CHINA – MEASURES AFFECTING IMPORTS OF AUTOMOBILE PARTS

(WT/DS340)

RESPONSES BY THE UNITED STATES TO THE SECOND SET OF QUESTIONS BY THE PANEL TO THE PARTIES

July 26, 2007

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Q176. 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?
(b) (*All parties*) Please provide evidence supporting your respective views on the commercial reality of the automotive industry?

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

2. 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."[1] 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.

3. 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

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

models. In general, tires of the same dimensions are interchangeable with tires on any model with similar dimensions.

4. 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.

5. 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.

Q179. 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):

. . .

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

6. 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."

7. 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.

Q180. (*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 complainant's respective responses to question No. 87 seem 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?

8. 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.

Q181. (*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.

9. 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.

10. 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.

11. 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."

Q183. (*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.

12. 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.

13. 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).

Q184. (*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.

14. 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 percent duties at their local Customs office. The original U.S. 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.

Q185. 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.

. . .

(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.

15. 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.

Q186. (*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.

16. 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).

17. 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).

18. 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.

19. 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.

Q187. (*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 <u>not</u> 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?"

20. 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.[2] A Member's tariff schedule establishes tariff bindings, it does not and cannot redefine the meaning of "ordinary customs duties" in Article II.

21. 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

[2] 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.

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.

22. 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.

Q189. (*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?

23. Yes. First of all, "importation" must be interpreted consistently with the ordinary meaning of that term. Please see the U.S. 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.

Q190. (*United States*) Please clarify whether it is the Unites States' position that the Article III:2 "internal charge" is the 15% additional charge paid once the auto parts imported under the measures have been assembled into a complete vehicle?

24. 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 U.S. 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%.

Q191. (*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".

25. 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)

26. 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.

27. 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."

> **Q192. (*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?**

28. 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.

Q195. (*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*?

29. 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.

30. 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.

31. 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.

32. 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.

Q196. (*All parties*) Is "importation" different from the "process of importation"? Please explain.

33. 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.

Q197. (*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?

34. 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.

Q198. (*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)?

35. 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.

Q200. (*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.

36. 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.

37. 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.

38. 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.

> **Q201. (*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).**

39. 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.

Q203. (*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 - Beef*), *EC – Asbestos* (Panel Report, WT/DS135/R, paragraphs 8.94-8.95), and *Dominican Republic – Cigarettes* (Panel Report, WT/DS302/R, paragraphs 7.258-7.260).

40. 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.[3]

41. 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 U.S. 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 *Dominican Republic – Cigarettes* regarding the term "on importation" in Article XI [4] is not transferrable to the meaning of "on importation" in Article II.

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[3] 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."

[4] *India – Autos* at paragraph 7.257 and *Dominican Republic – Cigarettes* at paragraph 7.258.

Q204. (*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?

42. 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).

Q205. (*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.

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

43. 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.)

44. 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.[5]

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.[6] 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.

45. 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.[7]

46. 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 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 . . . .).

Q208. (*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?

47. 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.

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[5] WT/ACC/CHN/49 (Ex. JE-26).

[6] HS Convention, Art. 9 (Ex. JE-35).

[7] Second Submission of Canada, para. 67.

Q209. (*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?

48. 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.

49. 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.

Q210. 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."

. . .

(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?

(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 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?

50. Response to Q210(b): 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 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.

51. 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.

52. Response to Q210(c): 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. U.S. 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 U.S. 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 U.S. Customs administration has cited this Treasury Decision routinely in administrative rulings on tariff classification matters.

53. 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," U.S. Customs authorities give this decision considerable weight and have classified in accordance with the WCO's decision to remove the reference of "simple assembly."

54. 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.

55. 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.

Q212. (*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?

56. 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.

57. 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).

58. 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.

59. 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 June 20, 2007 from the Secretary General of the WCO in response to the Panel's request for technical advice.[8] 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).

Q214. (*All parties*) Regarding the meaning of "elements originating in or arriving from different countries" mentioned in paragraph 10 of the HS Committee

[8] 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.

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?

60. 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.

61. 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.

Q215. 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?
. . .

62. 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.

Q216. 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.

. . .

