single entry. Thus, Canada has conceded that China is entitled to classify CKD/SKD kits as motor vehicles in accordance with the essential character test under GIR 2(a). The necessary consequence of this concession by Canada is that China is allowed to apply the 25 per cent duty for motor vehicles to CKD/SKD kits.

596. More generally, China does not "withhold a decision on essential character until it sees fit." Under Decree 125, the determination of whether a vehicle model is comprised of parts and components that have the essential character of a motor vehicle is made prior to the entry of parts and components for that vehicle model. It is this determination that gives rise to the importer's obligation to declare these parts and components accurately when they enter the customs territory of China. Canada's assertion merely restates the central question of whether this method of customs classification is based on a proper understanding of the term "as presented."

Response of the European Communities (WT/DS339)

597. The European Communities agrees with Canada that the assessment of an imported product for tariff classification can take place only at the border. As referred to in many occasions, the Appellate Body has considered that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border" (*EC – Chicken Cuts*, paragraph 246). In certain exceptional instances, Members may classify as a complete vehicle a combination of parts when presented at the border at the same time and having the essential character of a complete vehicle. In this respect reference is made to the replies of the European Communities *inter alia* to questions 211 and 231.

Response of the United States (WT/DS340)

598. The United States agrees with Canada's views. The United States notes, however, that "parts" are very unlikely to have the essential character of a finished vehicle. Rather, and the United States believes that this was what Canada stated, the point is that a collection of parts (commonly referred to as a CKD) presented at the border could have the essential character of an unassembled or disassembled vehicle, if that collection of parts met all the requirements of GIR 2(a).

Comments by the United States on China's response to question 250(b)

599. The United States notes that China's response to this question does not contradict its statement at the Second Substantive Meeting confirming the accuracy of the United States' description (in paragraphs 3-5 and 65 of the attachment to the US Rebuttal Submission) of China's pre-WTO accession tariff practices. China's response merely identifies one instance in which an auto manufacturer paid the motor vehicle rate when importing a CKD kit rather than a lower rate associated with imported parts. As the United States has explained previously (see paragraph 65 of the attachment to the US Rebuttal Submission), Chinese authorities would have insisted on applying the higher motor vehicle tariff rate if they had viewed a particular auto manufacturer as insufficiently committed to investment in China to justify the lower rate, although normally the negotiations between the Chinese authorities and an auto manufacturer resulted in the application of a lower rate associated with imported parts.

251. (*United States*) As stated in paragraph 10 of its second oral statement, the United States has maintained a view that "China's charges (whether internal charges or customs duties) are straightforward violations of Articles III:4 and III:5 of the GATT 1994, as well as the TRIMs Agreement." In this context, is the United States referring to China's measures as a whole (i.e.

charges and administrative requirements) when it uses the term "China's charges" in its statement above?

Response of the United States (WT/DS340)

600. Yes, in this context, the United States is referring to the measures as a whole. The specific example given in the oral statement focused on the manner in which the domestic-content conditionality of the charges (whether or not those charges are internal charges or ordinary customs duties) affected the internal use, purchase, and sale of imported parts. However, the same logic applies to the administrative burdens imposed by the measures. That is, the administrative burdens associated with applying the domestic-content tests in China's measures serve as a disincentive for manufacturers and parts producers to use, purchase, and sell imported auto parts.

If not, is it the United States' position that even if the Panel were to find the charges to be "customs duties" applied in a manner consistent with Article II, such "customs duties" should still be subject to the disciplines of Articles III:4 and III:5 of the GATT 1994 and the TRIMs Agreement?

Response of the United States (WT/DS340)

601. As noted, the answer to the first part of this question is "yes," so it appears that the second part of this question is not applicable. However, the United States again notes that the consistency of a measure with a Member's tariff bindings is not determinative of whether or not the measure is consistent with other WTO obligations.

252. (*United States*) Could the United States please elaborate on its argument in paragraph 28 of its second oral statement that "[t]he only pertinence of the HS Convention is to assist in interpreting China's Schedule of tariff commitments." In the United States' view, what elements of the HS Convention can be properly considered by the Panel to interpret China's Schedule of tariff commitments for auto parts?

Response of the United States (WT/DS340)

602. As the question indicates, the United States considers that the HS Convention can be used as a supplementary means of interpretation for Member's schedules that make use of the HS nomenclature. The United States is not aware of any limitations on the specific elements of the HS Convention (such as the Preamble, the nomenclature, general interpretative notes, and chapter notes) that might be used for such purposes.

253. (*United States*) Could the United States please provide any evidence that can support its view that "[i]t is normal business practice for a manufacturer to start operations with the assembly of kits, and then to move to full assembly operations using separate shipments of parts and assemblies." (paragraph 33 of the United States' second oral statement)

Response of the United States (WT/DS340)

603. The United States refers the Panel to historical analyses which have described a typical progression of the foreign expansion of auto makers beginning with the importation of assembled autos, then a movement to the importation of CKDs, before progressing to more full assembly

operations.[131] Most international joint ventures in China also began production with CKD assembly operations.[132]

E. CKD AND SKD KITS

254. (*All Parties*) Please provide the Panel with any documentary evidence to support your positions with respect to the way China's customs authorities treated CKD/SKD kit imports prior to its accession to the WTO as well as after its accession but prior to the implementation of the measures.

For example, the United States has maintained its position that up to the implementation of the measures, China did not apply the tariff rates for motor vehicles to CKD and SKD kits, but rather applied the tariff rates that were negotiated between an individual auto manufacturer in China and the Chinese authorities, based on the amount of the auto manufacturer's investment in China and the extent to which the auto manufacturer used local content in the assembly of its vehicles. On the other hand, China has argued that it has always treated CKD and SKD imports as complete vehicles.

Response of China

604. China has classified CKD/SKD kits as motor vehicles and assessed CKD/SKD kits at the applicable duty rates for motor vehicles both prior and subsequent to its accession to the WTO. This is evidenced by the documentation of two specific CKD import entries:

605. In 2001, before China acceded to the WTO, Dongfeng Peugeot Citroen imported a CKD kit and declared it as a CKD kit. Afterwards, the importer paid the 70% import tariff, which at the time was China's duty rate for the corresponding motor vehicle.[133]

606. In 2004, after China had joined the WTO, Shanghai GM imported and declared a CKD kit. Afterwards, the importer paid the 34.2% import tariff, which at the time was China's duty rate for the corresponding motor vehicle.[134]

Response of the European Communities (WT/DS339)

607. The European Communities does not possess any further specific documentary evidence on this issue beyond that submitted with its first written submission (see paragraph 25 thereof) and the evidence submitted by Canada under paragraphs 67 and 68 of its second written submission.

Response of the United States (WT/DS340)

608. In the attachment to its Rebuttal Submission (at paragraphs 3-5), the United States described China's tariff practices in the years leading up to its WTO accession, which took place on 11 December 2001. The United States further explained (at paragraph 5 of the attachment to its Rebuttal

[131] Ford in the Netherlands, 1903-2003, Global Strategies and National Interests, Ford: The European History 1903-2003, Ferry de Goey, pages 233-234 (Exhibit US-15).
[132] The Past, Present and Future of China's Automotive Industry: A Value Chain Perspective, Matthias Holweg, Jianxi Luo, and Nick Oliver (The Cambridge-MIT Institute, August 2005), page 37. (Exhibit US-16).
[133] CHI-47.
[134] CHI-48.

Submission) that these tariff practices continued after China acceded to the WTO "until China began to implement the measures at issue in this dispute."

609. At the Second Substantive Meeting, when asked if it disputed these factual assertions, China confirmed that the United States' description of China's tariff practices is factually accurate for the years leading up to China's accession to the WTO. China only disputed the United States' description of China's post-WTO accession tariff practices. China contended that, since its accession to the WTO, it has consistently applied the tariff rate for motor vehicles to CKD and SKD kits. For further documentary evidence of China's tariff practices for the years leading up to China's accession to the WTO, the United States would point the Panel to JE-25 (at page 189).

610. With regard to China's tariff practices during the period from China's accession to the WTO until the measures at issue went into effect, the United States has been unable to obtain additional documentary evidence at this point. Nevertheless, for the purposes of this dispute, the more relevant time period covers the years leading up to China's accession to the WTO, not the post-WTO accession period. In particular, it is China's tariff practices in the pre-WTO accession period that are relevant to the interpretation of China's commitment in paragraph 93 of the Working Party Report accompanying China's WTO accession protocol. As the United States explained in the attachment to its Rebuttal Submission (in paragraphs 8 and 9):

> China's tariff practices relating to CKDs and SKDs (and parts) during the period from 1992 until China's accession to the WTO at the end of 2001 help to explain why paragraph 93 of the Working Party Report accompanying China's Protocol of Accession reads the way it does. As the panel will recall, paragraph 93 provides:
>
> > 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.
>
> When negotiating this provision in the years leading up to China's WTO accession, WTO Members, including the United States, knew that China had separate tariff lines for CKDs and SKDs that scheduled tariff rates that were the same as those for motor vehicles from 1992 to 1995, and that China eliminated these tariff lines effective January 1, 1996. WTO Members also knew that the Chinese authorities had nevertheless been applying substantially lower tariff rates for CKDs and SKDs (and parts) than for motor vehicles, both when China had separate tariff lines for CKDs and SKDs and when it did not. In negotiating paragraph 93, therefore, WTO Members wanted to ensure that China would continue to treat CKDs and SKDs essentially as parts for tariff purposes after acceding to the WTO and that China would be unable to re-establish separate tariff lines for CKDs and SKDs, at higher rates, if its policy focus changed as its domestic auto industry evolved.

Response of Canada (WT/DS342)

611. Canada notes that during the second hearing China conceded that CKDs and SKDs that China allowed specific importers to import prior to accession were not charged at the whole-vehicle rate, but rather were charged lower duties. Canada has set out in paragraphs 67 and 68 of its second written submission its evidence regarding China's treatment of CKDs and SKDs prior to accession, with extensive references. In light of China's admission during the second hearing, it appears that China now concedes that the process prior to accession was as described, for example, in Exhibit CDA-28 at page 5, i.e, that CKDs and SKDs were treated as parts and, in accordance with China's pre-accession

policy, charged tariff rates based upon the domestic content of the vehicle in which the parts were incorporated.

Comments by the European Communities on China's response to question 254

612. The European Communities refers to its reply to question 254 and to Canada's observations on the replies of China after the second meeting of the Panel.

Comments by Canada on China's response to question 254

613. In response to this question, China has, for the first time, provided evidence of its classification and duty assessment of CKDs. That evidence is extremely helpful as it establishes that China in fact created separate tariff lines for CKDs and SKDs following its accession to the WTO. Paragraph 93 of the Working Party Report therefore requires China to apply a 10% duty rate for those tariff lines.

614. China's own evidence from December 2004 (Exhibit CHI-48) shows that the shipment in question was classified under a separate tariff line (8703.23.34.90) – "CKD for Buick 2800cc cars". As Canada noted in paragraph 67 of its second written submission, introducing tariff lines at the "national level" (i.e., beyond the six-digit level) is precisely how WTO Members create separate tariff lines for unassembled vehicles. China's classification is virtually the same as examples provided by Canada, such as Indonesia (at Exhibit CDA-24). The only difference appears to be that Indonesia's national tariff generally uses ".11" or ".21" as the last two digits, while China uses ".90".

615. To confirm that China's introduction of tariff lines for CKDs was not limited to 2800cc cars, Canada has obtained a copy of China's Customs Tariff for 2005, which shows that 10-digit tariff lines ending in ".90" are generally for CKDs and SKDs (or "complete sets of assemblies", as they are described in the tariff).[135]

616. China agreed in response to Question 257 that it committed to provide a tariff rate of 10% for any separate tariff lines for CKDs and SKDs. China notes in response to Question 258, "tariff treatment – *i.e.*, the applicable duty rate – is always linked to tariff classification". As Exhibit CHI-48 demonstrates, and Exhibit CDA-48 confirms, China has established separate tariff lines, with specific duty rates, for CKDs and SKDs. What China has not done, as China itself admits it is required to do, is to apply a 10% rate of duty for those separate tariff lines.

617. China's other example, Exhibit CHI-47, from January 2001, illustrates the application of duties to a particular CKD shipment prior to China's accession to the WTO. The complainants, starting with their first written submissions, demonstrated that the duty rate that China applied to CKDs prior to its WTO accession varied depending both on the domestic content of the vehicles manufactured using the CKD and negotiations by individual vehicle manufacturers. China conceded in the second hearing that vehicle manufacturers that were allowed to import CKDs during that period were charged a duty rate generally lower than the whole vehicle rate. China has not rebutted the evidence of the complainants on this point, either generally or specifically (e.g., by showing that CKDs imported into China in 1999 from Canada, referred to in paragraph 68 of Canada's second written submission, were charged duty at the whole vehicle rate). It is consistent with the evidence of the complainants that the particular CKD shipment in 2001 documented in Exhibit CHI-47 was charged a rate of duty at or near the whole vehicle rate.

[135] Customs Import and Export Tariff of the People's Republic of China, 2005, Economic Science Publishing House (Exhibit CDA-48).

Comments by China on Complainants' responses to question 254

618. The United States erroneously claims that, at the Second Substantive Meeting, "China confirmed that the United States' description of China's tariff practices is factually accurate for the years leading up to China's accession to the WTO."[136] China explained in response to a question from the Panel that, prior to its accession to the WTO, China maintained policies that allowed a limited number of auto manufacturers to obtain temporary reductions in the duty rates for *motor vehicles* that would ordinarily apply to the importation of CKD/SKD kits. These reduced rates for a limited number of auto manufacturers were not the rates for parts, and were not based on a classification of CKD/SKD kits as parts. After the expiration of these reductions in the applicable duty rate, these manufacturers would revert to paying the applicable *motor vehicle* rate for CKD/SKD imports, in accordance with the ordinary classification of CKD/SKD kits. China documented its ordinary pre-accession classification and tariff treatment of CKD/SKD kits in response to question 254 from the Panel.

619. The complainants have presented no evidence that China classified CKD/SKD kits as *parts* prior to its accession to the WTO, or treated them as *parts* for tariff purposes. The fundamental premise of their claim – that paragraph 93 committed China to apply the tariff rate for auto parts to CKD/SKD kits – is therefore entirely without foundation.[137] The United States continues to refer to JE-25 as "evidence" for this alleged pre-accession practice of treating CKD/SKD kits as "parts" (or "*essentially* as parts"), even though China has demonstrated that JE-25 uses the term "CKD" and "SKD" to refer generically to the use of imported parts to assemble motor vehicles – a point that Canada has explicitly conceded.[138] Canada now refers to CDA-28 at page 5, and yet it is evident that this document, whatever its authority, is using the term "CKD" in the same generic sense – as evidenced, once again, by the fact that the tariff rates to which this document refers are the tariff rates for *parts* under China's pre-WTO local content policies.[139] There is simply no evidence for the claim that China *ever* classified CKD/SKD kits as "parts" and assessed these entries at the applicable duty rates for parts.

620. For the reasons that China explained in paragraphs 138 to 155 of its second written submission, the complainants' effort to establish a pre-accession practice of classifying CKD/SKD kits as parts and assessing these entries at the tariff rates for parts is fundamentally irrelevant – in no event is it possible to interpret paragraph 93 as committing China to continue something that it was *already* doing, and in no event is it possible to read the express conditionality of the commitment out of paragraph 93. Irrelevant as it is, the complainants have not, in fact, presented any evidence of this alleged practice.

255. (*All parties*) For auto manufacturers, what are the benefits of importing CKD and/or SKD kits, as opposed to importing individual auto parts?

---

[136] US answers after second meeting at para. 122.

[137] In fact, the United States does not even claim that paragraph 93 required China to treat CKD/SKD kits as parts for tariff purposes; the most it can muster is its vague assertion that paragraph 93 represented a commitment by China to treat CKD/SKD kits "*essentially* as parts for tariff purposes …" US answer after second meeting at para. 123 (emphasis added).

[138] See China second written submission at para. 146.

[139] See CDA-28 at page 5. The tariff rates for "CKD parts" discussed in this document are the same as those described in JE-25, *i.e.*, the tariff rates for *parts* under China's pre-accession local content policies, not the applicable tariff rates for CKD/SKD kits.

Response of China

621. China does not consider that it is possible to generalize about the reasons why an auto manufacturer would import CKD/SKD kits, as compared to importing auto parts and components in multiple shipments. There are many factors that an auto manufacturer might take into account in deciding between these two methods of importation, including quality control considerations, inventory management, the balance between shipping and assembly costs at different locations, and the intended volume of production.

Response of the European Communities (WT/DS339)

622. The advantages are limited to very specific circumstances. It costs much more to ship CKD and SKD kits than to ship parts in bulks or complete vehicles because shipping in kits requires special costly boxes/containers and time and people to prepare the kits. This requires considerably more handling of the goods (with associated costs) than shipping parts in bulk or shipping a complete vehicle that can move by itself. The reason why CKD/SKD kits are shipped is that sometimes there is no manufacturing capacity in the country of destination. Essentially the necessary investment is yet to be made for building up cars from bulk shipments of parts.

623. To move to exports of parts in bulk, it is necessary to have in the place of destination the assembly and manufacturing plants together with a sufficiently developed informatics system and people able to manage thousands of parts to be used in different models. If that capacity does not exist, the management of the parts is carried out in another country where that capacity exists before shipping CKD/SKD kits to the country of destination. However, this is always a temporary solution pending the development of the needed capacity and a first step in the process of developing the local automobile industry.

Response of the United States (WT/DS340)

624. Rather than importing CKD or SKD kits, where auto manufacturers have no operations or only limited operations, they generally prefer to import completely-built-up vehicles (CBUs). As explained in our response to Panel question No. 253, manufacturers may decide to enter a market using imported CKD/SKD kits as part of a longer-term plan to establish production operations in a country. In addition, when auto manufacturers encounter government-imposed policies restricting the importation of CBUs (as was the case in China up through the mid-1990s) they may consider importing CKDs or SKDs.

Response of Canada (WT/DS342)

625. CKDs and SKDs are principally used by auto manufacturers either to start up their production or for vehicles that are sold in low volumes within a particular country. As noted by Liu (Exhibit CDA-31) at page 5, it is faster for vehicle manufacturers (both domestic and foreign) to get vehicles to market by at first importing in CKD or SKD form existing models. CKDs provide vehicle manufacturers with the commercial opportunity to introduce new models into a market quickly, either to test the market or to supplement existing products to meet market demand. A vehicle manufacturer does not need a full, dedicated assembly line to assemble CKDs into a complete vehicle. As a result, it does not have to pay the expensive fixed cost of setting up a full assembly line without knowing if the demand in the market would warrant such an investment.

626. It also allows vehicle manufacturers adequate time to develop local suppliers, if they need to do so. If the vehicle is in production in one market, the manufacturer has supply chains to provide all

the parts and systems necessary for vehicle production, which helps to ensure quality control at the outset of production. As the manufacturers develop commercial relationships with local suppliers, CKD exports tend to decrease, and eventually cease.

627. Finally, in some cases, vehicle manufacturers may obtain certain tax advantages in the form of differential tariffs or domestic tax preferences linked to providing local employment opportunities. These advantages will again diminish over time where the parts rate and overall cost structure of domestic production justify, as in the case of China, changing from a business model where complete vehicles or CKD/SKD kits are imported to one where production of both parts and complete vehicles is largely domestic.

Comments by the European Communities on China's response to question 255

628. China's reply incorrectly paraphrases the Panel's question. The issue is not about CKD and SKD kits vs. multiple shipments of parts. However, China's reply demonstrates that it actually recognises that CKD and SKD kits are clearly different from the importation of individual auto parts. Even China now admits that there are genuine operational reasons to import individual auto parts. This again demonstrates that China has invented its 'anti-circumvention theory'.

256. (*Canada*) Could Canada please provide evidence supporting its statement in its response to Panel question No. 61(b) that "most Members who have separate tariff lines for CKDs charge lower rate than for fully assembled vehicles." Please indicate the names of such Members.

Response of Canada (WT/DS342)

629. Canada directs the Panel to tariff lines for countries listed in footnote 80 to Canada's second written submission, specifically Malaysia (Exhibit CDA-23), Indonesia (Exhibit CDA-24), Vietnam (Exhibit CDA-26) and the East African Community (Kenya, Uganda, Tanzania) Common External Tariff, Chapter 87 (Exhibit CDA-27). The other two countries referred to in that footnote (Australia and the Philippines) have separate lines that would affect trade statistics, but the tariff rate treatment for unassembled vehicles is largely the same as that for assembled vehicles.

257. (*China*) In relation to China's commitment under paragraph 93 of China's Working Party Report, the United States submits in response to Panel question No. 61(b) that "conversely, it would not be reasonable to read the sentence as allowing China to provide any tariff treatment it wished, so long as China creates no new tariff heading for CKDs and SKDs. Such a reading would amount to no commitment at all..."

Could China comment on this view. In other words, if China was treating CKDs and SKDs as complete vehicles at the time of negotiations as China argues and the commitment under paragraph 93 were conditioned upon creation of a new tariff line, would not the commitment indeed be meaningless since all China has to do is continue to treat CKD and SKD kit imports as complete vehicles?

Response of China

630. No. As China has explained, paragraph 93 foresaw the possibility that China might choose to follow the path of several other developing countries in Asia by establishing lower tariff rates for CKD/SKD kits, in derogation of GIR 2(a). If China were to follow that path by establishing separate

tariff lines for CKD/SKD kits, or if it were to establish separate tariff lines for CKD/SKD kits for any other reason, China committed to establish a tariff rate of 10 per cent for these imports.

631. This is not a meaningless commitment – it binds China to adopt a specific tariff rate, if the condition set forth in paragraph 93 is met. The fact that this condition is under China's control does not make it a meaningless commitment. There are other instances in various WTO agreements in which a condition precedent is under the control of the Member against whom the obligation would be sought, if the condition were satisfied.[140] These are not meaningless commitments. Nor can these provisions be interpreted to *require* the Member to cause the condition to be satisfied, as the United States implicitly suggests.

632. Stated differently, it is not the case that the commitment in paragraph 93 is "meaningless since all China has to do is continue to treat CKD and SKD kit imports as complete vehicles," as this question proposes. There are reasons why China might choose to classify CKD/SKD kits as something other than complete vehicles, and to establish separate tariff lines for this purpose – for example, to encourage the growth of domestic assembly operations as an alternative to the importation of CBU vehicles. In that event, China would assess CKD/CKD kits at a duty rate of 10 per cent.

Comments by the European Communities on China's response to question 257

633. China's reply demonstrates that its interpretation of paragraph 93 of the Working Party Report must be erroneous. It is hardly credible to assert that the Members intended to leave it to China to "control" the commitment. Such a reading deprives the commitment of any value.

Comments by the United States on China's response to question 257

634. China asserts that paragraph 93 of China's Working Party Report foresaw the possibility that China might at some time after its WTO accession choose to follow the path of some other Asian countries and establish lower tariff rates for CKDs, i.e., lower than the motor vehicle rate. China, like every other WTO Member, has the right to apply a tariff rate below its bound rate; it doesn't need an accession commitment to allow it to do so. If that were the "commitment" that China made in paragraph, it would truly be a meaningless one.

258. (*China*) In response to Panel question No. 61(b), the United States submits that the use of the term "tariff treatment" in paragraph 93 of the Working Party Report highlights that the working party's concern was the rate of duty applied by China, and that the concern was not the classification of CKDs or SKDs. Does the term "tariff treatment" in paragraph 93 of the Working Party Report refer to the *tariff duty* applied by China, but not the *classification* of CKDs or SKDs? If not, is it China's view that tariff treatment is always linked to tariff classification? Please explain the legal basis for your answer.

[140] See, e.g., *Agreement on Government Procurement*, Article XII:1 ("If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO."); *General Agreement on Trade in Services*, Article XVI, fn. 8 (requiring Member to allow certain movements of capital, but only if it makes specified market access commitments); *General Agreement on Trade in Services*, Annex on Financial Services, Article 1(c) (committing Member to make certain financial services commitments if its allows these services to be provided in competition with public entities).

Response of China

635. It is axiomatic that the classification of a good precedes the determination of the duty rate that applies. Within a Schedule of Concessions, it is impossible to determine the correct rate of duty without first determining the classification of the good. A Schedule of Concessions is a matrix of articles, specified in rows, and corresponding duty rates, specified in columns. One cannot determine the correct duty rate without first establishing the correct tariff line. In this fundamental respect, tariff treatment – i.e., the applicable duty rate – is always linked to tariff classification.

636. Aside from overlooking this basic feature of how duties are assessed, the US attempt to sever the "tariff treatment" of CKD/SKD kits from the correct *classification* of CKD/SKD kits ignores the plain language of the commitment set forth in paragraph 93. Paragraph 93 makes no reference whatsoever to the "tariff treatment" of CKD/SKD kits in the abstract, without regard to their classification. On the contrary, the commitment that China made is conditioned on the creation of *tariff lines*. For the reasons just explained, the determination of whether a particular tariff line is applicable requires an act of classification. If the intention underlying paragraph 93 had been that China would apply a 10 per cent rate of duty to CKD/SKD kits *without regard to their correct classification in relation to a particular tariff line*, the commitment would not have been expressed in terms of the creation of new tariff lines. Instead, the paragraph would have stated, quite simply, that China would unconditionally apply a duty rate of 10 per cent to CKD/SKD kits, in all events. That is not what paragraph 93 says.

637. The US effort to sever the duty rate from the correct classification is just one more attempt by the complainants to rewrite the commitment that the parties actually negotiated, and that is set forth in paragraph 93. That commitment plainly and unambiguously requires the creation of new tariff lines as a condition precedent.

Comments by the European Communities on China's response to question 258

638. The classification of the good is assumed in paragraph 93 of the Working Party Report. The commitment is made in respect of the tariff treatment. As the US has stated under its reply to question 259 (c), Members were concerned that China would adopt a new tariff line which resulted in a change from the parts rates of duty to higher, whole vehicle rates.

Comments by the United States on China's response to question 258

639. *In applying its tariff schedule*, a Member will make a classification decision. At the same time, *in its agreements with other Members*, it need not commit to a particular classification. Rather, the Member can commit to a particular rate of duty that would apply irrespective of how that Member classifies a particular item. An example of this can be found in Attachment B of the *Ministerial Declaration on Trade in Information Technology Products* (ITA). See also the Certification of Modifications to Schedule XX - United States (WT/Let/182).

259. China states in its response to Panel question No. 137 that China does not consider that a Member can create a new tariff line "de facto" and that the process of creating a new tariff line involves amending the Member's tariff schedule to include the new tariff line.

(a) (*China*) What is the exact process of creating a new tariff line? How can a Member amend its tariff schedule to include a new tariff line?

Response of China

640. As China explained at the second substantive meeting of the Panel, the Ministry of Finance issues a revised tariff schedule each year (which, of course, reflects China's Schedule of Concessions). If China were to introduce a new tariff line, it would include the new tariff line in the next tariff schedule issued by the Ministry of Finance.

(b) (All parties) Assuming that a new tariff line can be de facto created, in such case, what factors should be taken into account to determine whether such a tariff line was created? For example, would it be relevant to examine how China, in fact, has been treating CKD and SKD kit imports regardless of what its Schedule indicates?

Response of China

641. As China explained in response to question 137, China does not consider that a new tariff line can be created "de facto." A tariff line is a specific thing – a line in a Member's tariff schedule, with corresponding duty rates. It either exists or does not exist. When Members negotiate commitments that are conditioned on the creation of a new tariff line, they must understand that the tariff line must come into existence in order for the commitment to arise. By contrast, if it is their common understanding that the Member assuming the obligation will fulfil that obligation *without regard to the contents of the Member's tariff schedule*, they will negotiate the commitment to reflect this understanding.

Response of the European Communities (WT/DS339)

642. A situation where a member adopts a measure that provides for a tariff treatment of that good without incorporating formally a new line concerning that good into its Schedule could be described as the creation of a new *de facto* tariff line. This is precisely what China has done under Article 2(2) and 21(1) of Decree 125. China applies the 25 % complete vehicle duty rate on such CKD and SKD kits instead of its commitment to apply a 10 % rate.

Response of the United States (WT/DS340)

643. The United States understands the discussion of a "de facto" tariff line to relate to the evaluation of the consistency of China's measures with the obligations set out in Paragraph 93 of the Working Party Report. More specifically, this issue arises because China argues that it is free from any obligation under Paragraph 93 to provide a 10 per cent tariff treatment on CKDs/SKDs because of the introductory clause of the last sentence of paragraph 93. That sentence states "If China created such tariff lines [for CKDs/SKDs], the tariff rates would be no more than 10 per cent." In other words, the concept of "de facto" tariff line is helpful to evaluate China's argument that it is free of any obligation with respect to the tariff rates on CKDs/SKDs because, according to China, it has not created a tariff line for CKDs/SKDs.

644. It is relevant to understanding the meaning of Paragraph 93 to examine how China was treating SKDs/CKDs at the time of accession. As the United States has explained, and as China agreed at the second substantive meeting, prior to accession China did <u>not</u> treat CKDs and SKDs the same as complete vehicles. Instead, they entered not at high whole-vehicle rates, but at rates of duty at or below the duty rates for parts, negotiated on a case-by-case basis that depended on the manufacturer's current use and planned future use of domestic content. In context, the phrase "if China created such tariff lines" in Paragraph 93 means that if China stops using parts rates of duty for CKDs/SKDs and instead begins entering CKDs/SKDs as single units under a specific tariff line, the

rate of duty must be no more than 10 per cent. Although the measures do not create a *de jure* new tariff line, they achieve the same effect as a new tariff line by deeming that all CKDs/SKDs must be entered as whole vehicles at a whole vehicle rate of duty. In other words, contrary to China's argument, China's measure achieve exactly what Members were concerned about (namely, a new, higher tariff treatment for CKDs/SKDs instead of the prior *ad hoc* rates that were at or below parts rates), and as such, when read in context, Paragraph 93 requires China to impose a rate of duty on CKDs/SKDs that is no greater than 10 per cent.

Response of Canada (WT/DS342)

645. Canada does not believe that there is a legal concept of creating a new tariff line "*de facto*". The issue is rather what paragraph 93 of the Working Party Report requires, and how China has violated its commitment to maintain the pre-accession and pre-measures preferential treatment for CKDs and SKDs. See Canada's response to Question 286 and Canada's second written submission at paragraph 63. As Canada has argued (for example, in Section II.E of its second written submission, and in its response to Question 61), paragraph 93 *either* requires China to classify CKDs or SKDs as parts in their appropriate individual headings, *or* to classify them as whole vehicles at the six-digit level, but to further classify them at a more detailed level (e.g., at the eight-digit level) as CKDs and SKDs, or "unassembled" and charge them duty no greater than 10%. As set out in paragraphs 68 and 69 of Canada's second written submission, this is consistent with China's preferential treatment of CKDs and SKDs prior to accession. Thus, the enactment of the measures violates the treatment China was obligated to continue to provide for CKDs and SKDs, as, under Article 21(1), it now treats CKDs and SKDs as subject to the whole-vehicle rate of 25%.

Comments by China on Complainants' responses to question 259(b)

646. Canada now concedes that it "does not believe that there is a legal concept of creating a new tariff line '*de facto*'."[141] Instead, Canada asserts that "the issue is rather what paragraph 93 of the Working Party Report requires, and how China has violated its commitment to maintain the pre-accession and pre-Measures preferential treatment for [CKD/SKD kits]."[142] Thus, notwithstanding the fact that the commitment that China made in paragraph 93 is *expressly* conditioned on a specific event – the creation of new tariff lines for CKD/SKD kits – Canada entirely forsakes the relevance of this condition, either *de jure* or *de facto*. Instead, it purports to find in paragraph 93 a "commitment to maintain" certain pre-accession practices, even though (a) the paragraph makes no reference to these alleged practices; (b) the paragraph makes no reference to maintaining *anything*; and (c) Canada has provided no evidence of what these alleged practices were. This is, as China has explained, a wholesale re-writing of the commitment that China actually made in paragraph 93.

(c) (*All parties*) Does "tariff line" in the context of paragraph 93 of China's Working Party Report refer to tariff treatment or tariff classification or both?

Response of China

647. Please see the response to question 258 above.

[141] Canada answers after second meeting at p. 39.
[142] Canada answers after second meeting at p. 39.

Response of the European Communities (WT/DS339)

648. The classification of the good is assumed in paragraph 93. The commitment is made in respect of the tariff treatment of the specific goods identified i.e. CKD and SKD kits.

Response of the United States (WT/DS340)

649. In context, the phrase "tariff line" in paragraph 93 refers to both tariff classification and tariff treatment. As the United States has explained, Paragraph 93 as a whole is clear in explaining that Members were concerned with tariff treatment of CKDs/SKDs. Thus, in context, the phrase "tariff line" indicates that Members were concerned that China would adopt a new tariff line which resulted in a change from the parts rates of duty to higher, whole vehicle rates.

Response of Canada (WT/DS342)

650. Paragraph 93 is dealing with tariff treatment. When a CKD or SKD is presented at the border, whether it is classified as parts or as a whole vehicle, China is obligated to charge a tariff rate no greater than 10%. As set out above in answer to paragraph (b), if China were to change its previous practice from classifying CKDs and SKDs as parts, it must introduce a tariff line in its customs tariff at a level greater than six digits for CKDs and SKDs, with a 10% rate of duty.

(d) (*All parties*) Is tariff treatment always linked to tariff classification? If not, could you please provide the Panel with examples of a Member's tariff treatment commitment that is made without any link to tariff classification.

Response of China

651. Please see the response to question 258 above.

Response of the European Communities (WT/DS339)

652. Tariff treatment is normally linked to the identification of the product at issue and relates to the applicable duty rate as identified in the Schedule of concessions of WTO members. In order to "categorize" or "classify" products within the schedule of concessions and then to look at the applicable tariff treatment, one has to apply HS tariff classification rules as context due to the fact that tariff concessions have been negotiated on the basis of the HS nomenclature.

Response of the United States (WT/DS340)

653. Tariff commitments are generally expressed in terms of tariff nomenclature (under the HS or other systems), but not always. For example, Article I of the GATT 1994 requires MFN treatment for like products, without any specific reference to tariff classification. Another example is the Ministerial Declaration on Trade in Information Technology Products. Attachment B of that agreement lists products subject to the tariff commitments in the agreement, regardless of how such products are classified. A third example is Paragraph 93 itself, which provides a tariff-treatment commitment for CKDs/SKDs, even though such articles were not at the time of accession listed in China's tariff schedule, nor are CKDs/SKDs provided for in the headings of the HS nomenclature.

Response of Canada (WT/DS342)

654. Tariff treatment commitments under a Member's Schedule are always linked to tariff classification. As Canada explained in footnote 79 of its second written submission, there may be further classification at the national level beyond the six-digit classification under the Harmonized System. Members may also have programs for waiver of customs duties that are not based upon tariff classification. But those programs in effect waive a liability that has already crystallized based upon the state of the imported product as it arrived at the border.

260. (*All parties*) In respect of a CKD or SKD kit, do the parties agree that the parts and components of such a kit could originate in different countries?

Response of China

655. Certainly. A CKD or SKD kit assembled in Germany, for example, is almost certain to include parts and components that originated in countries other than Germany. There is no difference, in this respect, between a CKD/SKD kit and a fully-assembled motor vehicle, which is also very likely to include parts and components that originated in more than one country.

Response of the European Communities (WT/DS339)

656. Yes, the parts and components of such a kit may and normally do originate in different countries. However, the kit itself arrives in a single shipment from one country.

Response of the United States (WT/DS340)

657. Yes, it is possible that the parts and components included in a particular CKD or SKD kit could originate in different countries, but such parts would be presented together and would be imported by a single importer.

Response of Canada (WT/DS342)

658. Canada agrees that in those rare cases where a true CKD or SKD is shipped from one country to another it may have parts of different origin. For example, the CKDs shipped from Canada to China in 1999 that were referred to in paragraph 69 of Canada's second written submission would certainly have contained parts of US as well as Canadian origin, given the integration of production of the auto industry in those two countries, and likely would also have had some parts of other origin (*e.g.*, Mexico, Japan, Korea, the EC, China, which supply parts to the automotive industry in Canada). However, the CKD itself arrives in a single shipment from one country.

Comments by the European Communities on China's response to question 260

659. The European Communities refers to its reply to question 260. China now acknowledges that parts and components originate from different countries.

F. SUBSIDIES AND COUNTERVAILING MEASURES

261. (*United States*) At paragraph 63 of the attachment to your rebuttal submission, you agree with China "in general that in the case of true border measures properly applying a Member's Schedule there may well be no 'revenue foregone' within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement." Does this mean that if the Panel were to rule in

China's favour under Article II of GATT 1994, no basis would remain for your claim under the SCM Agreement? Please explain in detail.

Response of the United States (WT/DS340)

660. One scenario in which a GATT Article II-compliant customs duty would not seem to result in foregone revenue is as follows: If a WTO Member is properly applying its tariff schedule to imported Product A, and it is also properly applying its tariff schedule to imported Product B, then the WTO Member is not foregoing revenue, even though the tariff rates for the two products are different.

661. In contrast, assume a scenario where a WTO Member is imposing tariffs on imported Product A at the applicable bound rate in one set of circumstances, but in another set of circumstances is imposing tariffs on imported Product A at a rate below the applicable bound rate. In this scenario, the WTO Member is foregoing revenue by virtue of the fact that the tariff rate for imported Product A varies depending on the circumstances. In this scenario, the appropriate "normative benchmark" is the revenue collected when the bound rate is applied to imported Product A. The revenue foregone equals the difference between the revenue collected in the circumstance when the bound rate is applied and the revenue collected in the circumstance when the lower rate is applied.

662. Similarly, if the government applies its tariff schedule to imported Product A at a rate below the applicable bound rate if the importing company uses certain domestic goods, but applies the applicable bound rate if the importing company does not use those domestic goods, then the government would be foregoing revenue in those circumstances where it applies a rate below the applicable bound rate. The appropriate "normative benchmark" is the revenue collected when the bound rate is applied to imported Product A (i.e., when the importing company does not satisfy the requirement of using the domestic goods). The revenue foregone equals the difference between the revenue collected when the bound rate is applied to imported Product A (i.e., when the importing company does not satisfy the requirement of using the domestic goods) and the revenue collected when the lower rate is applied to imported Product A (i.e., when the importing company satisfies the requirement of using the domestic goods). In this example, the government's financial incentive would fall within the "prohibited" category of Article 3.1(b) of the SCM Agreement because it is contingent on the use of domestic over imported goods.

663. In the context of this dispute, if the Panel were to find China's measures consistent with GATT Article II, either of the two scenarios described above could apply.

664. First, if the Panel were to find that China is properly applying tariffs to imported Parts A and B (i.e., imported Part A receives its properly applicable bound rate, imported Part B receives its properly applicable bound rate), the United States would agree that there may well be no revenue foregone by the Chinese government within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

665. If, however, the Panel were to find that China is applying tariffs to imported parts at the applicable bound rate in one set of circumstances (i.e., imported Part A receives a 25 per cent tariff rate when it is assembled into a motor vehicle containing insufficient local content), but is applying tariffs to the same imported Part A at a rate below the applicable bound rate in another set of circumstances (i.e., the same imported Part A receives a 10 per cent tariff rate when it is assembled into a motor vehicle containing sufficient local content), the United States would argue that there is foregone revenue (as described below in response to Panel question 267).

262. (*European Communities*) Does the European Communities agree with the United States that in the case of true border measures which properly apply a Member's Schedule, there may be no "revenue foregone" within the meaning of Article 1.1(a)(1)(ii)? If so, how does the European Communities reconcile this view with the fact that it only makes a claim under the SCM Agreement in the case that the Panel would have considered the measure as a border measure consistent with Article II GATT?

Response of the European Communities (WT/DS339)

666. The European Communities claims that the Chinese measures violate Articles 3.1(b) and 3.2 of the *SCM Agreement only in case the Panel were, contrary to the arguments of the European Communities, to find (a) that the measures fall under Article II of the GATT 1994 and (b)* that China is entitled to accord to the imports of auto parts the treatment (i.e. 25% rate) it provides for vehicles in its Schedule.[143] The European Communities has demonstrated in its previous submissions that the Chinese measures, under such a "double hypothesis", constitute a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*. China foregoes revenue "otherwise due" by charging certain imported auto parts at the 10% rate while charging other imported auto parts (i.e. those that do not satisfy the local content requirements set out in the measures) at the 25% rate which constitutes a "defined, normative benchmark".[144] The European Communities considers that this finding is not excluded if the 25% duty rate is in accordance with the Chinese Schedule.

263. (*European Communities*) Please explain in detail the legal basis for your position that legitimate border measures that are fully consistent with GATT Article II can nevertheless, in law, constitute prohibited subsidies under Article 3.1(b) of the SCM Agreement.

Response of the European Communities (WT/DS339)

667. The European Communities considers that nothing in the wording, context or purpose of Article 3.1(b) of the *SCM Agreement excludes* legitimate border measures consistent with Article II of the GATT 1994 from the scope of prohibited subsidies.

668. A measure is a prohibited subsidy within the meaning of Article 3.1(b) of the *SCM Agreement if three conditions are met: The measure must (a)* constitute a financial contribution within the meaning of Article 1.1(a)(1), (b) confer a benefit within the meaning of Article 1.1(b), and (c) be contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b). None of these conditions is excluded by the existence of legitimate border measures consistent with Article II of the GATT 1994.

669. As regards (a), a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement requires that "government revenue that is otherwise due is foregone or not collected". As set out by the Appellate Body in US – FSC, this is determined on the basis of a comparison between the "revenue actually raised" and revenue that would have been raised "otherwise" taking into account "some defined, normative benchmark". Both the revenue actually raised and the revenue otherwise due can be based on border measures that are consistent with Article II of the GATT 1994.

[143] See first written submission of the European Communities, para. 282, and second written submission of the European Communities, para. 149.

[144] See first written submission of the European Communities, para. 285 to 288, and second written submission of the European Communities, para. 150 to 151.

670. Concerning point (b) above, a benefit within the meaning of Article 1.1(b) is conferred if the financial contribution makes the recipient "better off" than it would otherwise have been. It is irrelevant for this assessment whether border measures conferring the benefit are consistent with Article II of the GATT 1994 or not.

671. With regard to point (c) above, subsidies are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) if the recipient gets the subsidy only under the condition that he uses domestic over imported goods. The consistency with Article II of the GATT 1994 of any border measures providing the subsidy is, again, irrelevant.

672. A simple example demonstrates this point. The tariff schedule of WTO Member X sets forth two different tariff rates for the import of processors: 20% for processors that will be assembled into computers with domestic hard disks (category A processors), and 40% for processors that will be assembled into computers with imported hard disks (category B processors). If X charges imports of processors according to this schedule, such import duties would not infringe Article II of the GATT 1994. X would, however, grant a subsidy prohibited under Article 3.1(b) of the *SCM Agreement. First, there is a financial contribution* within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*. X *foregoes revenues otherwise due if the revenues actually raised (i.e. 20% from imports of category A processors) are compared with the* revenue that would have been raised "otherwise" (i.e. 40% from imports of category B processors). This 40% revenue is no "entitlement in the abstract" but a "defined, normative benchmark" contained in X's legal system. Second, X also confers a benefit to manufacturers of computers which combine the processors with domestic hard disks since these manufacturers do not have to pay the higher duties. Third, this subsidisation is contingent upon the use of domestic over imported goods because computer manufacturers only get the benefit of the lower duty rate if they combine the processors with domestic hard disks. These findings are not affected by the fact that the import duties were in accordance with the schedule and, thus, not contrary to Article II of the GATT 1994.

264. (*European Communities*) Are you arguing that the existence of a WTO-consistent tariff rate on a complete article which is higher than a WTO-consistent tariff rate on the parts of that article can, in itself, constitute a subsidy? Please explain in detail.

Response of the European Communities (WT/DS339)

673. The European Communities does not argue that the existence of a WTO-consistent tariff rate on a complete article which is higher than a WTO-consistent tariff rate on the parts of that article can, in itself, constitute a subsidy.

674. As set out above and in previous submissions, the European Communities argues that China foregoes revenue "otherwise due" by charging certain imported auto parts at the 10% rate while charging other imported auto parts (i.e. those that do not satisfy the local content requirements set out in the measures) at 25 %, and that this confers a benefit.[145] In abstract terms, the European Communities does not argue that the difference between the tariff rates for the complete article and its parts constitutes a subsidy. The subsidy rather consists of the difference between the lower tariff rate for parts manufactured into articles with sufficient local content and the higher tariff rate for parts manufactured into articles with insufficient local content.

[145] See first written submission of the European Communities, para. 284 to 292, and second written submission of the European Communities, para. 150 to 152.

265. (*European Communities*) You stated at the Second Substantive Meeting that your claim under the SCM Agreement was based on the double hypothesis that the Panel found that China's measures are ordinary customs duties within the meaning of Article II:1(b) and that China is entitled to charge the 25% rate for parts.

(a) Please confirm that your contention is that if the Panel made these findings, the 25% rate would be the rate for *all* auto parts, and that therefore charging the 10% rate in respect of *some* parts would result in the Chinese government foregoing revenue that it otherwise was due.

Response of the European Communities (WT/DS339)

675. The European Communities does not contend, under the double hypothesis for its claim under Article 3.1(b) of the *SCM Agreement, that the 25% rate would be the rate for "all" auto parts. As set out above and in previous submissions, the 25% rate would be the rate* for auto parts that do not satisfy the local content requirements set out in the measures. For other auto parts, i.e. those that satisfy the local content requirements, the 10% rate would apply.[146]

676. As set out in response to questions 157 and 158 from the Panel, the European Communities does not argue that the 25% rate is a "default rate" and considers that such finding would not be part of the relevant legal test in order to determine the "normative benchmark" under Article 1.1(a)(1)(ii) of the *SCM Agreement*.[147]

266. (*European Communities and China)* If the Panel were to find that China was entitled to classify as a motor vehicle parts that have the essential character of a complete motor vehicle, and therefore was entitled to charge the 25% duty in the instances set forth in the measures, in your view would such a ruling mean that China was permitted to apply its motor vehicle rate to certain *parts,* or would it mean that China was permitted to apply its motor vehicle rate to *motor vehicles*?