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

(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?

63. Response to Q216(a): 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.

64. Response to Q216(c): 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.

65. Response to Q216(d): 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,[9] 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."

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

Q218. (*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*"?

66. 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.

67. 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.

Q221. (*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.

68. 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."

69. 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.

Q222. (*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).

70. 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.

Q223. (*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?

71. 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.

Q224. (*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.

72. 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 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.

73. 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."

74. 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.

Q226. (*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?

75. 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.

Q229. (*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.

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

77. 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".

78. 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.

79. 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.

80. 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 percent tax on bulk shipments of parts imported for manufacturing purposes.

81. 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.

Q230. (*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.

82. 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 percent.) Other than this, the United States is not aware of what China is referring to with respect to this alleged "concession."

Q231. 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?
(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?

83. Response to Question 231(a): 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).

84. 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.

85. 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.

86. 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.

87. Response to Question 231(b): 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.

Q233. (*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).

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

89. 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 percent duty on auto parts imported for manufacturing purposes – are inconsistent on their face with China's commitment to impose a maximum of a 10 percent 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.

90. 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.

91. 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).

Q235. (*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?

92. No, the United States does not agree.

93. 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 percent 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."

94. 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.

Q236. (*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)?

95. 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.

96. 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."

97. 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 much more than the definition of "as presented" is involved.

98. 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."[10]

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.

99. 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."

100. 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

[10] Ex. CHI-15.

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.

101. 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.

102. 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).

Q237. (*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.

103. 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.

104. 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 U.S. response to Panel question No. 216(c).

105. 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.

106. 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.

Q244. (*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".

107. 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.

Q245. (*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.

108. 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.

109. 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.[11]

110. 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.

Q247. (*Complainants*) Please explain how the complainants classify and treat imported auto parts and automobiles under their respective schedules.

111. 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.

Q248. (*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.

112. 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

[11] 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 U.N. nomenclature was to be used as context for interpreting Members' GATS schedules.

models in different price brackets for which information is publicly available – a Cadillac Escalade (U.S. retail base price of $55,000) and a Buick LeSabre (U.S. retail base price of $26,000) – both of which are sold in the Chinese market.[12] 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.

Q249. (*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?

113. 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."

114. 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.

115. 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.

Q250. 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:

. . .

(b) (*European Communities, United State and China*) Please comment on Canada's view.

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[12] 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.

116. 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).

> **Q251. (*United States*) [First part]. 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?**

117. 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.

> **Q251. (*United States*) [Second part]. 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?**

118. 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.

> **Q252. (*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?

119. 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.

Q253. (*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)

120. 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.[13] Most international joint ventures in China also began production with CKD assembly operations.[14]

Q254. (*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

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[13] *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).

[14] *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).

its vehicles. On the other hand, China has argued that it has always treated CKD and SKD imports as complete vehicles.

121. 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 Submission) that these tariff practices continued after China acceded to the WTO "until China began to implement the measures at issue in this dispute."

122. 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).

123. 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.

Q255. (*All parties*) For auto manufacturers, what are the benefits of importing CKD and/or SKD kits, as opposed to importing individual auto parts?

124. 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.

Q259. 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.
. . .
(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?
(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?
(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.

125. Response to Q259(b). 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 percent 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.

126. 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 not 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 percent. 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 percent.

127. Response to Q259(c). 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.

128. Response to Q259 (d). 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.

Q260. (*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?

129. 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.

Q261. (*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.

130. 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.

131. 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.

132. 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.

133. 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.

134. 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.

135. 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 percent 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 percent 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).

> **Q267. (*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?**
>
> **(a) (*European Communities and United States*) How can the application of the 25 percent rate be considered "legitimately comparable" to application of the 10 percent rate, if the 25 percent rate (or the difference between it and the 10 percent rate) are, in your view, WTO-inconsistent in the first place?**
>
> **. . .**

136. 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 percent 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 percent 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 percent tariff rate to imported parts assembled into a motor vehicle containing insufficient local content), it would be appropriate to view the 25 percent 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 percent tariff rate is inconsistent with GATT Article II. The 25 percent 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 percent tariff rate is applied to imported parts that are assembled into a motor vehicle containing insufficient local content and the revenue collected when the 10 percent tariff rate is applied to the same imported parts if they are assembled into a motor vehicle containing sufficient local content.