Response of China

677. China does not understand the distinction suggested by this question. Under GIR 2(a), parts and components that have the essential character of the complete article are classified as the complete article, not as parts. As the complete article, they are subject to the appropriate duty rates that apply to the complete article.

678. This question may pertain to an aspect of GIR 2(a) that the parties have discussed during the two substantive meetings of the Panel. It is unquestionably the case that, under GIR 2(a), a "part" will sometimes be classified as the complete article. For example, a steering wheel that is part of a group of parts and components that have the essential character of a motor vehicle will be classified and assessed as a motor vehicle, not as a steering wheel. This follows from the ordinary application of GIR 2(a). This is no different than the fact that the same steering wheel in a completely assembled motor vehicle will *also* be classified as part of a motor vehicle, not as a steering wheel.

679. For these reasons, a finding by the Panel that China is entitled to classify as a motor vehicle parts that have the essential character of a complete motor vehicle, and to charge the 25 per cent duty in the instances set forth in the challenged measures, would necessarily mean that China is allowed to

[146] See first written submission of the European Communities, para. 288; second written submission of the European Communities, para. 150; response by the European Communities to Question 157 from the Panel.
[147] Response by the European Communities to Questions 157 and 158 from the Panel.

apply the 25 per cent rate of duty to auto parts and components that have the essential character of a motor vehicle.

Response of the European Communities (WT/DS339)

680. Such a ruling would mean that China was permitted to apply the 25% (motor vehicles) rate to certain parts, i.e. those parts that do not satisfy the local content requirements set out in the measures.

Comments by the European Communities on China's response to question 266

681. China's acknowledgment, in response to question 266, that such a ruling would mean that China was "allowed to apply the 25 per cent rate of duty to auto parts and components" (emphasis added) supports the claim of the European Communities under Article 3 of the *SCM Agreement*. As set out in greater detail in previous submissions[148], the 10% duty treatment for parts not Deemed Whole Vehicles can be compared with the "definitive, normative benchmark" of the 25% duty treatment for parts Deemed Whole Vehicles since they both concern, under the hypothesis which opens the application of Article 3 of the *SCM Agreement*, the treatment of imports of auto parts in the Chinese legal system.

Comments by the United States on China's response to question 266

682. The United States takes China's response to mean that if a bulk shipment of a particular auto part falls within the purview of the measures, then China would "classify" that part as a complete vehicle. In this regard, the United States also refers the Panel to China's response to Panel question No. 175 and the comments of the United States thereon.

267. (*European Communities and United States*) How do the European Communities and the United States reconcile their view that the 25 per cent charge on imported parts and components is the appropriate "normative benchmark" for purposes of the analysis of their claims under Article 3.1(b) of the SCM Agreement, with their main claims that such charge is not the appropriate rate of duty for auto parts, but rather the appropriate rate of duty for motor vehicles? In other words, how can the difference between the 25% complete vehicle rate and the10 % parts rate constitute the revenue foregone that is otherwise due, if as the complainants argue the 10% rate (and not the 25% rate) is the appropriate rate to apply to all parts?

Response of the European Communities (WT/DS339)

683. The European Communities does not see any discrepancy. The claim under Article 3.1(b) of the *SCM Agreement* is based on the hypothesis that China is entitled to apply the 25% duty rate to auto parts not satisfying the local content requirements set out in the measures. Under such a hypothesis, the 25% rate constitutes the appropriate "definitive, normative benchmark". The claim relating to Article II of the GATT 1994, on the other hand, is not based on the aforementioned hypothesis. In the absence of the aforementioned hypothesis, the European Communities considers that China cannot impose customs duties of 25% on the imports of auto parts.

684. For the convenience of the Panel, the European Communities reiterates the structure of its claims which consists of three layers. In its main claim (level 1), the European Communities

[148] See first written submission of the European Communities, paras. 285 to 288; second written submission of the European Communities, paras. 149 to 151.

demonstrates that the measures violate Article 2 of the *TRIMs Agreement* and constitute internal measures inconsistent with Article III of the GATT 1994. In the alternative, i.e. were the Panel to find that the Chinese measures are merely enforcing ordinary customs duties (level 2), the European Communities sets out that China violates Article II of the GATT 1994 by imposing 25% duties on auto parts instead of the applicable 10% duty rate provided for in the Chinese schedule. Were the Panel to find that the measures are merely enforcing ordinary customs duties and that China is entitled to apply the 25% rate on auto parts ("double hypothesis", level 3), the European Communities alternatively claims that the measures violate Article 3.1(b) of the *SCM Agreement*. Within this third alternative level, China foregoes revenue "otherwise due" when it imposes 10% on auto parts satisfying the local content requirements set out in the measures 25% on auto parts that do not.

(a) (*European Communities and United States*) How can the application of the 25 per cent rate be considered "legitimately comparable" to application of the 10 per cent rate, if the 25 per cent rate (or the difference between it and the 10 per cent rate) are, in your view, WTO-inconsistent in the first place?

Response of the European Communities (WT/DS339)

685. As set out above, the application of the 25% rate to auto parts is not WTO-inconsistent under the hypothesis that China is entitled to apply the 25% duty rate to auto parts. This hypothesis is the basis for the claim under Article 3.1(b) of the *SCM Agreement*. Under this hypothesis, the 25% rate constitutes the appropriate "definitive, normative benchmark" in order to compare the "revenue actually raised" with the revenue that would have been raised "otherwise". Therefore, the European Communities considers that the 10% rate on auto parts satisfying the local content requirements contained in the measures and the 25% rate for auto parts that do not are in fact comparable for the purposes of Article 1.1(a)(1)(ii) of the *SCM Agreement*.[149]

Response of the United States (WT/DS340)

686. The scenario that seems to be the premise of the Panel's question is that China's measures impose ordinary customs duties in the amount of 25 per cent on imported parts if they are not assembled into a motor vehicle with sufficient local content but impose ordinary customs duties in the amount of only 10 per cent on those same imported parts if they are assembled into a motor vehicle with sufficient local content. In this scenario, assuming that the Panel were to find that China's measures constituted customs duties but applied tariffs in excess of the bound rate in breach of GATT Article II in some circumstances (e.g., in the circumstances in which those measures apply a 25 per cent tariff rate to imported parts assembled into a motor vehicle containing insufficient local content), it would be appropriate to view the 25 per cent tariff rate as the appropriate "normative benchmark" for purposes of the analysis under Article 3.1(b) of the SCM Agreement. That is the rate that would apply to a particular imported part unless the auto manufacturer responds to the incentives provided in China's measures and satisfies the requirement of using that imported part in the assembly of a motor vehicle containing sufficient local content. The United States does not view the SCM Agreement analysis as being affected by the fact that the 25 per cent tariff rate is inconsistent with GATT Article II. The 25 per cent tariff rate can still serve as the appropriate "normative benchmark" for purposes of the analysis under Article 3.1(b) of the SCM Agreement. Even though the application of that tariff rate would be inconsistent with GATT Article II, it is still the rate that applies in China, i.e., under Chinese law (as determined by the Panel as a factual matter), and it is Chinese law that determines the benchmark. The revenue foregone in this scenario would equal the difference between the revenue collected when the 25 per cent tariff rate is applied to imported parts that are assembled

[149] See second written submission of the European Communities, para. 151.

into a motor vehicle containing insufficient local content and the revenue collected when the 10 per cent tariff rate is applied to the same imported parts if they are assembled into a motor vehicle containing sufficient local content.

687. The United States views the charges imposed under China's measures not as ordinary customs duties but rather as internal charges. (See the US response to question No. 190.) Specifically, China's measures impose an internal charge in the amount of 25 per cent on imported parts if they are not assembled into a motor vehicle with sufficient local content but impose a charge of only 10 per cent on those same imported parts if they are assembled into a motor vehicle with sufficient local content. In this scenario, assuming that the Panel were to find that China's measures constituted internal measures that are inconsistent with GATT Article III, it would be appropriate to view the 25 per cent internal charge as the appropriate "normative benchmark" for purposes of the analysis under Article 3.1(b) of the SCM Agreement. That is the charge that would apply to a particular imported part unless the auto manufacturer responds to the incentives provided in China's measures and satisfies the requirement of using that imported part in the assembly of a motor vehicle containing sufficient local content. As in the scenario where the charges at issue are treated as ordinary customs duties, the United States does not view the SCM Agreement analysis as being affected by the fact that the 25 per cent internal charge is GATT-inconsistent. The 25 per cent internal charge can still serve as the appropriate "normative benchmark" for purposes of the analysis under Article 3.1(b) of the SCM Agreement. Even though the application of that internal charge would be inconsistent with GATT Article III, it is still the charge that applies in China, i.e., under Chinese law (as determined by the Panel as a factual matter), and it is Chinese law that determines the benchmark. The revenue foregone in this scenario would equal the difference between the revenue collected when the 25 per cent internal charge is applied to imported parts that are assembled into a motor vehicle containing insufficient local content and the revenue collected when a 10 per cent charge is applied to the same imported parts if they are assembled into a motor vehicle containing sufficient local content.

688. The United States notes that in response to Panel question No. 157, when attempting to describe the "revenue foregone" by the Chinese government within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, the United States characterized China's measures as requiring auto manufacturer to pay a combination of import duties and internal charges. The United States believes that the correct view of China's measures, as a legal matter, is that they only impose internal charges, as explained above.

(b) (*European Communities*) At paragraph 287 of your first written submission, in respect of your claim under the SCM Agreement, you argue that to determine whether a government is foregoing revenue that "otherwise would be due", it is necessary to "compare the revenues due under the contested measure and the revenues that would have been raised otherwise taking into account a normative benchmark governing such comparison." Comparing the revenue raised under the contested measure (25 per cent) to what in your view would be collected if the measure did not exist (10 per cent), it would appear that the contested measure produces <u>more,</u> not <u>less,</u> revenue for the government of China than would be the case in its absence. Why is this not the appropriate analysis; that is, why is 10 per cent not the appropriate "normative benchmark" in this case, particularly given your view that the 25 per cent is WTO inconsistent?

Response of the European Communities (WT/DS339)

689. First and as set out in response to the previous question, the application of the 25% rate to auto parts is not WTO-inconsistent <u>under the hypothesis,</u> on which the Article 3.1(b) claim is based, that China is entitled to apply the 25% duty rate to auto parts.

690. Secondly, the European Communities does not compare "the revenue raised under the contested measure (25 per cent) to what (…) would be collected if the measure did not exist (10 per cent)". Instead, the European Communities compares the revenues actually raised from the imports of auto parts satisfying the relevant local content requirements (10%) with revenues that could have "otherwise" been raised. These revenues appear in form of the duties imposed on auto parts not satisfying the relevant local content requirements (25%). As this 25% rate is explicitly foreseen for certain imported auto parts in the Chinese measures, it is, in the words of *United States – FSC*, no "entitlement in the abstract" but a "definitive, normative benchmark".[150] By charging imports of auto parts satisfying the relevant local content requirements with duties of only 10%, China has ignored this benchmark and, thus, has forgone "government revenue that is otherwise due".

691. The European Communities does not understand the alternative analysis referred to in the question. Comparing the 10% duties not with the 25% benchmark, but with the 10% duties would not be a comparison since one thing cannot be compared with itself. Besides, an alternative analysis cannot start with the 25% duties and compare these with the 10% duties. The European Communities does not claim that China foregoes revenues by imposing 25% duties on auto parts not satisfying the relevant local content requirements. The claim is rather that China foregoes revenue by charging imports of auto parts satisfying the relevant local content requirements with duties of only 10%.

268. (*United States*) Is the United States arguing that the 15% *ad valorem* differential between the 25% and the 10% rates, which according to the United States is charged internally, is the benchmark? If so, can the US explain the legal basis for a conclusion that the 15% is otherwise due to the Chinese Government when it is not charged on vehicles that have sufficient local content?

Response of the United States (WT/DS340)

692. The United States assumes that this question intends to refer to the "differential between the 25% and the 10% rates" rather than the "differential between the 15% and the 10% rates." As explained above in response to question Nos. 190 and 267, the benchmark is the revenue collected when the 25% charge is applied, and it is the differential between the revenue collected when the 25 per cent charge is applied and the revenue collected when the 10 per cent charge is applied that, as a legal matter, represents the revenue foregone by the Chinese government.

269. (*United States)* With respect to your claim under the SCM Agreement, at the Second Substantive Meeting you stated that the normative benchmark may change over time as the measures have their intended effect of diverting parts purchases from imports to local sources, *i.e.*, that in the beginning most auto manufacturers will pay the 15% charge and some will pay 0%, but in the end the converse will be true.

(a) If this statement is correct, does this not imply that the amount of revenue foregone, and any subsidization, would reach zero after the measures were in place for a certain period?

Response of the United States (WT/DS340)

693. The statement made by the United States at the Second Substantive Meeting was not intended to mean that the normative benchmark would change over time. Rather, the United States was addressing how to determine the appropriate normative benchmark in the circumstances of this

[150] See first written submission of the European Communities, para. 288; second written submission of the European Communities, para. 150; response by the European Communities to Question 157 from the Panel.

dispute. Specifically, the United States was attempting to explain that it was not always appropriate to define the normative benchmark in terms of a "default rate," to the extent that a default rate means the revenue normally or most often collected. In many cases it is appropriate to define the normative benchmark in these terms. However, in some cases, such as this dispute, the normative benchmark will not necessarily represent the revenue level normally or most often collected. Rather, the normative benchmark can mean the revenue level that applies unless a particular contingency is satisfied.

694. As the United States explained in paragraph 145 of the attachment to its rebuttal submission, when measures provide incentives for manufacturers to use domestic over imported goods, like the measures at issue in this dispute, they are by their nature designed to change manufacturers' behavior over time. The goal of measures like those at issue in this dispute is to change how business is normally conducted and to create an incentive for manufacturers to begin sourcing more parts locally rather than importing them. While the higher charge may prevail initially, as business practices respond to these incentives, the revenue most often collected under the measures would change as well. More and more manufacturers would qualify for the lower charge by assembling vehicles containing sufficient local content.

695. Thus, in the case of China's measures, the normative benchmark – the 25 per cent internal charge – remains the same over time. However, that does not mean that the 25 per cent internal charge is a default rate in the sense that it represents the level of revenue normally or most often collected, as the level of revenue normally or most often collected by the design of the measures themselves will change over time. Rather, the 25 per cent internal charge is the rate that applies unless an auto manufacturer satisfies the contingency of using sufficient local content in the assembly of a vehicle to qualify for the 10% charge, and for that reason the 25 per cent internal charge serves as the normative benchmark.

(b) What is the legal basis for your contention that a "normative benchmark", which is supposed to be the point of comparison for determining whether a measure engenders the foregoing of revenue, can be identified on the basis of the effects of that same measure when applied over a period of time?

Response of the United States (WT/DS340)

696. The United States is not arguing that the normative benchmark can be identified on the basis of the effects of the measure at issue when applied over time. As explained above in response to Panel question 269(a), the normative benchmark remains the same over time.

270. (*United States*) In your first written submission, in connection with your claim under the SCM Agreement, you state that the measures "exempt manufacturers from the charges otherwise due if they use domestic auto parts rather than imported auto parts", and you further argue that what the manufacturers are exempted from under those circumstances is an "across-the-board 25 per cent charge on auto parts". However, in your answer to question 157 from the Panel, you suggest that you are not arguing that 25 per cent is the "default" rate, or "general" rate from which there are exceptions under certain circumstances.

(a) Are you arguing that an "across-the-board" rate, from which "exemptions" are granted under certain circumstances is different from a "general" rate from which "exceptions" are granted under certain circumstances?

Response of the United States (WT/DS340)

697. The United States is not arguing that an "across-the-board" rate, from which "exemptions" are granted under certain circumstances is different from a "general" rate from which "exceptions" are granted under certain circumstances.

(b) Please provide your detailed legal reasoning for considering 25 per cent to be the appropriate "normative benchmark" in this case for determining the existence of "revenue foregone". If you are no longer arguing that there is a 25 per cent "across-the-board" rate on auto parts, please explain in detail the basis for your position that 25 per cent nevertheless is the appropriate "normative benchmark" to be applied for purposes of this claim.

Response of the United States (WT/DS340)

698. Please see the United States response to Panel question Nos. 267 and 268.

271. (*European Communities*) At paragraph 291 of your first written submission, you argue that vehicle manufacturers do not have to pay the higher rate of "typically 25%" if they satisfy the local content requirements of the contested measures. In your answer to the Panel's question 157, however, you state that you have not argued that 25% would be "the default rate" of charges applied to imported auto parts and that the 10% rate would "only be available upon demonstration that local content requirements were met". Please clarify in how a "typical" 25 per cent rate that will be reduced "if" local content requirements are met differs from a "default" or "general" rate from which "exceptions" will be granted under certain circumstances.

Response of the European Communities (WT/DS339)

699. In its first written submission, the European Communities stated:

> Vehicle manufacturers which satisfy the local content requirements of Article 21 of Decree 125 are financially "better off" than those which do not. They do not have to pay the higher import duties for parts of typically 25% and are instead only charged at 10%. They receive a benefit in the amount of the difference between the two duty rates.[151]

700. This does not mean that vehicle manufacturers generally face a 25% duty rate for parts which is reduced to 10% in case they manage do demonstrate that they meet the local content requirements. The European Communities has not argued that Article 28 of Decree 125 provides for such a default-exception structure. It rather depends on the ex-officio "verification" by the Chinese authorities whether auto parts are charged at 10% or 25%. The European Communities does not consider that the 25% rate must be the "default" rate in order to qualify as a "normative benchmark" under Article 1.1(a)(1)(ii) of the *SCM Agreement*.[152] It is sufficient that the 25% rate is explicitly foreseen for certain imported auto parts in the Chinese measures so that it constitutes, in the words of *US - FSC*, no "entitlement in the abstract" but a "definitive, normative benchmark".[153]

[151] See first written submission of the European Communities, para. 291.
[152] Response by the European Communities to Questions 157 and 158 from the Panel.
[153] See second written submission of the European Communities, para. 150.

272. (*European Communities and United States*) Please confirm, as stated orally during the second substantive meeting, that the European Communities and the United States are *not* pursuing their respective claims under the SCM Agreement in respect to importations of CKD and SKD kits under Article 2(2) of Decree 125.

Response of the European Communities (WT/DS339)

701. The European Communities confirms that it is not pursuing its claim under the *SCM Agreement* in respect to importations of CKD and SKD kits under Article 2(2) of Decree 125.

Response of the United States (WT/DS340)

702. The United States is not pursuing a claim under the SCM Agreement with regard to the importation of CKD and SKD kits under Article 2(2) of Decree 125.

G. ARTICLE III OF THE GATT 1994

273. (*All parties*) The Appellate Body in *EC – Bananas III* held that the distribution of import licenses among operators within the European Communities went:

> **"*far beyond* the mere import licence requirements needed to administer the tariff quota for third-country and non-traditional ACP bananas or Lomé Convention requirements for the importation of bananas. These rules are *intended, among other things,* to cross-subsidize distributors of EC (and ACP) bananas and to ensure that EC banana ripeners obtain a share of the quota rents. As such, these rules affect "the internal sale, offering for sale, purchase, ..." within the meaning of Article III:4 (...)." (Appellate Body Report on *EC – Bananas III*, para. 211) (Emphasis added)**

In light of the Appellate Body holding in *EC – Bananas III*, would the following questions be relevant to deciding whether the measures fall under Article III:4 GATT: namely, first, whether they "go far beyond" the requirements needed to administer the customs duties and, second, whether are intended, among other things to affect the internal sale of auto parts and components.

Response of China

703. As China discussed in response to question 85 from the Panel, the fundamental problem with the license allocation procedures at issue in *EC – Bananas III* is that they bore no relationship to the tariff rate quota that the EC was allowed to maintain. The criteria that the EC had adopted for the allocation of quota licenses were neither necessary nor germane to the administration of the TRQ. The EC was allowed to adopt procedures to allocate import licenses in accordance with its rights under Article II. However, the procedures that the EC adopted for this purpose did not allocate import licenses on a neutral, non-discriminatory basis. Rather, they did so in a manner that was plainly designed to favour operators who marketed bananas from EC and traditional ACP sources – a factor that was entirely unrelated to the TRQ itself. It was *this* aspect of the license allocation procedures that the panel and Appellate Body found to fall within the scope of Article III:4.[154]

[154] *See EC – Bananas III* at para. 211 ("At issue in this appeal is not whether *any* impose licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for

704. Applying these principles to the challenged measures, the complainants would need to demonstrate that the challenged measures "go far beyond" what is necessary to ensure the correct classification of motor vehicles under China's Schedule of Concessions, including parts and components that have the essential character of a motor vehicle. As in *EC – Bananas III*, this would only be the case in respect of specific aspects of the challenged measures that are not necessary to ensure the proper application of GIR 2(a) to parts and components of motor vehicles. In order to make this showing, the complainants would need to demonstrate the specific respects in which the challenged measures violate GIR 2(a), for example, because they result in classifications that are not consistent with the essential character test, or because they result in classifications that are not based on the manner in which parts and components are presented to Chinese customs authorities. As China explained in its oral statement to the Panel at the second substantive meeting, and as discussed in response to question 228 above, the complainants have failed to support these conclusions based on evidence and legal argument. The complainants therefore have no basis to contend that there are aspects of the challenged measures that are unrelated to the proper administration and enforcement of China's tariff provisions for motor vehicles, or that "go far beyond" what is necessary for this purpose.

705. As for whether the challenged measures are "intended to affect the internal sale of auto parts and components," whatever effect they have, in this regard, is the effect that arises from the difference in duty rates in China's tariff schedule between motor vehicles and parts of motor vehicles. The difference in duty rates, and whatever incentives or disincentives this difference in duty rates creates, are inherent features of the Schedule of Concessions that China negotiated, and that China is entitled to implement and enforce.

Response of the European Communities (WT/DS339)

706. The European Communities reiterates that the Chinese measures do not impose ordinary customs duties but fall under Article 2 of the *TRIMs Agreement* and Article III of the GATT 1994 for the reasons set out in great detail in its previous submissions.[155] The holding of the Appellate Body in *EC – Bananas III* provides additional reasons for determining that the Chinese measures fall under Article III:4 GATT.

707. The Chinese measures "go far beyond" the requirements needed to administer any possible customs duties in several respects. First, the measures go far beyond customs duty administration when they impose charges not at the time or point of importation, but internally after assembly and manufacture. Secondly, the measures do not impose charges "on importation", but on the basis of how the auto parts are used after importation and, in particular, whether they are subsequently assembled and manufactured in China into vehicles with an insufficient level of local content. Thirdly, the measures provide in Article 29 of Decree 125 that manufacturers have to pay charges even if they purchase parts on the Chinese internal market from suppliers that previously imported them. Fourthly, the measures go far beyond customs duty administration by imposing the very cumbersome procedural requirements which are set out in detail in the first written submission.[156] This is illustrated

---

the *distribution* of import licenses for imported bananas among eligible operators *within* the European Communities are within the scope of this provision."); *EC – Bananas III* (Panel Report) at para. 7.178 ("although licences are a condition for the importation of bananas into the EC at in-quota tariff rates, we find that the administration of licence distribution procedures and the eligibility criteria for the allocation of licenses to operators form part of the EC's internal legislation.").

[155] See second written submission of the European Communities, para. 35 to 56; also see first written submission of the European Communities, para. 138 to 139.

[156] See first written submission of the European Communities, para. 45 to 65.

by the currently pending applications under the procedures of the measures some of which date back to 2005 (Exhibit EC - 26).

708. The European Communities also considers that the Chinese measures are intended, among other things to affect the internal sale of auto parts. The Chinese measures intend to make imported auto parts less attractive for vehicle manufacturers since their use entails cumbersome administrative procedures and risks – depending on the level of local content in the manufactured vehicles – triggering higher internal charges on imported auto parts.[157] The burdensome procedures and the threat of the internal charge of 15 % on imported parts create an incentive for vehicle manufacturers to mainly use domestic parts. As such, the Chinese measures affect "the internal sale, offering for sale, purchase, ..." within the meaning of Article III:4, and therefore fall within the scope of this provision

Response of the United States (WT/DS340)

709. The United States agrees that the factors listed in *EC– BananasIII* are relevant. Moreover, in the event China's measures were considered as imposing ordinary customs duties, the United States submits that China's measures present an even clearer case than in *EC – Bananas* IIIof a border measure that breached Article III of the GATT 1994. Under China's measures, the measures on their face affect the internal use, purchase, and sale of imported parts by increasing the duties applicable to other imported parts based on the level of local content contained in an article manufactured within China.

Response of Canada (WT/DS342)

710. Canada notes first that if its argument is accepted that the measures are entirely internal, with no legitimate connection to customs duties, then the above analysis is not necessary – the measures on their face violate Articles III:2, 4 and 5 and the *TRIMs Agreement*.

711. Canada agrees that the factors in *EC – Bananas III* are relevant. Customs procedures that are not necessary to administer charges under Article II are subject to Article III:4. Article III:4 does not specify that laws or regulations must be "internal" to be subject to its purview, but rather any laws or regulations "affecting" the "internal sale, offering for sale, purchase, transportation, distribution or use" are subject to Article III:4.

712. With respect to the second question, the "intent" behind the measures is not relevant to assessing whether the measures violate Article III:4. What is relevant is whether the measures modify the conditions of competition and therefore provide less favourable treatment for imported goods than for domestic ones. This is not a question of "intent" but of the "effect" of the measures. In *EC – Bananas III*, the examination of "intent" assisted the determination of whether the measures at issue "affected" the internal sale, etc. Similarly, in the present dispute the fact that measures have a protectionist design emphasizes what is clear from the structure of the measures: that they are intended to affect the internal competition of imported auto parts in the Chinese market.

Comments by the European Communities on China's response to question 273

713. China responded that measures only go far beyond the requirements needed to administer the customs duties if "specific aspects of the challenged measures […] are not necessary to ensure the proper application of GIR 2(a) to parts and components of motor vehicles". China, thus, distorts the

[157] See first written submission of the European Communities, paras. 107 to 119 and 147 to 151; second written submission of the European Communities, para. 59.

test set out by the Appellate Body in *EC – Bananas III* by falsely equating customs duty administration with the "application of GIR 2(a)". As repeatedly set out by the European Communities[158], GIR 2(a) is of extremely limited relevance for customs duty administration in the present case. If interpreted correctly, the "go far beyond"-criterion established by the Appellate Body brings the Chinese measures clearly under the scope of Article III:4 GATT.[159]

714. With regard to the second element of the test, China's statement "whatever effect [the measures] have, (…), in this regard, is the effect that arises from the difference in duty rates" does not respond to the question from the Panel which relates to the intent of the measures. Besides, the statement is wrong since the likely effect of the measures, i.e. reducing imports of parts through discriminatory local content requirements, is diametrically opposed to the likely effects of the negotiated tariff differential in China's schedule, which is to give an incentive for the imports of auto parts. Were China to argue that the measures do not intend to affect the internal sale of auto parts, its response would ignore the stated purpose of the measures which is fostering the development of the Chinese auto parts industry, a purpose to be achieved by making the purchase of imported auto parts less attractive through higher internal charges and burdensome procedures.

274. (*Canada*) In paragraph 17 of its second oral statement, Canada states that under the measures, two otherwise-identical imported goods are given two different tariffs solely on the basis of their end use. Could you please explain how applying two different tariffs to the same goods is an internal measure within the meaning of Article III.

Response of Canada (WT/DS342)

715. See Canada's response to Question 188.

275. (*China*) Please comment on the view that China's measures at issue, by making certain imported auto parts less attractive due to additional procedural requirements and higher tariff duties, create incentives to use domestic auto parts.

Response of China

716. As China explained in response to question 273, whatever incentives or disincentives arise from the difference in duty rates in China's Schedule of Concessions are characteristics that are inherent to the Schedule of Concessions that China negotiated. One function of ordinary customs duties is to regulate access to markets. They do so, in part, through the incentives and disincentives that are created by the establishment of duty rates at different levels. No party disputes that the higher tariff rate for motor vehicles in China's Schedule of Concessions creates some degree of incentive to assemble motor vehicles in China from auto parts and components, as compared to importing finished motor vehicles. As China has explained throughout this proceeding, it is not inconsistent with China's rights and obligations under Article II to ensure that auto manufacturers do not evade this characteristic of China's tariff schedule, and deprive China of customs revenue, through the importation of motor vehicles in multiple shipments of parts and components.

717. With respect to the "additional procedural requirements" associated with the challenged measures, China notes that the complainants have failed to provide any evidence of the "burden" that these procedures allegedly impose upon auto manufacturers, and what impact they have had on any auto manufacturer's sourcing decisions. In any event, as China explained in paragraphs 128 to 131 of

[158] See e.g. second written submission of the European Communities, para. 93.
[159] For details see the response by the European Communities to Question 273 from the Panel.

its second written submission, the alleged "burden" imposed by customs procedures does not fall within the scope of Article III of the GATT 1994. The Members' rights and obligations in respect of customs-related procedures are set forth in Article VIII of the GATT.

Comments by the European Communities on China's response to question 275

718. The European Communities notes that China has not, as requested in the question from the Panel, commented on the complainants' argument that its measures create an incentive to use domestic parts. China's assertion that the measures avoid evasion of tariff rates contained in its schedule through "multiple shipments of parts" is misconceived for the reasons which the European Communities has set out previously.[160] Contrary to China's allegation, the European Communities has provided evidence of the administrative burden which the measures impose.[161]

Comments by the United States on China's response to question 275

719. China's answer – that tariffs always create a disincentive to import parts – entirely avoids the key issue raised by this question: that China's measures adversely affect the internal purchase, sale and use of imported auto parts, in direct breach of Articles III:4 and III:5 of the GATT 1995. The usual customs duty imposed by WTO Members – which is based on the article in its condition upon importation – does not create any further disincentives affecting the internal purchase, sale, and use of an imported good. But China's measures – by assessing duties based on the amount of local content contained in automobiles manufactured within China – create a major disincentive to the purchase, sale, and use of goods imported into China. And, this disincentive is in addition to, and separate from, the disincentive related to the tariff.

720. The separate and distinct nature of the disincentive is highlighted by China's own description of its treatment of fasteners under the measures. At the second meeting, China explained that (1) fasteners are always assessed at the 10 per cent parts rate, but that (2) the use of imported fasteners affects the local content calculations, so that using imported fasteners could require that all other imported parts in a vehicle would be assessed a 25 per cent charge, instead of a 10 per cent charge. Thus, separate and apart from any disincentive related to the rate of duty on fasteners, the measures create a disincentive to the internal purchase, sale and use of imported fasteners. The same is true with respect to all other parts subject to the measures, but the fact that (according to China) fasteners are never assessed at a 25 per cent rate helps to highlight the distinction between (1) the disincentive associated with customs duties normally applied by WTO Members and (2) the disincentive created by China's measures on the use of goods post-importation.

276. (*China*) If the Panel were to find that the charges fall within the scope of Article II GATT, would the procedural aspects fall within the scope of Article II GATT?

Response of China

721. More accurately, they would fall within the scope of Article VIII of the GATT 1994. As China explained in paragraphs 128 to 131 of its second written submission, if a Member imposes a customs procedure to ensure the collection of customs duties that it is allowed to impose under its Article II commitments, those measures are necessarily customs measures (provided, as discussed in response to question 273, that the measures are germane to the customs purpose). Article VIII concerns the "fees, charges, formalities and requirements imposed by governmental authorities in

[160] See most recently second written submission of the European Communities, paras. 92 to 132.
[161] See first written submission of the European Communities, paras. 45 to 65.

connection with importation and exportation," including, *inter alia*, the documents and documentation necessary to ensure the proper classification of import entries and the collection of ordinary customs duties.

Comments by the European Communities on China's response to question 276

722. China responded that, were the Panel to find that the charges fall under Article II of the GATT, the procedural aspects would be governed by Article VIII:1(c) of the GATT 1994.[162] In the view of the European Communities, the programmatic provision of Article VIII:1(c) does not exclude the application of Article III:4 to measures that "go far beyond" the requirements to administer ordinary customs duties and rather intend to affect the internal sale of products. As demonstrated in previous submissions, this is the case for the Chinese measures.[163] Therefore, the procedural aspects of the Chinese measures would still need to be assessed under Article III:4 of the GATT, even if Panel were to categorize the charges as ordinary customs duties.

H. TRIMS AGREEMENT

277. (*China*) If the Panel were to consider that paragraphs 1(a) and 2(a) of the Illustrative List of the TRIMS Agreement spell out two specific TRIMs that are considered inconsistent with respectively Article III:4 and XI:1 GATT, and thus decide that it does not have to make a preliminary assessment on whether the measures fall within the scope of respectively Articles III:4 and XI:1 GATT, why should the challenged measure not be considered as covered by these specific examples? Please explain based on the language of the Illustrative List.

Response of China

723. The panel in *EC – Bananas III* considered that the TRIMs Agreement, including the Illustrative List, "essentially interprets and clarifies the provisions of Article III (and also Article XI) where trade-related investment measures are concerned."[164] Likewise, the panel in *India – Autos* considered that the Illustrative List "simply provides additional guidance as to the identification of certain measures considered to be inconsistent with Article III:4 and XI:1 of the GATT 1994."[165]

724. Paragraph 1 of the Illustrative List describes two specific TRIMs that "are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 …" One of these, as set forth in Paragraph 1(a), is an advantage which requires "the purchase or use by an enterprise of products of domestic origin or from any domestic source …" These provisions cannot, by their express terms, apply to the application of an ordinary customs duty in accordance with the terms of a Member's Schedule of Concessions.

725. To begin with, the application of an ordinary customs duty cannot, for the reasons that China has explained, be "inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III …" As discussed in response to question 203, and the earlier submissions cited therein, the GATT clearly distinguishes between customs measures that are within the scope of Article II, and internal measures that are within the scope of Article III. The "discrimination" that Article II permits in respect of the application of ordinary customs duties to the goods of another Member cannot

[162] China's response refers to the second written submission of China, para. 131.
[163] See second written submission of the European Communities, para. 56; response by the European Communities to Question 273 from the Panel.
[164] *EC – Bananas III* (Panel Report) at para. 7.185.
[165] *India – Autos* at para. 7.157.

constitute an impermissible internal charge within the scope of Article III. Paragraph 1 of the Illustrative List, in describing certain TRIMs that are inconsistent with Article III, does not change this result. Otherwise, the charges that Members are allowed to collect under Article II could constitute a violation of the TRIMs Agreement, a result that is not consistent with the distinction between customs charges and internal charges, and that would risk encroaching upon with the rights and obligations of Members under Article II. By its terms, paragraph 1 of the Illustrative List refers to measures and charges of a type that are within the scope of Article III. Ordinary customs duties are not of this type.

726. In addition, there is no "advantage" in the application of an ordinary customs duty that is obtained by "the purchase or use by an enterprise of products of domestic origin or from any domestic source." This is illustrated by the facts of the present dispute. Under China's Schedule of Concessions, the purported "advantage" – the lower duty rate for auto parts and components – is contingent upon what the manufacturer *imports*. If the manufacturer imports parts and components, it pays the duty rate for parts and components. If the manufacturer imports motor vehicles or parts and components that have the essential character of a motor vehicle, it pays the duty rate for motor vehicles. This is a feature that arises directly from China's Schedule of Concessions, not from "the purchase or use by an enterprise of products of domestic origin …"

727. Consider, in this regard, two different sets of imports. To avoid any controversy over the multiple shipment issue, we will assume that both sets of imports arrive in what all parties would consider to be a "single shipment." One set of imports consists of auto parts and components that do not have the essential character of a motor vehicle. Accordingly, they are assessed at a duty rate of 10 per cent. The other set of imports consists of auto parts and components that *do* have the essential character of a motor vehicle, and they are therefore assessed at a duty rate of 25 per cent. The first set of imports will be assembled together with domestic parts and components to form a complete motor vehicle. However, the 10 per cent duty rate applicable to those parts and components is not an "advantage" that required "the purchase or use by an enterprise of products of domestic origin." The manufacturer obtained the 10 per cent duty rate because of what it imported, not because it purchased or used a certainty quantity of domestic parts in the final assembly of the motor vehicle. The applicable duty rate is a function of the proper classification of the imported parts, not the ratio between imported and domestic parts in the vehicle that the manufacturer finally assembles.[166]

728. This example illustrates that the purported "advantage" – the 10 per cent duty rate – is entirely endogenous to China's tariff schedule. It falls outside the scope of paragraph 1(a) of the Illustrative List because (1) it is not an internal charge or measure of the type that paragraph 1(a) defines; and (2) in any event, it is not contingent upon the purchase or use by the manufacturer of products of domestic origin.

729. The same conclusion applies in respect of Article XI and paragraph 2(a) of the Illustrative List. Paragraph 2(a) defines certain TRIMs that are inconsistent with Article XI of the GATT 1994. Article XI, by its terms, explicitly excludes ordinary customs duties as a type of prohibition or restriction on imports. The administration and enforcement of ordinary customs duties is therefore outside the scope of the types of charges and measures that paragraph 2 of the Illustrative List seeks to define. In addition, the challenged measures do not "restrict … the importation by an enterprise of products used in or related to its local production …", as set forth in paragraph 2(a) of the Illustrative

[166] If it were otherwise, the proper application of GIR 2(a) could *always* give rise to an improper "local content requirement" within the scope of paragraph 1(a) of the Illustrative List. This "advantage" would be conferred whenever the tariff rate for parts and components of an article is lower than the tariff rate for the complete article.

List. As Article XI itself makes clear, ordinary customs duties do not "restrict" imports. Rather, they are charges that a Member is entitled to collect in accordance with its rights and obligations under Article II of the GATT 1994. A contrary reading of paragraph 2(a) of the Illustrative List would mean that *all* customs duties constitute a violation of the *TRIMs Agreement*, to the extent that the article on which the duty is assessed is "used in or related to" the local production of the importer. There is simply no basis to conclude that the *TRIMs Agreement* was intended to prohibit ordinary customs duties on any article that is used in or related to local production – a category that encompasses a vast array of ordinary customs duties that WTO Members routinely assess in accordance with their Schedules of Concessions.

Comments by the European Communities on China's response to question 277

730. In spite of the Panel's request to specifically address the examples in paragraphs 1(a) and 2(a) of the Illustrative List of the *TRIMs Agreement*, China's response with regard to paragraph 2(a) is entirely – and concerning paragraph 1(a) largely – limited to a repetition of its well known "threshold" arguments which the European Communities has repeatedly refuted.[167]

731. In addition, China now argues for the first time – in spite of ample previous opportunities – that the advantage of the lower charges does not "require (…) the purchase or use by an enterprise of products of domestic origin" (see paragraph 1(a) of the Illustrative List) but that it is solely "contingent upon what the manufacturer *imports*". This is incorrect. As demonstrated in previous submissions[168], the imposition of charges under the Chinese measures depends on whether the Verification Center, after verifications, concludes that the imported automobile should be characterised as complete vehicles (Article 28 of Decree 125) which in turn depends on whether the imported parts were assembled into vehicles with an insufficient level of local content (see Article 57 of the Automotive Policy Order, Articles 21 and 22 of Decree 125 and Articles 13 to 24 of Announcement 4). In other words, the question of whether a manufacturer enjoys the advantage of the lower charges *depends on* how the auto parts are used after importation and, in particular, whether they are *subsequently assembled and manufactured in China into vehicles with an insufficient level of local content*.[169]

278. (*All parties*) In the light of the language of the General interpretative note to Annex 1A, would it be possible to consider that Article 2 of the TRIMs Agreement should prevail over the provisions of the GATT 1994?

Response of China

732. Yes, but as China noted at the second substantive meeting of the Panel, it does not consider that this dispute implicates any potential conflict between the *TRIMs Agreement* and the GATT 1994.

Response of the European Communities (WT/DS339)

733. The General interpretative note to Annex 1A provides:

[167] See response by the European Communities to Questions 85 and 103 from the Panel; second written submission of the European Communities, para. 20 to 23.

[168] See first written submission of the European Communities, para. 66; second written submission of the European Communities, paras. 51 to 55.

[169] See first written submission of the European Communities, para. 96 to 106.

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

734. The European Communities does not consider that there is in the present case a conflict between Article 2 of the *TRIMs Agreement* and the applicable provisions of the GATT 1994. The Chinese measures are inconsistent both with Article 2 of the TRIMs Agreement and with Article III, paragraphs 2, 4 and 5 of the GATT 1994. Therefore, there is no need for the *TRIMs Agreement* to prevail over the provisions of the GATT 1994.

735. Nevertheless, the European Communities recommends following the approach outlined by the Appellate Body in *EC – Bananas III* where it considered that the agreements more specific to the matter should be considered first.[170] Therefore, the Chinese measures should be first examined under Article 2 of the TRIMs Agreement and then under Article III of the GATT 1994. Thus, the finding that the Chinese measures fall within paragraph 1(a) of the Illustrative List annexed to the *TRIMs Agreement* and, thereby, "are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994" (see Article 2.2 of the *TRIMs Agreement*) informs their examination under Article III:4 of the GATT 1994.[171]

Response of the United States (WT/DS340)

736. As a theoretical matter, yes, this would be possible. As the United States has explained, however, the United States is not aware of any conflict in the context of this dispute between the TRIMs Agreement and the GATT 1994.

Response of Canada (WT/DS342)

737. To the extent a conflict between the *TRIMs Agreement* and the GATT occurs, the *TRIMs Agreement* should prevail in the light of General interpretative note to Annex 1A. However, no such conflict exists in this case.

738. China attempted to argue at the second hearing that a TRIM would not apply because it was solely a question of China enforcing its Schedule under Article II that was at issue and paragraph 1 of the Illustrative List only applies to internal measures. This suggestion is incorrect, as what is relevant is whether a TRIM imposes a local-content requirement. This can occur internally or at the border and the TRIM will be deemed inconsistent with Article III:4 of the GATT. Further, a finding of a violation of the *TRIMs Agreement* is not in conflict with China's defence because the measures do not actually enforce China's Schedule but rather *directly conflict* with it. To the extent there was an actual conflict between application of the *TRIMs Agreement* and China's so-called right to enforce its Schedule, the General interpretative note to Annex 1A makes it clear that the *TRIMs Agreement* would take precedent over such an Article II defence.

[170] Appellate Body Report, *EC – Bananas III*, paras 202-204.
[171] See second written submission of the European Communities, para. 61.

I. ARTICLE XI OF THE GATT 1994

279. In paragraph 20 of its second oral statement (see also the United States' response to Panel question No. 165), the United States states that China's measures could constitute a prohibited import restriction under Article XI of the GATT 1994.

(a) (*United States*) Could the United States please elaborate on this point, with specific reference to the requirements of Article XI of the GATT 1994 and the aspects of the measures the United States believes qualify as import restrictions.

Response of the United States (WT/DS340)

739. Article XI:1 of the GATT 1994 states, in relevant part:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

740. The range of measures that Members may not institute or maintain under Article XI:1 is quite broad. The provision encompasses all prohibitions or restrictions on importation other than those enumerated, regardless of whether a Member utilizes a quota, an import or export licensing regime, *or other measures* to effect the prohibition or restriction. Several previous panels have characterized the scope of this provision as "broad" and "comprehensive."[172]

741. The only caveat contained in Article XI:1 is that "duties, taxes or other charges" are exempted from coverage. While the measures do impose charges, to the extent that the charges may be considered to be imposed "on importation," the measures also constitute prohibitions or restrictions on the importation of auto parts.

742. In paragraph 115 of its rebuttal submission China argues that "the process of importation is complete, and goods have been imported, once all the customs formalities required in connection with the importation of these goods have been satisfied." In its response to Panel question No. 37, China states that a basic feature of the measures is "to defer the completion of customs formalities in respect of parts that are declared as parts of registered vehicle models until the auto manufacturer has imported and assembled all of the imported parts and components that it will use to assemble the vehicle model." China thus argues that the charges are imposed upon importation and that importation does not occur prior to the assembly of the parts into a motor vehicle. While the United

[172] See *India - Autos*, WT/DS/146/R, WT/DS/175/R, paras. 7.246 (noting that the term "other measures" is a "broad residual category" that is meant to suggest a broad scope of measures that could be subject to Article XI:1 disciplines) and 7.264 (noting that "the text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'"), *citing India – Quantitative Restrictions*, WT/DS90/R, para. 5.128; *Turkey –Textiles*, WT/DS34/R, para. 9.61 (noting that the title of Article XI – General Elimination of Quantitative Restrictions" – makes clear the general rule that Members shall not utilize quantitative restrictions against imports); and *India-Quantitative Restrictions*, para. 5.142 (noting that Article XI:1 is "'comprehensive' in that it prohibits import restrictions 'made effective through quotas, import or export licences *or other measures*'"). Other panels that have found Article XI:1's coverage to be "comprehensive" include: Panel Report, *Korea – Various Measures on Beef*, WT/DS 161/AB/R, WT/DS/169/AB/R, para. 749; *Japan – Agricultural Products I*, BISD 35S/163, para. 5.2.2.2; and *Japan – Semi-Conductors*, BSID 35S/116, para. 104.

States disagrees with this assertion, if accepted, this alleged deferral of "importation" would restrict imports in at least two ways:

743. First, there is a temporal restriction. A manufacturer is not allowed to import a part for assembly into a new vehicle until all parts of new vehicle are gathered for assembly. A manufacturer cannot import parts in separate shipments at different times, but must combine all the imported parts used in the same vehicle into a single importation.

744. Second, there is a qualitative restriction. A manufacturer is not allowed to import "parts" to be included in a vehicle if the collected imported parts in the finished vehicle will exceed the thresholds established in the measures. At that point, a manufacturer can only import "vehicles." For example, a manufacturer may wish to import special premium tires to be included as an optional feature on a particular model. If the engine, chassis, and body were imported, the measures would deem the imported parts in that vehicle to "fulfill the characteristics of a whole vehicle." At that point the auto manufacturer in China would be prohibited from importing tires for the vehicle. Any tire included in the vehicle would have to be considered a feature of a whole vehicle and imported as part of the "vehicle." Thus, the manufacturer would be prohibited from importing tires in a separate shipment, but would instead be required to collect all parts into a single importation which China would then consider a complete vehicle.