137. The United States views the charges imposed under China's measures not as ordinary customs duties but rather as internal charges. (See the U.S. response to question No. 190.) Specifically, China's measures impose an internal charge in the amount of 25 percent on imported parts if they are not assembled into a motor vehicle with sufficient local content but impose a charge of only 10 percent 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 percent 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 percent internal charge is GATT-inconsistent. The 25 percent 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 percent 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 percent charge is applied to the same imported parts if they are assembled into a motor vehicle containing sufficient local content.

138. 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.

Q268. (*United States*) Is the United States arguing that the 15% ad valorem differential between the 15% 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?

139. 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 percent charge is applied and the revenue collected when the 10 percent charge is applied that, as a legal matter, represents the revenue foregone by the Chinese government.

Q269. (*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?
(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?

140. Response to Q269(a). 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 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.

141. 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.

142. Thus, in the case of China's measures, the normative benchmark – the 25 percent internal charge – remains the same over time. However, that does not mean that the 25 percent 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 percent 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 percent internal charge serves as the normative benchmark.

143. Response to Q269(b). 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.

Q270. (*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 percent charge on auto parts". However, in your answer to question 157 from the Panel, you suggest that you are not arguing that 25 percent 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?

(b) Please provide your detailed legal reasoning for considering 25 percent 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 percent "across-the-board" rate on auto parts, please explain in detail the basis for your position

that 25 percent nevertheless is the appropriate "normative benchmark" to be applied for purposes of this claim.

144. Response to Q270(a). 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.

145. Response to Q270(b). Please see the United States response to Panel question Nos. 267 and 268.

Q272. (*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.

146. 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.

Q273. (*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.

147. The United States agrees that the factors listed in *EC– Bananas* 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* of 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.

Q278. (*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?

148. 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.

Q279. 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.
. . .

149. 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 . . . .

150. 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."[15]

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[15] *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 – Restrictions on Imports of Textile and Clothing Products*, 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*,

151. 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.

152. 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 States disagrees with this assertion, if accepted, this alleged deferral of "importation" would restrict imports in at least two ways:

153. 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.

154. 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.

155. 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.

WT/DS 161/AB/R, WT/DS/169/AB/R, para. 749; *Japan -Restrictions on Imports of Certain Agricultural Products*, BISD 35S/163, para. 5.2.2.2; and *Japan – Trade in Semi-conductors*, BSID 35S/116, para. 104.

Q280. (*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?

156. 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.

157. 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 percent 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.

158. 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.

159. Finally, under Article 93 of the Working Party Report, China is required to impose a maximum of a 10 percent 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).

Q281. (*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)?

160. 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).

Q286. (*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.

161. 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.

Q292. (*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)?

162. 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.[16]

163. 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

[16] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

United States notes that laws are often adopted for more than one reason,[17] 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."

Q293. (*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.

164. The United States has addressed these arguments by China in its response to Question 280, and respectfully refers the Panel to that response.

Q294. (*All parties*) Please provide more specific evidence to support your arguments with respect to the effect that the measures have had on trade.

165. 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.

Q303. (*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"?

166. 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

[17] 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.

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."

EXHIBIT LIST

US-5	"Wave goodbye to the family car," *The Economist*, 11 January 2001
US-6	List of Different Tires Suitable for Same Vehicle
US-7	Dictionary Definitions of "import" and "importation"
US-8	Suppliers to Various Vehicle Models
US-9	2006 U.S. Custom NY Lexis 5121 (September 5, 2006)
US-10	2006 U.S. Custom NY Lexis 5748 (September 11, 2006)
US-11	19 C.F.R. 141.51
US-12	19 C.F.R. 142.3
US-13	Value of Parts Combinations in Exhibits EC - 1, 2, 5, 6, 7, 8, 9, 10, 11
US-14	19 C.F.R. 141.1
US-15	*Ford in the Netherlands, 1903-2003: Global Strategies and National Interests*, Ford: The European History 1903-2003, Ferry de Goey (2003)
US-16	*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)