745. The United States is not arguing that the measures are inconsistent with Article XI as part of its case in chief; this is an argument in the alternative. Indeed that United States maintains that parts are imported at the time they enter the territory of China and that the measures, rather than delaying importation, actually impose internal charges on imported parts in breach of Article III of the GATT 1994. The United States is asserting, in the alternative, that *if* China were correct that the measures prohibited importation until the time of assembly, the measures would be inconsistent with Article XI.

(b) (*China*) Does China agree with the United States? Please comment on the United States' arguments above.

Response of China

746. The US assertion in paragraph 20 of its second oral statement is premised upon multiple mischaracterizations of China's arguments and the manner in which the challenged measures operate. China has never argued that "no parts are to be considered 'imported' until after manufacturing." Nor has it described the challenged measures as operating on this basis. As China has explained most recently in response to question 199 above, the challenged measures establish a customs process to ensure the correct classification of parts and components that have the essential character of a motor vehicle. This classification determination is based on the prior evaluation of the vehicle model and the resulting declaration that the manufacturer provides at the time the parts and components enter the customs territory of China. The measures do not "prohibit the importation of parts until after the completion of a manufacturing operation," or prohibit the importation of auto parts in any other respect. Manufacturers are free to enter auto parts and components into China. The customs procedure that Decree 125 establishes merely assures the proper classification and collection of duties on parts and components that have the essential character of a motor vehicle. Article XI makes clear that the collection of ordinary customs duties is not a prohibition or restriction on imports that is within the scope of the provision.

Comments by the European Communities on China's response to question 279(b)

747. The European Communities has addressed the mischaracterization of the Chinese measures (e.g. "customs process", "determination is based on the prior evaluation (…) and the declaration") apparent in China's response to this question in previous submissions.[173] China's assertion that it "has never argued that 'no parts are to be considered 'imported' until after manufacturing'. Nor has it described the challenged measures as operating on this basis" is directly contradicted by its response to question 204. There, China stated that "the measures at issue in the present dispute (…) do not impose duties on parts and components after they have entered free circulation in China". This implies that in China's view the parts are not yet in free circulation when charges are imposed. As charges are imposed after manufacture (see Article 28 of Decree 125), this can only mean that parts are not in free circulation or, in other words, imported when manufacture takes place.

J. ARTICLE XX(D) OF THE GATT 1994

280. (*Complainants*) Paragraph (d) of Article XX refers to, *inter alia*, "laws and regulations that are not in themselves inconsistent with the provisions of the GATT 1994". China argues that the measures secure compliance with China's tariff provisions for motor vehicles, which are incorporated in the GATT and are therefore not inconsistent with the GATT provisions. Do the complainants agree with China's view? If not, why?

Response of the European Communities (WT/DS339)

748. The European Communities does not agree with China's view that its measures secure compliance with China's Schedule of Concessions. It is irrelevant that China's tariff provisions reproduce China's Schedule and are not as such GATT-inconsistent. China has not demonstrated that the measures are "necessary to secure compliance with" its Schedule as required under Article XX(d) of the GATT 1994. The European Communities has already presented extensive arguments in this regard[174] and only provides a succinct summary of these arguments in response to this question.

749. First, the Chinese measures do not intend to secure compliance with China's schedule of concessions, but actually aim at fostering the development of the Chinese auto parts industry. Secondly, the Chinese measures are not suitable to secure compliance with China's schedule of concessions. As demonstrated in the alternative Article II claim,[175] the measures impose duties which are at variance with China's tariff schedule. Thirdly, China has not demonstrated that there is in reality a problem of tariff evasion that needs to be addressed. Finally and even if there was a problem of tariff evasion, China has failed to consider any less burdensome means to secure compliance with its tariff schedule.

Response of the United States (WT/DS340)

750. The United States does not agree. As the United States explained in its opening statement at the second meeting, China uses this type of language to express two very different positions, involving two entirely different factual contexts. A proper analysis of China's arguments requires that these two different positions presented by China be disentangled.

---

[173] See in particular second written submission of the European Communities, paras. 50 to 56.
[174] See second written submission of the European Communities, para. 141 to 146.
[175] See first written submission of the European Communities, para. 207 to 281; second written submission of the European Communities, para. 67 to 135.

751. First, China uses this language of "**securing compliance with China's tariff provisions for motor vehicles"** to mean that under its domestic tariff schedule, China is to charge a whole-vehicle rate of duty on any imported part, so long as that part is used to manufacture within China a vehicle with a foreign content that exceeds the thresholds under China's measures. As the United States has explained, there is no possible interpretation of China's WTO obligations that would allow for China to impose a 25 per cent duty on bulk shipments of parts imported for manufacturing purposes. Thus, under this formulation of China's position, there is no "law or regulation" identified by China "that is not inconsistent" with the provisions of the GATT 1994.

752. Second, China uses the same language about "**securing compliance with China's tariff provisions for motor vehicles"** to mean that China must be able to address certain limited, though still hypothetical, examples, such as the case of a CKD split into two separate shipments. China, however, has failed to show a single instance where any importer ever engaged in the specific practices identified by China. Moreover, China's asserted rationale does not match the scope of China's measures. To the contrary, China's measures sweep broadly to cover all imports of bulk parts for manufacturing purposes, not just instances of CKDs split into two separate shipments. Thus, leaving aside whether or not China's may (consistent with its WTO obligations) stop the hypothetical practice of splitting CKD kits into two separate boxes, the measures China has actually adopted are not necessary to secure compliance with its provisions for motor vehicles because they are drastically broader in scope than measures intended to stop such types of "evasion" alleged by China.

753. Finally, under Article 93 of the Working Party Report, China is required to impose a maximum of a 10 per cent rate of duty on CKDs/SKDs. Since China's measures – under China's own theories of the application of GIR 2(a) – classify imported manufacturing parts as CKDs/SKDs, China's measures result in a tariff treatment that is inconsistent with China's WTO obligations (as contained in the Working Party Report).

Response of Canada (WT/DS342)

754. The measures do *not* secure compliance with China's tariff provisions for motor vehicles. As set out in paragraphs 87-90 of Canada's second written submission, the purpose of the measures is clear, namely to provide protection and support to the domestic auto parts industry. Second, as the EC pointed out in its second oral statement at paragraph 36, the measures are not designed to enforce China's Schedule since, on their face, they *conflict* with it by imposing an additional 15% charge on foreign auto parts. This additional charge is not listed in China's Schedule and therefore cannot be applied.

281. (*All parties*) Which measure should be considered as "the law or regulation" falling within the meaning of paragraph (d): China's tariff provisions for motor vehicles *as such* or China's tariff provisions for motor vehicles as *interpreted* by China allegedly according to GIR 2(a)?

Response of China

755. China does not perceive a distinction between its tariff provisions for motor vehicles "as such" and its tariff provisions for motor vehicles as interpreted in accordance with the rules of the Harmonized System. As the Appellate Body has found in *EC – Computer Equipment* and *EC – Chicken Cuts*, tariff headings are interpreted in accordance with the interpretive rules of the Harmonized System. The term "motor vehicles" in China's tariff provisions must be understood in the context of GIR 2(a) and its rules for distinguishing between an article and the parts and components of that article.

756. In addition, as China discussed in paragraph 168 of its second written submission, the interpretive relationship between motor vehicles and parts of motor vehicles would arise even if GIR 2(a) did not exist. The relationship between parts and wholes is intrinsic to any set of tariff provisions that has separate headings for an article and its constituent parts; customs authorities must have some basis to determine where one set of tariff provisions ends and the other begins. Thus, the question of tariff interpretation arises no matter what, and customs authorities must have some basis to resolve this question of interpretation.

Response of the European Communities (WT/DS339)

757. China provided the response to this question in its first written submission when it alleged that "the challenged measures implement and enforce the provisions of China's tariff schedule relating to imports of 'motor vehicles'" (emphasis added).[176] This refers to the Schedule as such. China's erroneous interpretation of its Schedule was developed by China ex post for the purposes of this dispute and is not part of its Schedule. In the context of China's Article XX(d) defence, it is for the Panel to interpret China's Schedule and not for China.

Response of the United States (WT/DS340)

758. As the party asserting an affirmative defense, China has the burden of explaining how its measures purportedly fit within the scope of Article XX(d). China has not been clear on its theory regarding the supposed application of Article XX(d). As set out in the United States response to Question 280, the United States submits that regardless of how China would formulate its purported defense, China's measures do not fall within the scope of Article XX(d).

Response of Canada (WT/DS342)

759. Canada considers that the alleged GATT-consistent "law or regulation" is the whole of China's Schedule as implemented under Chinese law, and not one particular tariff line. The GATT-consistent law or regulation consists solely of the Schedule and not secondary considerations such as the GIRs under the Harmonized System, since they are not directly incorporated into the Schedule. The GIRs are relevant as part of the Harmonized System in interpreting the proper classification of a good under a Member's Schedule. However, that context requires an application of the Harmonized System as a whole, including GIR 1 and appropriate Explanatory Notes (such as for 87.06). Canada also directs the Panel to its responses to Questions 187 and 210, and Section II.C.1 of its second written submission.

Comments by the European Communities on China's response to question 281

760. China's response attempts to blur the line between the "law or regulation" which it allegedly seeks to secure compliance with, i.e. its tariff schedule provisions for vehicles, and its erroneous interpretation thereof. As set out in the EC response to this question, it is for the Panel, and not for China, to assess under Article XX(d) of the GATT 1994 *inter alia* whether (a) the Chinese tariff provisions are consistent with the GATT 1994 and (b) the measures are necessary to secure compliance therewith. China's interpretation of its "law or regulation", on the other hand, is irrelevant in this context.[177]

[176] See first written submission of China, para. 203.

[177] China's response is all the more surprising since China emphasises in response to question 290 that the defence under Article XX(d) cannot depend on evaluations inside the domestic legal system of the WTO

282. (*China*) In paragraph 145 of its second written submission, the European Communities submits that China's arguments under Article XX(d) is "inherently contradictory" when it comes to the attempt of justifying an infringement of Article II of the GATT 1994 because, in that case, the measures "apparently do not enforce but deviate from China's Schedule." Does China agree with the European Communities? If not, please explain how the measures can be justified under Article XX(d) if the Panel were to find them inconsistent with Article II. Please also explain whether, and if so, how the Panel's analysis of China's defence under Article XX(d) in respect of an Article II violation should be different from that in respect of an Article III violation.

Response of China

761. In respect of Article II, the Panel could find, for example, that there is uncertainty within the Harmonized System concerning the circumstances under which customs authorities are allowed to classify multiple shipments of parts and components as having the essential character of the complete article. Based on such a finding, the Panel might conclude that the challenged measures are not in accord with China's rights and obligations under Article II, as they do not have a clear *affirmative* basis within the rules of the Harmonized System.

762. For the reasons that China set forth in paragraphs 42 to 45 of its second oral statement, China considers that a finding of uncertainty within the rules of Harmonized System is a circumstance in which the doctrine of *in dubio mitius* would apply, and should lead to the conclusion that China retains its sovereign authority to define and enforce the boundaries between complete motor vehicles and parts of motor vehicles, and between the substance of what an importer imports and the form in which it does so.

763. However, another way of viewing the presence of a known and identifiable ambiguity within the rules of the Harmonized System, and within international customs practice generally, is that China is entitled to rely upon the general exception in Article XX(d) to adopt measures that are necessary to secure compliance with its tariff provisions for motor vehicles, and to ensure that those provisions have meaningful effect. China's tariff provisions for motor vehicles reflect the tariff bindings set forth in its Schedule of Concessions, and they are therefore not inconsistent with the GATT 1994. To the extent that the rules of the Harmonized System do not provide an unambiguous legal basis for China to give effect to those provisions, this authority could be found in Article XX(d). The rules of the Harmonized System may not clearly provide for every circumstance in which customs authorities need to interpret and enforce their tariff schedules to ensure that they are undermined through the manner in which importers structure and document their imports. In these circumstances, it is consistent with the purpose of Article XX(d) to ensure that Members are nonetheless able to adopt measures that are necessary to secure compliance with their tariff provisions.

764. The Article XX(d) analysis would be different in respect of a finding of a violation of Article III. The Panel might find, for example, that the challenged measures collect internal charges in violation of Article III based on its understanding of when goods are considered to be "imported" for the purpose of Article III. The Panel might also find, for example, that the challenged measures impose procedures that constitute internal measures, again based on its understanding of the scope of Article III in relation to the scope of Article II. In these circumstances, the charges and measures could be justified under Article XX(d) as charges and measures that are necessary to secure

---

Member concerned: "It would not be consistent with the object and purpose of the GATT to find that the availability of a defence under Article XX(d) is contingent upon what a Member considers to be illegal under its national laws – a consideration that will necessarily differ from one Member country to another."

compliance with a valid interpretation of China's tariff provisions for motor vehicles, i.e., an interpretation that encompasses parts and components in multiple shipments that have the essential character of a motor vehicle. That is, the Panel could find that China's interpretation of its tariff provisions is not inconsistent with the interpretive rules of the Harmonized System, and is not otherwise inconsistent with the meaning of the relevant terms in China's tariff schedule, but that China has adopted impermissible "internal" charges and measures as a means of securing compliance with that interpretation.

765. While China would not agree with the finding of violation under Article III, it would seem to be exactly the circumstance in which Article XX(d) would apply. The reference to customs enforcement in Article XX(d) presupposes that Members may need to take actions that are inconsistent with its GATT obligations (and thus requiring the invocation of a general exception), but that are otherwise necessary to secure compliance with its customs laws. The adoption of charges and measures that violate the disciplines of Article III, but that are necessary to secure compliance with a customs measure that the Member is *allowed* to impose in accordance with its Article II commitments, would seem to be the paradigmatic case in which Article XX(d) would apply. If Article XX(d) did not apply in this circumstance, it is hard to see when it would ever apply.

766. As China has explained throughout this proceeding, the purpose of Decree 125 is to ensure that its tariff provisions for motor vehicles apply without regard to the manner in which the manufacturer chooses to structure and documents its imports of parts and components that have the essential character of a motor vehicle. Decree 125 ensures that substance prevails over form in the assessment of duties. For the reasons that China has explained, China believes that Decree 125 falls within the scope of China's rights and obligations under Article II. However, if the Panel were to find that one or more aspects of the measure constitutes an impermissible measure or charge within the scope of Article III, China considers that any such internal measure or charge is justified under Article XX(d) to secure compliance with duties that China is allowed to collect by reason of the importation of parts and components that have the essential character of a motor vehicle.

Comments by the European Communities on China's response to question 282

767. In its response, China does not manage to escape the inherent contradiction in its argument which lies in the fact that measures providing for ordinary customs duties in excess of the Schedule cannot be necessary to secure compliance with the Schedule. Instead, China tries to hide the contradiction by replacing the clear term "infringement of Article II of the GATT 1994" with the evasive label "ambiguity within the rules of the Harmonized System". Such labeling does not change the reality of China's contradictory Article XX defence.

768. With regard to the alleged justification of an Article III violation, the European Communities notes that China has still not demonstrated that the measures are necessary to secure compliance with its tariff schedule provisions for vehicles. Instead, China formulates its hope that "it would seem to be exactly the circumstance in which Article XX(d) would apply" or "[i]f Article XX(d) did not apply in this circumstance, it is hard to see when it would ever apply". Such wishful thinking, however, cannot replace a proper defense under Article XX(d).

283. (*China*) China submits in its second written submission that it invokes Article XX(d) in case the Panel were to find that, *inter alia*, (1) China needs a separate basis within the WTO law to enforce its tariff provisions for motor vehicles; and (2) the rules of the Harmonized System do not provide a basis for China to give meaningful effect to the higher duty rates for motor vehicles. Could China please explain in detail what China is respectively referring to by these two scenarios.

Response of China

769. Several of the Panel's questions following the first substantive meeting of the Panel asked the parties to discuss the legal basis within the WTO agreements for Members to adopt measures to prevent the evasion of ordinary customs duties. As discussed in paragraphs 162 and 163 of China's second written submission, and the answers to Panel questions cited therein, China considers that the prevention of tariff evasion is a question of ensuring the proper classification of imported goods, including the proper classification of goods under circumstances in which the importer has sought to structure and document its imports so as to evade a specific classification result. For the reasons explained therein, China considers that these are issues of customs administration that can be resolved within the rules of the Harmonized System.

770. Because the Harmonized System provides context for the interpretation of a Member's Schedule of Concessions, the Harmonized System is, in China's view, the basis in WTO law for the resolution of these types of issues. In paragraph 164 of its second written submission, China referred to the event in which the Panel nonetheless considered that "China needs a separate basis within WTO law to enforce its tariff provisions for motor vehicles." By "separate basis", China was referring to a basis in WTO law *other than* the rules of the Harmonized System. In referring to this circumstance, China meant to address the possibility that, for whatever reason, the Panel would find that the Harmonized System does *not* provide a basis in WTO law for China to adopt measures to enforce its tariff provisions for motor vehicles. This is one of the circumstances in which China considers that it could properly rely upon Article XX(d) to justify the challenged measures.

771. The second circumstance to which China referred, in which the rules of the Harmonized System do not provide a basis for China to give meaningful effect to its tariff provisions for motor vehicles, is the circumstance discussed in response to question 282 above. That is, the Panel could find that there is ambiguity within the Harmonized System concerning the circumstances under which customs authorities can classify multiple shipments of parts and components as having the essential character of the complete article, and conclude, for this reason, that the Harmonized System does not provide a clear legal basis for the measures. For the reasons discussed in response to question 282, this is another circumstance in which China considers that it could properly rely upon Article XX(d) to justify the challenged measures.

Comments by the European Communities on China's response to question 283

772. As set out in our comments on the previous reply, China errs when it argues that Article XX(d) of the GATT 1994 provides "a basis in WTO law *other than* the rules of the Harmonized System". Logically, a measure infringing Article II of the GATT 1994 or "the rules of the Harmonized System", as China now puts it, cannot be necessary to secure compliance with China's Schedule.

284. (*Canada*) Canada submits that "Canada accepts that Article XX(d), in principle, could be used to justify internal charges necessary to enforce customs measures." (Canada's response to Panel question No. 82) Please clarify whether "customs measures" in its answer refers to China's tariff Schedule.

Response of Canada (WT/DS342)

773. Customs measures could include China's tariff Schedule *in principle*, since Article XX(d) does not preclude such a defence under Article III. Indeed, that is essentially what was at issue in the *EEC – Parts and Components* case. A Member could *in principle* attempt to justify such internal

charges as necessary to enforce customs measures. Canada does *not* suggest that such a defence would necessarily be successful simply by virtue of the relationship of the defence to a Member's Schedule.

774. However, *in reality*, if the Panel were to find that China's measures violate Article III, then its Article XX(d) must necessarily fail. This is because, on the facts of this particular case, the purpose of the additional charge is to protect China's domestic auto industry and not to enforce its Schedule. Moreover, as explained at paragraph 79 of Canada's second written submission and in response to Question 84, China cannot use its Schedule as a defence to violate its other obligations under the GATT.

285. (*Canada*) Please elaborate on your position that China cannot use its Schedule to shield a violation of Article III or the TRIMs Agreement unless specific provision is made for such departure in the WTO Agreement itself.

Response of Canada (WT/DS342)

775. Canada emphasizes that China has no conditions in its Schedule that would allow it to classify auto parts based on their end-use. Consequently, it has no justification to derogate from applying the tariff rate for auto parts listed in its Schedule. Even if, theoretically, China were allowed to read into its Schedule the ability to classify motor vehicles based on end-use, the Appellate Body has made it clear in *EC – Export Subsidies on Sugar* that a Member is not permitted to reduce its obligations under other provisions of the GATT by qualifying them under Article II:1(b) or any other provision.[178] China is therefore barred in the present dispute from attempting to read into its Schedule the condition that it can classify auto parts based on end-use, as this would derogate from its Article III obligations.

286. (*All parties*) If the Panel were to find China's measures to be inconsistent with the provisions of GATT Articles III, could the parties explain whether, and, if so, to what extent the Panel's analysis under China's Article XX(d) defence, must entail a similar type of analysis as that undertaken in respect of Article II, in particular concerning the interpretation of China's tariff Schedule.

Response of China

776. Under Article XX(d), a measure relating to customs enforcement must by necessary to secure compliance with laws or regulations that are not inconsistent with the GATT. In the event that the Panel were to find that the challenged measures are inconsistent with the provisions of Article III, the Panel would need to evaluate, in respect of China's defence under Article XX(d), whether the challenged measures secure compliance with an interpretation of China's tariff provisions for motor vehicles that is consistent with its rights and obligations under the GATT. This is the circumstance that China discusses beginning in the fourth paragraph of its response to question 282 above.

Response of the European Communities (WT/DS339)

777. In the view of the European Communities, when the Panel analyses China's alleged justification under Article XX(d), it needs to examine whether the Chinese measures are "necessary to secure compliance with" China's schedule of concessions. This entails a similar type of analysis as under Article II because measures imposing duties that are inconsistent with China's Schedule cannot

[178] *EC – Export Subsidies on Sugar*, Appellate Body Report, at para. 219.

be considered to be suitable and, thus, necessary to secure compliance therewith. This analysis resembles the one under Article II to the extent that the Panel would need to examine whether the charges imposed under the measures are in excess of those provided for in the Schedule. In contrast to the analysis under Article II, this Article XX(d) analysis would however not depend on a finding that the charges under the Chinese measures are ordinary customs duties.

Response of the United States (WT/DS340)

778. As a theoretical matter, it may be possible to justify under Article XX(d) a measure adopted to enforce an ordinary customs duty consistent with Article II that is in breach of Article III of the GATT 1994. (Article XX(d) does mention "customs enforcement.") However, in the context of this case, the United States does not understand, and China has not met its burden of showing, why it would be necessary to adopt a measure in breach of Article III in order for China to enforce any legitimate customs measure, including the collection of ordinary customs duties on autos or auto parts. Put another way, China has not explained why – if it is in fact applying an ordinary customs duty – China cannot simply impose that rate of duty on auto parts based on their condition at the time they are imported into the territory of China.

Response of Canada (WT/DS342)

779. As Canada has emphasized at paragraph 23 of its First Oral Statement, China's Article II argument is really nothing more than an Article XX(d) defence to its Article III violation. Article II is itself not a "defence" – it imposes obligations on Members, which are cumulative to other obligations in the *WTO Agreement*. The assessment of a defence under Article XX(d) is therefore different than an assessment of whether China is imposing ordinary customs duties as permitted by Article II:1(b), first sentence, in two ways. First, China bears the burden of proof to justify an Article XX(d) defence. Second, there is a specific legal test to be applied under Article XX(d) that does not apply where a charge is properly classified under Article II. The relevant question under Article II would be whether China is applying ordinary customs duties in excess of those set out in its Schedule for auto parts, while an Article XX(d) defence instead involves an examination of whether the measures are necessary to secure compliance with China's Schedule. The latter does not require an assessment of the validity of China's interpretation of auto parts and motor vehicles under its Schedule, but only whether the measures ensure compliance with that Schedule, where the Schedule is properly applied.

780. With respect to Article XX(d), Canada refers the Panel to Section III of its second written submission. Canada maintains that this is the sole defence that China may invoke, as the measures do not impose ordinary customs duties.

Comments by the European Communities on China's response to question 286

781. China's response that "the Panel would need to evaluate, (…) whether the challenged measures secure compliance with *an interpretation of* China's tariff provisions for motor vehicles" (emphasis added) is based on the same misunderstanding which the European Communities already identified in its above comment on China's response to question 281. Under Article XX(d), the infringing measure must be necessary to secure compliance with a law or regulation, and not with an erroneous interpretation thereof.

287. (*China*) With regard to China's arguments under Article XX(d) in respect of Article 29 of Decree 125, could China confirm whether it is its position that the measures at issue (i.e. Policy Order No. 8, Decree 125, and Announcement 4) are "laws or regulations that are not themselves inconsistent with the GATT 1994 " within the meaning of Article XX(d). If so, does

an analysis of this element under Article XX(d) in relation to Article 29 of Decree 125 depend on whether China's measures themselves can be found consistent with the GATT 1994?

Response of China

782. The measures secure compliance with China's tariff schedule, which incorporates China's Schedule of Concessions by reference.[179] This is the law or regulation that is not inconsistent with the GATT 1994. As China discussed in paragraphs 185 to 187 of its second written submission, Article 29 of Decree 125 is justified under Article XX(d) because it is necessary to ensure that China's tariff provisions for motor vehicles are not subject to evasion by manufacturers who are able to arrange with third-party suppliers to import parts and components that have the essential character of a motor vehicle.

Comments by the European Communities on China's response to question 287

783. The infringement of Article III of the GATT 1994 through Article 29 of Decree 125 cannot be justified on the basis of Article XX(d) of the GATT 1994. Contrary to China's response, Article 29 of Decree 125 is not necessary to prevent any evasion of China's vehicle tariffs through collusion between third-party parts suppliers and vehicle manufacturers. China has neither substantiated tariff evasion, nor collusion or that any of these would necessitate a provision like Article 29 of Decree 125.[180] As set out above, the measures do not enforce the 25% tariff rate for complete vehicles.

288. (*China*) In its defence of "Article 29 Decree 125 measures" under Article XX(d), China appears to take into account *intentional* circumvention of the measure by the manufacturers, whereas "intent" does not seem to be considered relevant to justify other aspects of the measures at issue under Article XX(d) and for its general definition of circumvention. Could China elaborate on this argument and clarify the relevance of the importers' intent.

Response of China

784. China does not consider that intention is relevant in either circumstance. The purpose of the challenged measures is to ensure that parts and components that have the essential character of a motor vehicle receive the same tariff classification, and are subject to the same rate of duty, without regard to the manner in which the auto manufacturer structures and documents its imports. One respect in which the auto manufacturer may structure its importation of parts and components is to arrange to purchase imported parts and components from a third-party supplier in China. This is the specific circumstance that Article 29 addresses.

Comments by the European Communities on China's response to question 288

785. The question whether the importers' intentions are relevant for this case has been the subject of ever changing positions by China (see e.g. the second written submission of the European Communities, paragraphs 125 to 129). It appears that China has now come to the conclusion that intention is not relevant at all although in its first written submission the "demonstrated and declared intention" was the cornerstone of the anti-circumvention theory (see China's first written submission, paragraphs 33, 153, 155 and 162).

[179] See China first written submission at para. 203.

[180] See, for a discussion of China's Article XX(d) defence in general, second written submission of the European Communities, paras. 143 to 146.

289. (*Canada*) Canada submits, *inter alia*, in relation to the requirements of the chapeau of Article XX(d) that there is no question that the application of the measures adversely affects the conditions of competition between imported and domestic parts (paragraph 103 of Canada's second written submission). Please elaborate in your argument on the violation of the *chapeau* of Article XX, in light of the Appellate Body's finding in *US – Gasoline* that "the provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of substantive rules has been determined to have occurred." In other words, if the violation of China's measures for which Article XX(d) is invoked is in relation to Article III, would the question of discrimination between imported and domestic parts not already have been determined?

Response of Canada (WT/DS342)

786. Canada agrees with the Panel's statement. Canada was considering the third strand of discrimination under the *chapeau*, namely whether the measures constitute a disguised restriction on trade. The statement referring to respecting the application of the measures was simply to supplement the main point of the paragraph, namely that "as set out in paragraph 88, the primary purpose of the restriction is to afford protection to the domestic automotive industry from imported competition". Thus, reference to the application of the measures shows that, in the context of Article XX, both the design and application of the measures, when taken individually or as a whole, illustrate that they are nothing more than a disguised restriction on trade. This is important, since the Appellate Body has found that the prevention of abuse of the Article XX exceptions is a fundamental purpose of assessment under the *chapeau*. For this reason, if the measures were considered provisionally justifiable under Article XX(d), they fail to meet the *chapeau* requirements because they are an abuse of the Article XX(d) exception.

290. (*China*) The Panel in *EEC – Parts and Components* found that the examples of laws and regulations identified in Article XX(d) would seem to suggest that Article XX(d) only covers measures designed to prevent actions that would be *illegal* under the laws or regulations. In light of this statement, what are the *illegal* actions under the laws or regulations that China's measures are designed to prevent? Please explain in detail.

Response of China

787. China does not consider that there is anything in the ordinary meaning of Article XX, or Article XX(d) in particular, to support the conclusion that the actions that a measure seeks to prevent must be "illegal." Article XX(d) makes no reference to "illegality." Moreover, the "illegality" of a particular action is defined under municipal law. It would not be consistent with the object and purpose of the GATT to find that the availability of a defence under Article XX(d) is contingent upon what a Member considers to be illegal under its national laws – a consideration that will necessarily differ from one Member country to another.

788. The specific term to which Article XX(d) refers is "customs enforcement." Members may enforce their customs laws and regulations in ways that do not necessarily involve a prior finding of illegal action by the importer. For example, a Member may require the submission of certain documentation to ensure the correct classification of an import entry. While it may be illegal under national law to fail to submit this documentation, or to submit this documentation with material inaccuracies or misrepresentations, Article XX(d) does not require that any such illegality actually occur as a precondition to the adoption of the documentation requirements. Likewise, a Member may impose a particular customs control procedure to ensure the proper classification of an import entry, to ensure compliance with a specific condition of entry, or for any other valid customs purpose. To the extent that these types of measures have elements that are inconsistent with a Member's other

GATT commitments (for example, because they are inconsistent with the requirements of Article III), a Member may seek to justify these elements under Article XX(d) without regard to whether any illegality has occurred under its national laws or regulations. The question, in each instance, is whether the measure is related to customs enforcement.

789. With that said, it is illegal under Chinese law to fail to pay the customs duties that apply to imported articles. China has previously described the relevant Chinese laws and regulations, and provided relevant excerpts, in response to question 30 from the Panel. The challenged measures secure compliance with these laws and regulations by ensuring that importers correctly declare the entry of parts and components that have the essential character of a motor vehicle and pay the corresponding duties, whether the parts and components enter the customs territory of China in one shipment or in multiple shipments.

Comments by the European Communities on China's response to question 290

790. Contrary to China's response, the European Communities considers that the Chinese measures fail to satisfy the qualification "to secure compliance with laws or regulations" as interpreted by the Panel in *EEC – Parts and Components* (at paras. 5.15 to 5.18). The Panel required that measures *prevent actions inconsistent with the obligations set out in laws or regulations* or, in other words, are *related to the enforcement of obligations under laws or regulations*. According to China, the "laws or regulations" in question are the tariff provisions for vehicles contained in its Schedule. The measures, however, do not prevent behaviour inconsistent with the Chinese Schedule. They do not enforce the Schedule, but are on the contrary inconsistent with the Schedule by imposing charges that deviate from the tariffs contained in the Schedule.[181]

291. (*China*) With respect to China's Article XX(d) defence, China stated at the second substantive meeting that the illegal actions China's measures are designed to prevent was the improper declaration of goods being imported.

(a) Is China arguing that if an auto manufacturer imports a shipment of brakes and declares them as such and if those brakes are meant to be included in a registered vehicle model that meets the thresholds for a "deemed whole vehicle" in China's measures, that auto manufacturer is committing customs fraud?

Response of China

791. If a manufacturer were to import a shipment of brakes for a registered vehicle model, Article 15 of Decree 125 would require the manufacturer to note this status on the import declaration form. Failure to complete the declaration in accordance with Article 15 would constitute a violation of Decree 125. As set forth in Article 36 of Decree 125, a violation of the rules set forth in Decree 125 may constitute an act of smuggling or a violation of customs supervision rules under the *Customs Law* and the *Implementation Rules on Customs Administrative Penalties*. China has previously discussed these laws and regulations in response to question 30 from the panel. As discussed in response to that question, the exact nature of the violation and the range of potential penalties would depend upon the amount of the customs duties that were evaded through the improper completion of the customs declaration form.

(b) Can China clarify whether it believes that if an auto parts supplier imports a shipment of brakes and declares them as such and if those brakes are later sold to an auto manufacturer

[181] See second written submission of the European Communities, para.146.

who includes it in a registered vehicle model that meets the thresholds for a "deemed whole vehicle" in China's measures, that auto manufacturer is committing customs fraud?

Response of China

792. If the manufacturer purchases the parts from the supplier for a registered vehicle model, the manufacturer is required under Article 29 to pay the difference between any duty already collected in respect of those parts and the duty applicable to parts and components that have the essential character of a motor vehicle. This is a question of ensuring the correct classification of these parts and components. For the reasons discussed in response to question 290, China does not consider that Article XX(d) can only be invoked in respect of what a Member might classify as "customs fraud."

Comments by the European Communities on China's response to question 291

793. In the view of the European Communities, China's responses reveal the absurdity of the measures: Vehicle manufacturers who properly declare auto parts for what they are, i.e. on the basis of "the 'objective characteristics' of the products in question when presented for classification at the border" (see the Appellate Body in *EC – Chicken Cuts*, para. 246), can violate the measures and, thus, commit an act of smuggling or a violation of customs supervision rules under Article 36 of Decree 125. The same goes for vehicle manufacturers who do not pay certain charges if they purchase parts on the Chinese internal market from suppliers that previously imported, declared and cleared them. measures which criminalize behaviour that is consistent with the tariff provisions in the Schedule cannot be "necessary to secure compliance" therewith.

292. (*All parties*) Is the object and purpose of the measure relevant under the analysis of paragraph (d) of Article XX? If so, under what element of analysis under paragraph (d)?

Response of China

794. China is uncertain as to what the Panel means by the "object and purpose of the measure." In China's view, the relevant consideration under Article XX(d) is whether the measure is one that is necessary to secure compliance with customs laws. This can be discerned by the nature and operation of the measure at issue. In this respect, the "object and purpose of the measure" is a relevant consideration under Article XX(d).

Response of the European Communities (WT/DS339)

795. Under Article XX(d) of the GATT 1994, a measure can be provisionally justified if it is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement".

796. The Appellate Body in *Korea – Various Measures on Beef* held that Article XX(d) sets out a two-pronged test:

> For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance. A Member who invokes

> Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.[182]

797. Under the first element of this test, China needs to demonstrate that its measures are "designed to secure compliance" with its Schedule of concessions. As demonstrated in greater detail in previous submissions, the Chinese measures are not designed to secure compliance with China's schedule of concessions, but actually aim at fostering the development of the Chinese auto parts industry.[183]

Response of the United States (WT/DS340)

798. The Appellate Body has found that an examination of a measure under Article XX(d) involves a two-step analysis:

> For a measure ... to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance.[184]

799. In examining whether China's measures are in fact "designed to secure compliance" with some GATT-consistent measure, the Panel should look at all facts and circumstances. The United States notes that laws are often adopted for more than one reason,[185] and that statements of intent contained in legislation may not be determinative. Nonetheless, the statements of intent contained in China's laws are relevant and should be considered by the Panel. In particular, the Panel should take note that China's measures state that they are intended to promote the development of China's domestic auto parts industry, and the fact that China's measures make no mention of any goal of preventing "tariff evasion" or "tariff circumvention."

Response of Canada (WT/DS342)

800. The object and purpose of the measures is relevant to assessing them under Article XX(d) in three respects. First, the object and purpose is relevant under the first part of the provisional justification test, namely whether the measures are "designed to secure compliance" with a GATT-consistent measure. As explained at paragraphs 87-90 of Canada's second written submission and Question 280, above, the object and purpose of the measures is not to secure compliance with China's Schedule as, on their face, their fundamental thrust is to offer protection and support to the domestic automotive industry.

801. Second, the object and purpose may colour the assessment of whether the measures are "necessary" under the second part of the provisional justification test, as the measures could not be said to be necessary for a specific purpose (i.e., enforcing a Schedule), if, in fact, the predominant purpose of the measures was found to be different (i.e., protectionist in nature). In this dispute,

---

[182] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[183] See second written submission of the European Communities, para. 144.
[184] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[185] The United States notes that "object and purpose" has a specific meaning under the Vienna Convention with respect to the interpretation of international agreements, and that it may create confusion to refer to the "object and purpose" of domestic measures adopted by individual countries.

"necessary" must be applied in the strictest sense given the protectionist object and purpose of the measures.

802. Last, an assessment of the object and purpose of the measures is relevant to considering whether the measures are a disguised restriction on trade under the *chapeau*. While *application*, not *design* is the relevant consideration under the *chapeau*, it would be difficult to assess whether a measure is a "disguised restriction on trade" without taking into consideration its object and purpose. Again, in this dispute, the measures on their face reveal that they are nothing more than a disguised restriction on trade.

293. (*United States and European Communities*) China submits that the measures at issue serve to protect important interests and values such as the prevention of tariff circumvention, the collection of tax revenues and the enforcement of negotiated tariff concessions. Please comment on China's position.

Response of the European Communities (WT/DS339)

803. As set out in previous submissions, China has not demonstrated that its measures serve to protect any of these values. China has not demonstrated that there is in reality a problem of tariff circumvention or that its measures serve the collection of tax revenues or the enforcement of negotiated tariff concessions.[186] Vehicle manufacturers which import auto parts for assembly and manufacture into vehicles in China do not circumvent any tariffs. According to the negotiated tariff concessions laid down in the Chinese schedule, imported auto parts are charged at 10%, and not – as the measures provide – at 25% for the mere reason that they are manufactured into vehicles with insufficient local content. As the measures impose charges in excess of what is provided in China's tariff schedule, they disrespect the negotiated tariff concessions.

804. In the view of the European Communities, the one important value at stake in this case is the respect for the core principles of the WTO system, namely the principles of non-discrimination and the security and predictability of the multilateral trading system. The Chinese measures put in question these core principles of the WTO system.

Response of the United States (WT/DS340)

805. The United States has addressed these arguments by China in its response to Question 280, and respectfully refers the Panel to that response.

294. (*All parties*) Please provide more specific evidence to support your arguments with respect to the effect that the measures have had on trade.

Response of China

806. The lack of any adverse impact on trade is evidenced most directly by the continued rapid growth of the import of auto parts into China. Since Decree 125 was first introduced in 2005, China compared import statistics from 2004 and 2006 to illustrate the lack of impact. According to data from the China Automotive Industry Yearbook, in 2004, the total value of imported auto parts was USD10.39 billion, whereas in 2006 the value was USD 12.45 billion, an increase of 19.8 per cent.

[186] See second written submission of the European Communities, para. 146.

807. In addition, in 2006, many auto manufacturers introduced new models of cars into the Chinese market. According to the data from China Automotive Industry Yearbook, in 2006, there were 110 new models of passenger car introduced, of which 43 were new models and more than 70 were upgraded models. Most of the new models were from Volkswagen, GM, Toyota, BMW, Mercedes-Benz, and other joint ventures in China.

Response of the European Communities (WT/DS339)

808. As illustrated in the graphics attached as Exhibit EC - 37[187], the adoption of the Automotive policy order in May 2004 was followed by a dramatic fall of EC exports of car parts to China. In just a few months, exports dropped to 53%, and then to as low as 33% of their May 2004 level. Thereafter exports of parts began to grow slowly and appear to have now stabilised at the level of May 2004. However, this must be considered against the booming Chinese demand and production of vehicles and the much steadier growth rates of EC exports observed before May 2004.

809. A comparison between EC exports of car parts and Chinese production of motor vehicles suggests that the adoption of the Automotive policy order prompted auto manufacturer to switch as quickly as possible to domestic parts suppliers in order to adapt to the local content requirements imposed by the measures. This resulted in a reduction of EC parts' market share, which now seems to have become permanent as evidenced by the steady gap between the two curves.

810. Meanwhile, recent industry analysis suggests that Chinese companies are becoming increasingly aggressive and there are growing fears that with government support and incentives foreign companies will eventually be sidelined. The risks for foreign investors are growing (see Exhibit EC – 38, last bullet point).

Response of the United States (WT/DS340)

811. The level of the trade effects of China's measures are not an element of the United States claims under the WTO Agreement, and the United States has not made arguments with respect to levels of trade effects. Should the DSB ultimately find that China's measures are in breach of its obligations and should China fail to come into compliance, the level of trade effects would be considered in an arbitration under Article 22.6 of the DSU.

Response of Canada (WT/DS342)

812. The measures have a great impact given that the automotive industry is a signature industry for any economy and the measures apply without restriction to the whole automotive industry.

813. It is apparent on its face, and for the commercial reasons set out in the complainants' submissions (which China has not disputed) that in a highly competitive and price-sensitive market an

[187] In this graphics, the European Communities has used export statistics for engines for vehicles and their components, and parts and components of motor vehicles (HS 8407.31, 8407.32, 8407.33, 8407.34, 8408.20, 8409.91, 8409.99, 8708). This is considered an approximation sufficiently accurate for the purpose of giving an overview of the trade impact of the measures. Statistics for Chinese production of motor vehicles have been obtained from the website of the National Bureau of Statistics of China (http://www.stats.gov.cn/english/statisticaldata/index.htm).

increased cost and burden on imported auto parts will have a significant impact. To the extent that the Panel needs to make a factual finding on this point, it is an inference that can easily be drawn.[188]

814. With respect to the effect on parts manufacturers outside China, whose imports are those discriminated against by the measures, Canada notes that the Canadian Auto Parts Manufacturers' Association specifically indicated its concern about the measures, reflecting the effect they have had on trade.[189]

815. Evidence of the effect of the measures is also found in statements by Chinese businesspeople after the measures came into force. For example:

816. A presentation by a director of China Automotive System, a Chinese-owned company and one of the largest auto parts suppliers in China, in February 2007, referred to one of the "pillars" supporting the growth of auto parts production in China being the government policy that "requires local content" (i.e., the measures), noting that "[t]hey really boost the sales for China auto part makers".[190]

817. Similarly, in a July 2006 article discussing the auto industry in China, an analyst (from Global Insight), referring to the measures, noted that they have already had a big impact on some luxury brands with low production volumes, citing a stop in production of Cadillacs by GM in particular, and stating that other vehicle manufacturers "may follow in its footsteps".[191]

Comments by the European Communities on China's response to question 294

818. China's choice of reference periods is vitiated by the fact that the Automotive policy order was announced in May 2004. As shown in exhibit EC–37, this was followed by a dramatic reduction of EC exports of parts to China (-60% between May and December 2004). The annual total for 2004 therefore constitutes an unnaturally low base as far as imports of car parts are concerned, which results in an "inflated" percentage growth between the two periods.

819. Furthermore, the 19,8% growth of imports of parts should be compared with the growth of Chinese production of cars. According to our calculations based on data from China's Statistics bureau, China produced 5,186,400 cars in 2004, and 7,611,500 cars in 2006, i.e. an increase of 46.8%, more than the double than the growth in imports of parts.[192] In other words, more and more parts are sourced from local suppliers.

820. A more detailed analysis of the effects of the measures on the basis of monthly data and considering the relation between imported parts and Chinese production of cars shows that Chinese

---

[188] See, for example, *Canada – Aircraft*, Appellate Body Report, at para. 203: "Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it…".

[189] *Automotive Parts Manufacturers' Association News*, "President's Message: Driving Canada's Future", November 2006, at p. 2 (Exhibit CDA-45).

[190] China Automotive Systems, Roth Capital Conference, Presentation Transcript, 21 February 2007, online: http://china.seekingalpha.com/article/27700 (Exhibit CDA-46).

[191] *Assembly Magazine*, "The Great Race", 1 July 2006, online: http://www.assemblymag.com/CDA/Articles/Feature_Article/3b60276b6ba1c010VgnVCM100000f932a8c0 (Exhibit CDA-47).

[192] These figures were obtainined by adding the monthly figures contained in EC-36. As explained in the exhibit, data for January and December 2006 are not available and were inferred as the average of the values for the previous and following months. Even limiting production of cars in 2006 to the 10 months for which data are available (Fed-Nov. 06), this would add up to 6,361,300 units, i.e. an increase of 22.7% compared to 2004.

production of cars grew, between the announcement of the Automotive policy order and the last comparable figures (March 2007), by 101%, while EC exports of parts grew only by 18% (see second graph of exhibit EC – 36).

Comments by China on Complainants' responses to question 294

821. The EC's claim that the challenged measures have had an impact on its exports of car parts to China suffers from a basic flaw of logic and causation. The EC refers to a short-term decline in the volume of EC exports to China after May 2004, when Order No. 8 was adopted. The inference that the EC seeks to draw is that Order No. 8 had a direct and immediate impact on the value of the EC's exports of car parts to China. The problem with this reasoning is that Order No. 8, by itself, did not impose any obligations on auto manufacturers, or have any impact on the classification and assessment of duties on motor vehicles or parts of motor vehicles. As China has explained, Chapter XI of Order No. 8 was a broad statement of policy concerning the administration and enforcement of China's tariff rates for motor vehicles and motor vehicle parts.[193] It was not until the adoption of Decree 125 in April 2005 that the challenged measures could have had any conceivable impact on sourcing decisions. However, as the EC's own data illustrate, the EC's exports of auto parts to China resumed their upward trend in early 2005 – just as Decree 125 took effect.[194] Since that time, the value of EC car part exports to China has reached record heights, reaching its highest point as recently as March 2007, according to the EC's own data. This is hardly consistent with the proposition that the challenged measures have had an adverse impact on trade.

295. (*China*) What is the exact level of enforcement China seeks with respect to its laws and regulations within the meaning of paragraph (d) of Article XX?

Response of China

822. As discussed in response to question 296 below, China seeks to ensure the uniform classification of parts and components that have the essential character of a motor vehicle, without regard to whether they enter the customs territory of China in one shipment or in multiple shipments. Proper classification of import entries is an objective that, by its nature, customs authorities seek to achieve in respect of all similar entries.

Comments by the European Communities on China's response to question 295

823. The European Communities would like to note that China's reference to "uniform" and "[p]roper classification" attempts to distract from the fact that China has up to now not demonstrated the proportionality of its measures. For the reasons set out in the EC second written submission, the measures are in fact inappropriate and disproportionate.[195]

296. (*China*) In the view of the European Communities, as an alternative to the measures at issue, China could have investigated only individual instances of alleged evasion under its customs laws, instead of imposing charges under the measures on all imported auto parts that are assembled into vehicles that do not satisfy the arbitrary Chinese local content thresholds. Could China comment on this view, including why such a less trade-restrictive alternative would not be reasonably available to achieve the desired level of enforcement.

[193] See China's answer to question 48 from the Panel.
[194] See EC-37.
[195] See second written submission of the European Communities, para. 146.

Response of China

824. The EC's assertion is mistaken, in two respects. First, the measures do not "impose charges on all imported auto parts that are assembled into vehicles that do not satisfy the arbitrary Chinese local content requirements." Rather, as China has explained, the measures ensure the correct classification of imported auto parts and components that have the essential character of a motor vehicle. As China has also explained, the question of tariff evasion, in the present context, is one of ensuring the correct classification of what is imported. One important objective of customs classification is to achieve the same classification of an article whenever it is imported. To achieve this uniformity of classification, the same classification results should apply in all like circumstances, not only in those cases in which customs authorities dedicate the necessary resources to investigate specific import entries. This is why the measures cannot be limited to "individual instances" – the objective of the measures is to ensure the consistent classification of parts and components that have the essential character of a motor vehicle, in all cases.

825. The second problem with the EC's assertion is that, in the absence of the challenged measures, China would have essentially no mechanism for determining whether multiple shipments of parts and components are related to each through their common assembly into a single article. Without a customs process for determining whether a manufacturer is importing parts and components that have the essential character of a motor vehicle in multiple shipments, there is no basis to investigate and determine whether any given shipment of auto parts and components results in the evasion of China's tariff provisions for motor vehicles. It is this lack of transparency into the commercial reality of what an auto manufacturer is importing that the challenged measures seek to remedy.

Comments by the European Communities on China's response to question 296

826. China's arguments why investigations of customs evasion on an individual basis do not provide for a reasonably available alternative to the measures are not convincing. Acts of customs evasion, the danger of which China has still not demonstrated, would by their nature be individual acts. Therefore, it would be possible for China to ensure the "uniform classification" of vehicles and parts through individual investigations. China's reference to the possibly limited resources of its customs authorities cannot justify otherwise disproportionate measures. Furthermore, China has not demonstrated why it needs a "mechanism for determining whether multiple shipments of parts and components are related to each through their common assembly into a single article". In the view of the European Communities a "mechanism" creating fictions such as the ones contained in the measures is not suitable, necessary or proportionate to further the objective of uniform customs classification.

297. (*Canada*) In paragraph 35 of its second oral statement, Canada states that it has demonstrated that China's measures are arbitrary in application and expressly designed to restrict trade. Please refer the Panel specifically to where in Canada's written submissions this is demonstrated.

Response of Canada (WT/DS342)

827. It is important to note that under Article XX, China, not Canada, has the burden of proof to show that its measures are necessary. Nonetheless, Canada has shown that the measures are applied in a manner that results in arbitrary and unjustifiable discrimination and a disguised restriction on trade. In paragraph 102 of its second written submission, Canada first notes that the measures apply arbitrary discrimination because the thresholds under the measures are by their very nature arbitrary. As demonstrated in paragraphs 48-51 (including the chart), the measures would rarely, if ever, result

in a motor vehicle or a good having the essential character of a whole vehicle. They simply do not relate to proper classification for motor vehicles under the Harmonized System. Therefore, their application results in arbitrary discrimination.

828. Canada has also shown that the measures result in unjustifiable discrimination because they *presume* circumvention in all instances, yet China has not shown that a legal concept of "tariff circumvention" exists, and even if it had, Canada has shown at paragraphs 91-96 and footnote 106 of its second written submission, and in response to Question 14, that no such evidence exists. Last, Canada has elaborated on paragraph 103 of its second written submission in answer to Question 289, above, to explain how the measures are nothing more than a disguised restriction on trade.

298. (*China*) In its response to Panel question No. 14, China provides some import statistics for the years 2002, 2003, and 2004. The data shows percentage increases in 2002 and 2004 that are comparable to each other, however the growth for 2003 is nearly 200%. What was different about 2003?

Response of China

829. The most significant development in 2003 was the dramatic increase in the production of sedans. This is shown in the following statistics:

Production of Motor Vehicles in China

	1999	2000	2001	2002	2003	2004
Cargo Vehicle	756,312	751,699	803,076	1,092,546	1,228,181	1,514,869
Increase Ratio	-	-0.61%	6.83%	36.05%	12.41%	23.34%
Coach	509,179	709,042	834,927	1,068,347	1,177,476	1,243,022
Increase Ratio	-	39.25%	17.75%	27.96%	10.21%	5.57%
Sedan	566,105	607,455	703,525	**1,092,762**	**2,037,865**	2,312,561
Increase Ratio	-	7.30%	15.82%	55.33%	86.49%	13.48%
Total	1,831,596	2,068,186	2,341,528	3,253,655	4,443,522	5,070,452
Increase Ratio	-	12.92%	13.22%	38.95%	36.57%	14.11%

830. As these figures show, total motor vehicle production increased by 36 per cent in 2003 (a figure comparable to 2002), while sedan production increased by 86 per cent – nearly doubling the production of sedans as compared to 2002. This increase in the production of sedans corresponded with the introduction of a large number of new vehicle models into the Chinese market.

831. China considers that the large increase in auto parts and engine parts in 2003 (as reported in response to question 14) is clearly related to the sharp increase in the production of sedans in the same year. China's customs statistics record the importation of only 34,858 CKD/SKD kits in 2003. The parts and components for the remaining 910,245 additional sedans produced in that year must have come from somewhere, and the sharp increase in the value of imported engines and auto parts in 2003 provides the answer.

832. These figures demonstrate that auto manufacturers in China were sharply increasing their production of motor vehicles, and sedans in particular, using very high ratios of imported parts and components. As China has previously discussed in response to questions 77 and 160, the fact that many of these vehicles models are assembled from imported parts and components that have the essential character of a motor vehicle has been confirmed by the fact that approximately 130 vehicle models have been verified as such. China has also provided examples of specific vehicles models in response to question 160.

Comments by the European Communities on China's response to question 298

833. According to industry sources (exhibit EC – 41), 2003 was a year characterised by an impressive growth in demand. Higher demand for cars resulted in increases in Chinese production of cars and in the launch of new models. This of course in turn resulted in higher demand for parts.

834. Local suppliers of parts and assemblies could not meet this rise in demand for parts in the short term, and car manufacturers, eager to maintain high production levels in order to satisfy demand for cars, relied on imported parts, especially to accelerate the launch of new models (EC – 41, last bullet point of the April 2003 report, sixth bullet point of the August 2003 report).

835. Against this example, it is clear that the measures at stake in these proceedings are not designed and enforced to fight a non-existent "circumvention" of the customs duty on motor vehicles, but to make sure that the local industry of parts and components gets its "fair share" of the ever increasing Chinese production of cars, or, in the words of the Automotive policy order, to "nurture a group of relatively strong auto-parts manufacturers".

836. As for China's circular argument that a high level of verifications is evidence of a high level of models built from parts having the essential character of a motor vehicle, reference is made to paragraphs 12 and 13 of the EC rebuttal submission.

299. (*Canada*) Canada states in paragraph 37 of its second oral statement that "Article XX(d) can be used to justify measures taken in respect of law or regulation otherwise consistent with GATT, such as China's Schedule *properly applied*. The measures are not actually used for customs enforcement, as there are no customs duties at issue to enforce." (emphasis added) Could Canada please explain how the Panel can determine whether China's Schedule is properly applied within the meaning of Article XX(d). Please also clarify what Canada means by the statement that "there are no customs duties at issue to enforce."

Response of Canada (WT/DS342)

837. Canada's reference to "properly applied" means enforcement of the proper tariff rate for auto parts or motor vehicles listed in China's Schedule. This must be done based on the objective characteristics of the product as presented at the border in a single shipment, not based on end-use or multiple shipments from different exporters to different importers. If China had properly applied its tariff rate based on proper classification of auto parts or motor vehicles, then it could validly attempt to justify its measures as "necessary" if it were able to show an actual enforcement problem existed based on a recognized legal defence. However, China has failed to meet its burden to demonstrate that "tariff circumvention" is a valid defence, or that, even if it were, there is any evidence of such a problem.

838. With respect to Canada's comment that "there are no customs duties at issue to enforce", see Question 225.

300. (*China*) The complainants have expressed a view that China's arguments relating to Article II of the GATT 1994 are essentially China's Article XX(d) defence. Does China agree with this view?

Response of China

839. China emphatically disagrees with this view. China considers that it is, in fact, the complainants who are attempting to shift the burden of proof by mischaracterizing what is unquestionably a complex set of interpretive issues under Article II as "essentially" an Article XX(d) defence.

840. As China discusses in response to question 228 above, it was the *complainants* who opted to bring an as such case against the challenged measures, including their claim that the challenged measures are inconsistent with China's obligations under Article II. The complainants have the burden of proving their claims, including their claim that the challenged measures do not collect the ordinary customs duties on motor vehicles that China is allowed to collect under its Schedule of Concessions. The complainants cannot shift this burden of proof to China by disregarding the necessary elements of their own claims and forcing China to defend the measures under Article XX(d). China is entitled to invoke Article XX(d) in the event that the Panel identifies one or more respects in which the challenged measures are inconsistent with its WTO obligations. But it is the complainants who have the burden of proving the inconsistencies they have alleged before the question of Article XX(d) even arises.

841. In addition, it is entirely evident that the substantive issues under Article II and Article XX(d) are *not* the same, and are not even "essentially" the same. The core interpretive issue under Article II is whether the challenged measures collect ordinary customs duties in accordance with China's tariff provisions for motor vehicles, as interpreted in accordance with GIR 2(a), including the terms "essential character" and "as presented." China's position is that the challenged measures are based on a proper understanding of these terms within the Harmonized System, that the measures collect valid customs duties in accordance with China's Schedule of Concessions, and that the measures are consistent with China rights and obligations under Article II. This is *not* the same question as whether the challenged measures would be justified under Article XX(d) in the event that the Panel found that they were inconsistent with China's obligations in respect of Article II or Article III.

Comments by the European Communities on China's response to question 300

842. Contrary to what China suggests in its response, the European Communities does not attempt to "shift th[e] burden of proof to China". The European Communities and the other complainants have demonstrated *inter alia* that the Chinese measures are "internal" measures inconsistent with Article III:2, III:4 and III:5 of the GATT 1994. The burden of proof for a successful Article XX defense rests then on China. China, however, fails to demonstrate that its measures are necessary to secure compliance with its Schedule since they impose charges which are in excess of the tariff rates set forth therein.[196]

301. (*European Communities*) Could the European Communities please elaborate its argument in paragraph 35 of its second oral statement that "even according to the statistics provided by China itself, there has been an important and constant growth in the importation of complete vehicles into China prior to the adoption of the measures."

[196] See second written submission of the European Communities, para. 146.

Response of the European Communities (WT/DS339)

843. China has not been forthcoming in providing statistical information for the various assertions it has made in relation to the circumvention of its schedules on motor vehicles. However, if one takes as the basis the statistics provided by China in its reply to question 14 b) from the Panel that relates to the period prior to the adoption of the measures, there is no evidence that would suggest any shift in the pattern of trade between imports of complete vehicles and their parts. There has been a constant growth in the import of automotive products in general, which is a testimony of the booming market for vehicles in China following its economic success story.

302. (*European Communities*) Could the European Communities please elaborate on its position in paragraph 36 of its second oral statement. What analysis would the Panel be required to carry out to determine whether "[the measures] impose charges which directly conflict with China's tariff schedules instead of enforcing them" within the meaning of Article XX(d)?

Response of the European Communities (WT/DS339)

844. See response to question 286 from the Panel.

303. (*All parties*) The Panel in *EEC – Parts Components* held that Article XX(d) only covers measures related to *the enforcement* of obligations under laws and regulations that are GATT consistent and not measures which merely prevent actions that are consistent with laws or regulations but undermine their *objectives*. In the context of the present case, do the measures serve to enforce the payment of ordinary customs duties for "motor vehicles"?

Response of China

845. Yes. For the reasons that China has explained, it is consistent with a proper interpretation of the term "motor vehicles" to conclude that the term includes parts and components that have the essential character of a motor vehicle, including multiple shipments of parts and components that are related to each other through their common assembly into a motor vehicle. It is this GATT-consistent interpretation of the term "motor vehicles" that the measures serve to enforce.

Response of the European Communities (WT/DS339)

846. No, the Chinese measures do not serve to enforce the payment of ordinary customs duties for motor vehicles. This would be the case if the measures helped to ensure that importers of vehicles pay the appropriate customs duties for vehicle imports. However, the enforcement of the ordinary customs duties for vehicle imports is not at stake in the present case. The measures do not concern the imports of vehicles. They exclusively deal with imported auto parts, which even when considered together do not have the essential character of a complete vehicle, and impose on them charges in excess of those provided for in the Schedule.

Response of the United States (WT/DS340)

847. As the United States has explained in its oral statement at the second meeting, and in response to Question 280 above, the answer to this question depends on precisely what practice China is trying to address. If China means that importations of bulk shipments of manufacturing parts are subject to a whole-vehicle rate of duty, then no, the measures do not enforce the payment of ordinary customs duties on motor vehicles because bulk shipments of parts are not motor vehicles under any possible

reading of China's schedule. If China means that a CKD kit split into two separate boxes should be subject to a whole-vehicle rate (and leaving aside for purposes of this question China's commitments under paragraph 93 of the Working Party Report), then China's measures arguably might enforce such a policy. However, as the United States has explained, China's measures are vastly more broad in coverage than the hypothetical CKD kit broken into two separate boxes, and thus the measures cannot be necessary to enforce any policy regarding "split kits."

Response of Canada (WT/DS342)

848. The measures do not serve to "enforce" the payment of ordinary customs duties for "motor vehicles" but, as explained in Canada's response to Question 280, directly "conflict" with China's Schedule by imposing an additional 15% internal charge on auto parts.

849. In *EEC – Parts and Components* the panel found that a measure could be justified under Article XX(d) if it served to enforce an obligation under a GATT-consistent law, but could not be justified if it did not "enforce" the law or regulation but only prevented the undermining of the policy objectives of that law or regulation.[197] In other words, Article XX(d) cannot be used to prevent "undermining" a Member's permitted charges, such as anti-dumping (or ordinary customs duties). Applying this principle, China's measures cannot be justifiable under Article XX(d) in two respects. First, the measures prevent "actions" fully consistent with China's Schedule, namely application of the appropriate duty rates for auto parts, on the theory that the charges under the measures are necessary to prevent "tariff circumvention", i.e., undermining of the Schedule. Second, not only are the measures preventing actions consistent with China's Schedule, but they attempt to enforce the policy objective of protecting and supporting China's automotive industry.[198]

Comments by the European Communities on China's response to question 303

850. See the comments of the European Communities on China's response to question 290.

[197] *EEC – Parts and Components*, Report of the GATT Panel, at para. 5.17.
[198] As set out in Canada's second written submission at paras. 87-90

ANNEX A-3

RESPONSES AND COMMENTS OF PARTIES TO AN ADDITIONAL QUESTION FROM THE PANEL 6 AUGUST 2007

304. (*All parties*) Please clarify the order in which the following events take place under China's measures with respect to imported auto parts characterized as complete vehicles:

- **the assembly of imported auto parts into complete vehicles;**
- **automobile manufacturer's *declaration for duty payment* for imported auto parts;**
- **automobile manufacturer's application for verification by the Verification Center and the Center's issuance of verification report[s];**
- **the customs authorities' classification of imported auto parts; and**
- **the customs authorities' collection of duties for imported auto parts.**

Please support your answer with relevant provisions of the measures as well as, if possible, any documentary evidence showing a specific sequence of these procedures. Please also confirm that imported auto parts that should not be characterized as complete vehicles are not subject to the above procedures applicable to imported auto parts characterized as complete vehicles.

Response of China

1. To clarify the order in which the events specified by this question take place, it is important to emphasize the distinction between the assembly of the *first batch* of a particular vehicle model, and the subsequent assembly of that vehicle model in commercial production. As China explained in response to question 167(b) from the Panel, the self-evaluation and verification process under Decree 125 is conducted on a vehicle model basis. This process results in a determination, on a per-model basis, of whether the imported auto parts in that vehicle model meet one or more of the thresholds set forth in Article 21 of Decree 125. This determination will apply to all subsequent imports of auto parts for the same vehicle model, unless and until the imported auto parts used in the assembly of that vehicle model change in relation to the thresholds specified under Article 21.

2. Thus, in relation to the events specified by the Panel in this question, the first event that occurs is the assembly by the manufacturer of the *first batch* of a particular vehicle model. As China explained in response to question 167(b), this can be one vehicle or a small quantity of vehicles, a number that the manufacturer may choose at its discretion. The second event that occurs is the manufacturer's application for verification of the self-evaluation results. Under Article 19 of Decree 125, the manufacturer is required to submit this application within 10 days after the assembly of the vehicle model that is to be registered (i.e., after the assembly of the first batch). The verification application includes the results of the manufacturer's self-evaluation of the vehicle model.[1] The Verification Center then conducts its review of the self-evaluation and releases its verification report.[2]

3. The results of the self-evaluation and verification process determine the subsequent declaration and classification of auto parts that the manufacturer imports for use in the regular commercial production of the vehicle model. If the vehicle model has been verified as meeting one or more of the thresholds of Article 21 of Decree 125, the manufacturer must import parts for that

[1] See Article 25 of Decree 125 and Article 7 of Announcement No. 4.
[2] See Article 19 of Decree 125.

vehicle model separately from other auto parts, and must declare the imported parts as parts of a registered vehicle model.[3] The manufacturer provides this declaration at the time the parts enter the customs territory of China, as part of the normal customs entry process. These parts enter the customs territory of China in bond and remain under customs control.[4]

4. Under Article 28 of Decree 125, the manufacturer declares the amount of duty owed to the Customs after it has assembled the parts and components into a finished motor vehicle. The manufacturer is required to declare the amount of duty owed on the tenth working day of each month, based on the number of registered vehicle models that it assembled in the prior month.[5] The classification of the imported parts and components in the assembled motor vehicles, and the determination of duty liability, are based on the *prior* determination that the vehicle model in question is assembled from imported parts and components that have the essential character of a motor vehicle.[6] As China explained in response to question 167(b) from the Panel, there is no additional verification process that occurs after *each* entry of auto parts for that vehicle model, or after the assembly of *each* motor vehicle of that vehicle model type. The results of the evaluation and verification process, conduct in respect of the first batch of that vehicle model, will apply to all subsequent imports of auto parts for that vehicle model, unless and until the manufacturer can demonstrate that the imported parts and components in that vehicle model no longer have the essential character of a motor vehicle.[7]

5. China confirms that, following the self-evaluation and verification process, auto parts that are not used in the assembly of registered vehicle models are not subject to the procedures described above.

Response of the European Communities (WT/DS339)

6. The question from the Panel distinguishes between procedures applicable to imported auto parts characterised as complete vehicles and those that are not. This implies that the procedures or their sequence under China's measures could differ *ab initio* for imported auto parts characterised as complete vehicles and those that are not. The European Communities would like to stress however that this is not the case. Rather, it is only on the basis of the procedural steps under the measures that a characterisation of parts as complete vehicles or not is made. For example, the characterisation of an imported auto part as not "complete vehicle" can be based on either the review (Article 7(2) of Decree 125) or the verification (Article 18 of Decree 125). Their characterisation as either "complete vehicles" or "not complete vehicles" (i.e. parts) is the outcome of these procedural steps, which may vary depending on the specifics of the situation and the stage of the process.

7. The Chinese measures provide for the following sequence with regard to the procedural steps mentioned by the Panel question (i.e. those after self-evaluation and review under Article 7 of Decree 125):

- The assembly of imported auto parts into the first batch of complete vehicles;
- automobile manufacturer's application for verification by the Verification Center and the Center's issuance of verification report(s);
- automobile manufacturer's declaration for duty payment for imported auto parts;

[3] See Articles 14-15 of Decree 125.
[4] See Articles 16, 27 of Decree 125.
[5] See Article 31 of Decree 125.
[6] See Article 28, para. 2 of Decree 125.
[7] See Article 20, para. 2 of Decree 125.

- the customs authorities' classification of imported auto parts;
- the customs authorities' collection of duties for imported auto parts.

8. This sequence of events follows from the following considerations.

9. Assembly before verification: The assembly of imported auto parts into complete vehicles precedes the verification of the vehicle model. This follows directly from Article 19(1) of Decree 125[8] which provides:

> An automobile manufacturer shall submit a verification application to the CGA within 10 days after the first batch of vehicles of the registered vehicle model are produced/assembled. The Verification Center shall, within one month after receiving instructions from the CGA, conclude the verification and issue a verification report. (footnote omitted, emphasis added)

10. Assembly and verification before duty declaration, classification and collection: Article 28 of Decree 125 clearly sets out that the manufacturer's declaration for duty payment and the ensuing classification and collection of duties by customs necessarily follows the assembly of imported auto parts into complete vehicles and their verification:

> After the imported automobile parts have been assembled into complete vehicles, the automobile manufacturer shall make a declaration of duty payable to Customs and Customs shall, (…), proceed with classification and duty collection.
>
> If the Verification Center, after verifications, concludes that the imported automobile parts should be characterized as complete vehicles, the customs shall classify them as complete vehicles, and shall base both the tariff and the import VAT on rates applicable to complete vehicles. If the imported automobile parts should not be characterized as complete vehicles, the customs shall classify them as parts, and shall base the tariff and the import VAT on rates applicable to parts.

11. Furthermore, Article 34 of Decree 125 is based on the premise that the manufacturer's declaration (and, consequently, the classification and collection of duties by customs) follows after the production/assembly of the complete vehicles.

12. Reference is also generally made to paragraphs 47 to 67 of the first written submission of the European Communities, the correctness of which China has not disputed. The European Communities has seen the practical examples in the reply of Canada and would like to associate itself with those examples.

Response of the United States (WT/DS340)

13. As discussed below, the order in which the listed events will occur will vary based on different factual situations. Also, in addition to the listed events involving the application of China's measures, the US response below includes what is often the initial event in the sequence: namely, the importation of the parts (that is, the time when the parts are physically brought into China).

[8] The European Communities refers to the common translation of Decree 125 as agreed upon between the complaining parties and China as sent by China to the Panel on 2 August 2007, with the exception of Article 28(1) for which we refer to the UNOG translation of 16 August.

14. Before addressing various scenarios, some background is helpful. The process of applying China's measures usually begins with the manufacturer performing the self-evaluation required by Article 7 of Decree 125.[9] This process is mandatory, since it is a necessary precondition for obtaining an import license. Article 7 provides that if the manufacturer determines that the model does not trigger any of the established thresholds then it must request a review by the Verification Center. If the Verification Center concludes that imported parts in the model are not "characterized as complete vehicles," then no registration is required at that time. The remaining requirements of the measures are then not applied to that model until such time as changes are made in the composition of the vehicle, which in turn would result in a need to re-examine the applicability of the thresholds.

15. If the self-evaluation determines that the imported parts in the basic model exceed the thresholds established in the measures, then Article 7 requires the manufacturer to register the vehicle model. Pursuant to Article 19, the manufacturer must submit an application within 10 days after the first "batch" of vehicles of the registered vehicle model is assembled to have the model "verified." The Verification Center will then issue a verification report. As indicated in China's response to Panel question No. 171, and as commented upon by the European Communities, the length of time it takes to complete the verification report varies and can be significant.

16. Pursuant to Article 28, after the imported parts have been assembled into complete vehicles, the automobile manufacturer shall make a declaration for duty payments to customs. The customs authorities will then make "classification" decisions and collect charges on the imported parts. Further, Article 31 provides that "customs shall collect the duty and the import VAT for all imported automobile parts used in assembling a certain vehicle model in the last month by a manufacturer, applying the tariff rates applicable to complete vehicles."

17. With this background in mind, the order of the various events listed above, under various scenarios, is as follows:

18. For the first batch of assembled vehicles, the order would be: importation of auto parts, assembly of imported parts, application for verification, issuance of the verification report, declaration for duty payment, "classification" by customs authorities, and collection of charges.

19. For parts imported after the initial batch (or batches), but before the verification report is issued (a process that China concedes can take a substantial period of time), the order would be: application for verification, importation of auto parts, assembly of imported parts, issuance of the verification report, declaration for duty payment, "classification" by customs authorities, and collection of charges.

20. If a model has been in production for some time without any modification to its production plan, and after initial inventories of auto parts have been exhausted, the order for parts imported at that point will likely be: application for verification, issuance of verification report, importation of auto parts, assembly of imported parts, declaration for duty payment, "classification" by customs authorities, and collection of charges.

21. However, if any changes in the parts used in production occur, then importation of the parts again becomes the first step in the list of events. For example, Article 20 provides that if optional parts are installed on a vehicle, the manufacturer shall report the options to the Verification Center and make declarations at the time of the actual installation of the optional parts. The Verification Center would then review and issue a verification report. Similarly, if the production plan is adjusted

[9] See also Article 6 of Order No. 4.

in a way that would affect the local content requirements of the measures, the manufacturer may reapply for a re-verification. In these circumstances, the order would be similar to that of the "first batch" of vehicles (paragraph 6 above).

22. Finally if an imported part – even if originally intended for use in producing a complete vehicle – is not in fact used in such production within one year,[10] then the order of events would be: importation of auto parts, assembly of other parts (but not this particular imported part) into complete vehicles, declaration for duty payment, "classification" by customs authorities, and collection of charges.

23. In sum, although the importation of parts, application for verification, assembly operations, and issuance of the verification report may occur in different orders depending on the circumstances, the last three activities will consistently be the declaration for duty payment, the "classification" determination, and then the collection of charges pursuant to Article 28.[11] Furthermore, in every case it is impossible to predict whether an imported auto part will actually be used in the production of any particular model until production actually occurs, and in many cases, the importation of the parts will occur before even the issuance of a verification report for the model in which the part is intended to be used.

Response of Canada (WT/DS342)

24. Canada notes that this reply reflects the information set out by Canada in its first written submission in Section IID to H, where the measures and their consequences are described in detail. That information is, in Canada's view, sufficient to establish that the measures apply internal charges on imported auto parts based upon their use in manufacturing, contrary to GATT Article III and the *TRIMs Agreement*.

25. First, Canada emphasizes that the measures apply to all imported auto parts, for it is the measures that establish the artificial distinction between imported auto parts that are or are not Deemed Whole Vehicles. For example, prior to customs finally determining whether imported parts are Deemed Whole Vehicles, vehicle and auto parts manufacturers that use imported auto parts must track the imported content of all products and maintain evidence of payment of ordinary customs duties for those parts.[12] Even if a vehicle manufacturer has concluded that a particular vehicle model should not be subject to charges under the measures given its level of imported content, and even if that self-verification has been confirmed on review by the Verification Centre, the vehicle manufacturer (and auto parts manufacturers that supply imported parts to that vehicle manufacturer) cannot be certain that a different result will not be obtained on verification by the Verification Centre after the first batch of vehicles has been produced.[13]

26. With respect to the specific steps in the Panel's question, Canada builds on the examples set out at paragraphs 65 and 66 (including Table 1) of its first written submission, with reference to specific provisions of the measures, as appropriate. We use two examples of shipments of 100 brake cylinders for a light truck with a customs value of 1,000 RMB to demonstrate the order in which the

[10] This could occur for a variety of reasons, such as where parts are defective, destroyed in manufacturing, or are used as replacement parts, and also where initial production forecasts are not accurate and accordingly the manufacturer does not produce as many vehicles as originally planned.

[11] Article 19 (2) of Decree 125 also contains special provisions covering models already in production at the time Decree 125 entered into effect. See also Article 10 of Order No.4.

[12] Decree 125, Article 22; Announcement 4, Article 20. This requirement is discussed in Canada's First Written Submission, at paras. 62 and 63.

[13] Decree 125, Article 28; Announcement 4, Article 7.

steps in the Panel's question occur, although those steps may be demonstrated using any number of other examples.

27. First, we take a brake cylinder imported by a parts manufacturer and used to manufacture a vehicle model initially calculated not to be subject to charges under the measures, but, with sourcing changes, it is recalculated as being found subject to such charges (the third scenario in the joint Background section of the first written submissions). Then we consider a situation where a vehicle manufacturer imports the shipment directly for use in a model self-verified as subject to the measures (a scenario not described in the joint Background section). For the sake of illustration, in both cases the brake cylinders are shipped by vessel from Canada to Shanghai, and used to manufacture a vehicle in Chongqing.

28. First example – a shipment of brake cylinders imported by an auto parts manufacturer in China:

a. The vehicle manufacturer, as required by the Measures, files a self-verification plan for the vehicle model in which it calculates the imported parts that it intends to use in manufacturing that model. To get that information, the vehicle manufacturer is required to consult all of its domestic suppliers to determine the imported parts that those suppliers will use in products the manufacturer will buy from them for use in the vehicle model. As a result of those consultations, the vehicle manufacturer calculates the level of imported parts that it will use and determines that only the Engine, the brake Assembly (in part due to the use of imported brake cylinders), and the transmission Assembly are Deemed Imported Assemblies under the measures. As the threshold of Deemed Imported Assemblies has not been exceeded,[14] the vehicle manufacturer submits a self-verification stating that parts used in that vehicle model are not Deemed Whole Vehicles under the measures. The self-verification is reviewed by the Verification Centre,[15] which confirms that imported parts used in the vehicle model will not be Deemed Imported Vehicles.

b. The shipment of brake cylinders is ordered by the auto parts manufacturer from abroad. The auto parts manufacturer applies for and receives a licence to import the brake cylinders.[16] No financial guarantee is posted under the measures with respect to the brake cylinders.[17]

c. The vessel carrying the shipment arrives at the port of Shanghai. The shipment is unloaded, but is kept in the physical control of China customs.[18]

d. The importer declares the shipment.[19]

[14]One of the thresholds under Decree 125, in Article 21(2)(b), is an Engine and *three* other Assemblies.

[15] See China's response to Question 167, which confirms that the Verification Centre reviews determinations of vehicle manufacturers under the measures, whether positive or negative.

[16] Article 7 of Decree 125 requires a vehicle manufacturer to submit a self-verification report when making an application for an import licence, but this requirement does not apply to auto parts manufacturers who import auto parts.

[17] China confirmed, in response to Question 185(a), that the bond procedure does not apply to parts imported by auto parts manufacturers, who instead "go through the regular normal customs process and pay the import duty to the customs".

[18] As provided for in Articles 14 and 17 of the Customs Law of the People's Republic of China ("Customs Law") (attached as Exhibit CDA-49).

e. Chinese customs authorities classify the shipment as 100 brake cylinders for light trucks (8708.93.40). Customs duties are assessed[20] at 10,000 RMB according to the import tariff rate for those goods (1,000 RMB x 10% x 100 brake cylinders).

f. Customs issues a duty memorandum in the amount of 10,000 RMB for customs duty.

g. The importer pays 10,000 RMB in customs duty.[21]

h. The shipment of brake products is released from customs to the importer,[22] and shipped to the auto parts manufacturer's facilities.

i. The importing auto parts manufacturer then uses the brake cylinder, together with other imported and domestic parts, to manufacture a brake assembly that is a Deemed Imported Assembly under the measures because it has four imported key parts. That Assembly is then shipped to the vehicle manufacturer in Chongqing.

j. At around the same time, a wholly owned domestic parts manufacturer advises the vehicle manufacturer that it will not be able to supply an axle shaft for the vehicle model. The self-verification submitted by the vehicle manufacturer for the vehicle model had indicated that the axle shaft would have no imported content, but the vehicle manufacturer is unable to find an alternative source domestically in sufficient time for the first production of the model and must use imported axle shafts. As a result, the front drive Assembly is now also Deemed Imported. Since the vehicle model now has a Deemed Imported Engine and three other Assemblies, the vehicle manufacturer is required to apply to customs for re-verification.[23] That re-verification confirms that the imported content in the vehicle model has exceeded the permitted number of Deemed Imported Assemblies, and that therefore imported parts used in the model will be charged under the measures as Deemed Whole Vehicles.

k. The vehicle manufacturer uses the brake Assembly provided by the parts manufacturer (which includes the imported brake cylinder) to manufacture a batch of 100 vehicles. The vehicle manufacturer submits a verification application to customs for the first batch of vehicles.[24]

l. The Verification Centre issues a verification report confirming that the batch produced by the vehicle manufacturer has exceeded the thresholds for imported content, and is therefore subject to charges under the measures.[25]

m. The vehicle manufacturer pays charges under the measures for all imported parts, which for the brake cylinders amounts to a payment of 15%, or 15,000 RMB.[26]

---

[19] This must be done within 14 days of the declaration of the arrival of the vessel, as set out in Article 24 of the Customs Law.

[20] In accordance with Article 53 of the Customs Law. We do not discuss in this example payment of other amounts that are not at issue in this dispute (e.g., internal charges such as VAT that could, in accordance with GATT Article II:2(a), be applied at the border).

[21] In accordance with Article 60 of the Customs Law, this must be done within 15 days of issuance of the duty memorandum.

[22] In accordance with Article 29 of the Customs Law.

[23] See Decree 125, Articles 20 and 21(2)(b).

[24] See ibid., Article 19.

[25] See ibid.

29. Second example – a shipment of brake cylinders imported directly by a vehicle manufacturer:

a. The vehicle manufacturer, as required by the measures, files a self-verification plan in which it calculates that a particular model that it intends to manufacture will have Deemed Imported Assemblies that exceed the thresholds in the measures. That determination is reviewed by the Verification Centre,[27] which confirms that imported parts used in the model will be Deemed Whole Vehicles subject to charges under the measures.

b. The vehicle manufacturer applies for an import licence for the brake cylinders (and other auto parts imported directly by the vehicle manufacturer), attaching the self-verification plan.[28] The import licence is issued for the brake cylinder (and other parts), with a notation that the parts are Deemed Whole Vehicles.

c. The vehicle manufacturer provides a duty guarantee for parts that it intends to import based on the value of the monthly average of imported parts.[29] For the sake of illustration, assume that the only monthly import of auto parts directly by the vehicle manufacturer will be the shipment of 100 brake cylinders for light trucks. In that case, the guarantee is set at 10,000 RMB.[30]

d. The vessel carrying the shipment arrives at the port of Shanghai. The shipment is unloaded, and released from physical control of customs. The vehicle manufacturer is free to arrange for transport of the parts to Chongqing as it sees fit (*i.e.*, there is no requirement to use bonded carriers, nor does customs supervise in any other way the process of transport).

e. The importing vehicle manufacturer then uses the brake cylinders in brake assemblies that it manufactures, which in turn are used in the vehicle model. The vehicle manufacturer submits a verification application to customs for the first batch of vehicles manufactured using a particular combination of parts.[31]

f. The Verification Centre issues a verification report confirming that the batch of vehicles has exceeded the permitted number of Deemed Imported Assemblies, and that therefore imported parts used in the model will be charged under the measures as Deemed Whole Vehicles.[32]

---

[26] 15% x 1,000 RMB x 100 brake cylinders. This assumes that the vehicle manufacturer can prove that the auto parts manufacturer that imported the brake cylinder already paid 10,000 RMB in ordinary customs duty, and thus under Article 29 of Decree 125 the vehicle manufacturer gets credit for this payment. If the vehicle manufacturer cannot prove this payment, then the charge would be 25,000 RMB (as noted in Canada's First Written Submission in fn. 114). In accordance with Article 31 of Decree 125, the payment must be made by the tenth working day of the month subsequent to the month in which the verification report is issued.

[27] See China's response to Question 167, which confirms that the Verification Centre reviews determinations of vehicle manufacturers under the measures, whether positive or negative.

[28] As required by Article 7 of Decree 125.

[29] See Decree 125, Article 12.

[30] China confirmed in answer to Question 18 that "customs calculates the bonds based on the applicable rates for auto parts." As set forth above, the rate for brake cylinders is 10%, and thus the guarantee with respect to those parts would be 10% x 1,000 RMB x 100 brake cylinders.

[31] See Decree 125, Article 19.

[32] See ibid., Article 19.

g. Customs determines that the brake cylinder and other imported parts are subject to charges under the measures as Deemed Whole Vehicles.[33]

h. The vehicle manufacturer pays charges under the measures to the customs office for all imported parts used in the vehicle batch, whether imported directly or contained in parts bought domestically.[34] The brake cylinders are charged 25% under the measures, or 25,000 RMB.[35] That amount equals the 10% ordinary customs duty (10,000 RMB) that crystallized upon the arrival of the shipment of brake cylinders at Shanghai, and an internal charge of 15% (15,000 RMB). The duty guarantee in the amount of 10,000 RMB remains in place.

30. The specifics of the measures' application may vary, as these examples demonstrate. The verification and assembly processes, assembly and issuance of the original or subsequent verification reports may vary in order depending on the example. However, the final steps under the measures for all imported parts will always involve the declaration for duty payment, the so-called classification of the parts, and the determination and collection of charges.

Comments by the United States on China's response on question 304

31. As the United States has explained in its prior oral and written submissions, under China's measures the level of the charge assessed on any particular imported part cannot be determined until after the part is actually used in the production of a complete vehicle. The reason for this is twofold: (i) because no manufacturer can accurately predict whether any particular imported part will actually be used in the production of a specific vehicle model, as opposed to the other possible uses or dispositions of that part (such as use in production of a different vehicle model, or use as a replacement part, or being discarded as defective, or being destroyed in manufacturing); and (ii) because the determination of whether any specific vehicle model meets the local-content thresholds is based on a lengthy post-manufacturing verification process, and that determination must be revisited whenever the composition of the parts used in the model is modified. It is for these very reasons that, under China's measures, the charges on imported parts are not assessed until after manufacturing of vehicles within China.

32. China's response to Question 304 ignores the first set of issues set out above, and tries to underplay the second. In particular, China's response tries to make it sound as if the uncertainties regarding the level of charges to be applied to any particular imported part are a minor issue affecting small numbers of imported parts, when in fact these uncertainties are ongoing and an inherent part of a system which assesses a charge based on the level of local content contained in a product assembled within China after importation.

33. China's response suggests that there is an initial decision on the "first batch" of assembled vehicles which establishes certainty on all future imports. However, since the issuance of the verification report on the first batch of vehicles takes weeks or months, the vehicle manufacturer will likely be importing parts and assembling them during the period prior to the issuance of the verification report. Thus, in this entire period prior to the issuance of the verification report, the level of charges to be imposed on imported parts used in the vehicle model is unsettled. Moreover, a "vehicle model" is not a static concept. Whenever the composition of the parts in a model changes,

[33] See ibid., Article 28.
[34] See ibid., Article 31.
[35] 25% x 1,000 RMB x 100 brake cylinders.

additional verifications will be required, which again leaves uncertain the level of charges to be imposed on imported parts used in the production of the model.

34. China's response states that "the results of the self-evaluation and verification process determine the subsequent declaration and classification of auto parts that the manufacturer imports for use in the regular commercial production of the vehicle model." This statement undermines China's assertion that its charges are customs duties assessed upon importation. Since parts used in production may be imported prior to the issuance of China's verification report, and since the determination of the level of the charge is based on an examination of the final assembled vehicle and the amount of imported content in that vehicle, China's own statements confirm that the level of the charges assessed on a particular part is not based on the characteristics of the part itself (or on any element of the importation process), but rather on the amount of imported content in the vehicle and on processes that occur within China after importation.

35. Although the measures require a *manufacturer* (when the part is imported by a manufacturer rather than a parts supplier) to declare that an imported part is part of a registered vehicle model at the time the part enters China, that declaration is not dispositive. Rather, the government of China, pursuant to Article 28 of Decree 125, makes the dispositive determination, and does not do so until after the part has been assembled into a complete vehicle.

36. Finally, China states that "there is no additional verification process that occurs after each entry of auto parts for that vehicle model, or after the assembly of each motor vehicle of that vehicle model type." While *verification* may not occur after the assembly of each vehicle, the "*classification*" of each imported part and the *assessment* of the charges due on each imported part do occur after the assembly of each motor vehicle. Verification simply examines the amount of imported content in a particular vehicle model; that is, the verification process is tied to models, not to the importation of any particular part. Under China's measure, the only way to determine definitively the "classification" of a particular imported part, and thus the only way to assess the level of the charge on that imported part, is to determine after importation and assembly whether that part was used in a vehicle that is deemed a "whole vehicle" under China's local-content criteria.

Comments by Canada on China's response to question 304

37. Canada would first note that China's response to Question 304 contains the following statement: "[t]he results of the self-evaluation and verification process determine the subsequent declaration and classification … of the vehicle model". That is, classification occurs *after* the manufacturing of the vehicle. China attempts to confuse this fact by alleging that classification occurs at the border based on a prior determination. Article 28 of Decree 125, on its face, makes it clear that "after the imported automobile parts have been assembled into complete vehicles … Customs shall proceed with classification and duty collection". Even if classification were only based on the import declaration as China suggests, this would still not change the fact that the declaration is not voluntary and is itself based on end-use classification. It is the self-verification and subsequent review by customs together with the Verification after the manufacture of the first batch of vehicles which form the basis for the final declaration. It follows that any subsequent declaration must necessarily also be based on the end-use of those parts, not their classification at the border.

38. Second, Canada disagrees with China's explanation of how the measures operate. Article 19 of Decree 125, read in context, shows that the first event is not the production or assembly of the first batch of vehicles. Rather, the first event is the self-verification followed by customs review of the self-verification. China conflates the customs review of the self-verification under Article 7 with the Verification of the first batch of manufactured vehicles under Article 19. Decree 125 makes clear that

self-verification and review precede Verification of the first batch of vehicles. Self-verification and customs review are necessary as part of the *registration* process (see Articles 7-9), whereas the assessment of the first batch of vehicles and subsequent Verification of that batch (Article 19) occur *after* the vehicle model is registered.

ANNEX A-4

RESPONSE OF CHINA TO A QUESTION FROM THE UNITED STATES FOLLOWING THE SECOND SUBSTANTIVE MEETING

1. Consider a vehicle model (Model I), registered under Article 7 of Decree 125, with respect to which the imported automobile parts used in that particular model are required to be characterized as complete vehicles. Part A used in Model I is produced in the United States. Part B used in Model I is produced in Canada. All other imported parts used in Model I are produced in other countries. Assume that Part A and Part B both have their own tariff headings under China's tariff schedule, and that they would be so classified under those headings if they were not characterized as complete vehicles. The following sequence of events occur:

- **Model I is registered in 2006.**
- **In December 2006, the manufacturer imports from the United States 300 units of US-produced Part A and declares the parts as being characterized as complete Model I vehicles under Decree 125.**
- **In January 2007, the manufacturer imports from Canada 250 units of Canadian-produced Part B and declares the parts as being characterized as complete Model I vehicles under Decree 125.**
- **During 2007, the manufacturer starts production of Model I, and produces 200 Model I vehicles. It decides to halt production in late 2007.**
- **The remaining 100 units of Part A and 50 units of Part B are held in inventory, to be used in other models with respect to which imported parts are not characterized as complete vehicles, or to be sold to dealers as replacement parts.**

A. Please explain how the 2006 importation of 300 units of Part A are reflected in China's official import statistics. In particular, what would be:

(i) the year of importation;
(ii) the tariff heading (e.g, the heading for Model I or the heading for Part A)
(iii) the number of units;
(iv) the value (e.g., as based on the value of Part A, or the value of a complete Model I);
(v) the country of origin (and/or country of exportation, if reflected in China's statistics);
(vi) the timing of when such imports are reflected in China's official statistics.

B. Please explain how the 2007 importation of 250 units of Part B are reflected in China's official import statistics. In particular, what would be:

(i) the year of importation;
(vii) the tariff heading (e.g., the heading for Model I or the heading for Part B);
(ii) the number of units;
(iii) the value (e.g., as based on the value of Part B, or the value of a complete Model I);

(iv) the country of origin (and/or country of exportation, if reflected in China's statistics);
(v) the timing of when such imports are reflected in China's official statistics.

C. Please explain whether the production of 200 Model I vehicles during 2007 has any effect on China's import statistics.

D. Please explain the effect, if any, on China's import statistics of the manufacturer's decision to use the remaining units of Part A and Part B for uses other than producing Model I or other vehicles the parts of which are characterized as complete vehicles.

E. Please explain whether the production of 200 Model I vehicles has any effect on China's production statistics.

2. Consider a vehicle model (Model II) produced in the United States. Model II is produced exclusively from imported parts. Only one part from China, Part C, is used in the production of Model II. Part C has its own tariff heading under China's tariff schedule. The Chinese exporter of Part C knows that Part C will be used in the production of Model II, and knows that Model II will be produced entirely from imported parts.

In December 2006, the exporter exports 300 units of Chinese-produced Part C to the United States, to be used in the production of Model II. Please explain how the 2006 exportation of 300 units of Part C is reflected in China's official export statistics. In particular, what would be:

(i) the year of exportation;
(ii) the tariff heading (e.g., the heading for Model II or the heading for Part C);
(iii) the number of units;
(iv) the value (e.g., as based on the value of Part C, or the value of a complete Model II);
(v) the timing of when such exports are reflected in China's official statistics.

Response of China

1. Please see China's response to panel question 175 concerning customs statistics.

Comments by the United States on China's response

2. China has chosen not to respond to the questions posed by the United States. Instead, China includes only a reference to its response to Panel question 175. That response of China contains a mere assertion: "With regard to the question of whether the import statistics of China will match the export statistics of other countries, in most cases the figures will match, but there are always exceptions."[1]

3. China provides no explanation for this assertion regarding "most cases", and in fact, this assertion must be wrong. As the United States questions are intended to highlight, whenever an imported part is treated as a "whole vehicle" under China's measures, there will necessarily be completely different treatment – in each and every case – under China's import statistics and the

[1]China's responses to the written questions from the Panel following the second meeting, response to question 175.

exporting country's export statistics. Moreover, when Chinese producers export parts to other countries, China applies no measures comparable to Decree 125. As a result, China's own import and export statistics for auto parts must be completely inconsistent.

4. The United States submits that China's failure to respond to the US questions is telling. China's entire defense in this dispute is based on its purported interpretation of the HS Convention. A main object and purpose of that agreement is to ensure the consistency and usefulness of trade statistics (and not, as China implies, to ensure the collection of certain levels of duty). Yet when asked a question that would require China to reconcile the operation of China's measures as they affect trade statistics with the object and purpose of the HS Convention to ensure the consistency of such statistics, China refuses to respond. The reason is clear – China' s proposed interpretation of the GIR 2(a) would destroy the usefulness of trade statistics, and, as such, that interpretation is unsustainable as being fundamentally incompatible with the object and purpose of the HS Convention. Without any possible tie to the goals set out in the HS Convention – a non-WTO Agreement upon which China so heavily relies – China's measures must be seen for what they actually are: namely, as domestic content requirements intended to foster the growth of a domestic auto parts industry, adopted without any regard to the plain inconsistency of those measures with China's WTO obligations.

_____