CHINA – MEASURES AFFECTING IMPORTS OF AUTOMOBILE PARTS

(WT/DS340)

**RESPONSES BY THE UNITED STATES
TO THE QUESTIONS BY THE PANEL TO THE PARTIES**

June 11, 2007

Measures at issue and products at issue

Q1. In respect of the criteria set out in Articles 21 and 22 of Decree 125:
. . .
(b) *(All parties)* Are these types of criteria commonly used as standards by customs offices in determining whether parts and components of a product should be considered as a complete product?

1. The criteria set out in Articles 21 and 22 of Decree 125 are not the types of criteria commonly used as standards by customs officials in determining whether parts and components of a product should be considered as a complete product. The United States follows the long-standing principle that goods should be classified based on its condition as entered, regardless of what occurs to the goods after entry. U.S. Customs officials apply General Interpretative Rule (GIR) 1 and classify merchandise in accordance with the terms of the headings and the relevant section and chapter notes. When components and parts of a motor vehicle are entered, U.S. Customs officials will determine whether they meet the terms of a particular heading. For example, a vehicle body is specifically described by the terms of heading 87.07, which provide for: "Bodies (including cabs), for the motor vehicles of headings 87.01 to 87.05". A gasoline engine is specifically described by the terms of heading 84.07, which provide for: "Spark-ignition reciprocating or rotary internal combustion piston engine".

2. In situations where a finished good is entered unassembled (e.g., a complete kit to make 1 good), the United States will classify the imported good that is unassembled as if it were complete under General Interpretative Rule 2(a). In situations where incomplete or unfinished merchandise is imported, U.S. Customs authorities will examine the merchandise as presented at the time of importation to determine whether the incomplete or unfinished merchandise has the essential character of the complete or finished good. For example, see General Explanatory Note to Chapter 87 (JE-37).

Q3. *(All parties)* Do automobile manufacturers themselves also assemble or manufacture the so-called "assemblies" listed in Article 4 of Decree 125? If so, how common is this in the automobile industry in general or in the Chinese automobile industry? Is there a clear distinction between automobile manufacturers and parts manufacturers?

3. Automobile manufacturers commonly assemble within their own operations and facilities at least a few of the listed assembly operations. For example, most automobile manufacturers assemble the body, whether from stampings provided by a supplier, stampings they make themselves, or a combination of both. Engine assembly is also a common operation for automobile manufacturers. The same holds true for chassis assembly, assuming that chassis means what is also referred to as the "frame." It is extremely common, if not universal, that

automobile manufacturers perform one or more of the listed assembly operations, although they may not all perform the same ones or combinations thereof.

4. With respect to the listed assembly operations, a clear distinction cannot be made between automobile and parts manufacturers.

Q8. *(Complainants*) Please explain whether, and if so, to what extent, the procedural requirements under the measures affect the average period necessary for the assembly of a vehicle.

5. As the United States explained in paragraphs 46-66 and 99-104 of its first submission, China's measure impose burdensome procedural requirements on manufacturers who use imported parts, while any manufacturers who use only domestic parts are excused from these burdensome requirements. This difference accords less favorable treatment to imported parts as compared to like domestic parts, and results in a *prima facie* violation of Article III:4. China has not even attempted to rebut this *prima facie* case.

6. Information on the average period of delay resulting from China's measures was not an element of the United States' *prima facie* case on this issue, and the United States does not have such information readily available.

Q9. (*All parties*) Assuming that a country can have an anti-circumvention policy in the context of ordinary customs duties, how much flexibility should a country have in introducing measures to enforce such a policy?

7. The United States cannot accept the assumption – advocated by China in this dispute – that it amounts to "circumvention" when automobile manufacturers use normal channels of trade to source bulk shipments of parts for assembly purposes. As the United States has explained, China's attempt to analogize all auto manufacturing operations as the assembly of separately organized and shipped "knock down kits" is baseless, and ignores the reality of modern manufacturing operations.

8. Moreover, the United States does not otherwise know what China means by "circumvention" with respect to the application of customs laws. The United States follows the long-standing principle that goods should be classified based on its condition as entered, regardless of what occurs to the goods after entry.

9. The United States, however, notes that the WTO Agreement certainly does not prevent the enforcement of a Member's customs laws. Many provisions of the WTO Agreement refer to the existence of, and the enforcement of, customs laws. For example, Article X of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") imposes certain disciplines, including that customs laws be administered "in a uniform, impartial and reasonable manner." Additional disciplines are set out in other WTO Agreements, such as the *Agreement on Implementation of*

Article VII of the General Agreement on Tariffs and Trade 1994 ("Customs Valuation Agreement") and the *Agreement on Import Licensing Procedures*.

Q10. (Complainants) China submits in paragraph 15 of its first written submission that the details of the specific tariff headings and tariff rates are not relevant to the disposition of the claims before the Panel. Do the complainants agree with China? If so, is your view the same regardless of whether the charge concerned should be considered as tariff duty or internal charge?

10. The United States disagrees with China. In the U.S. view, the tariff headings and rates in China's Schedule are relevant to the disposition of this dispute. The way specific tariff headings tie into the matters at issue depends on the specific claim under consideration.

GATT 1994 Articles III:4 and III:5 and TRIMs Agreement: For these claims, the key aspect of China's Schedule is the 15 percent differential between the whole vehicle tariff (25%) and the parts tariff (10%). China's measure's impose a WTO-inconsistent local content requirement for vehicle manufacturers, which results in the imposition of the 15 percent additional charge unless the local content requirements are met. Note that this local-content requirement is WTO-inconsistent, regardless of whether the additional charge is considered an internal charge or part of China's ordinary customs duties or other duties or charges.

GATT 1994 Article III:2: If, as the United States contends, China's measures are internal charges, then again the key aspect is the 15 percent differential between the whole vehicle tariff (25%) and the parts tariff (10%). This additional charge is imposed only on imported parts, and never on domestic parts.

GATT 1994 Article II: If, as China contends, China's additional charge is a customs duty, then such a duty breaches China's tariff bindings on parts. In this instance, the difference between the whole vehicle tariff and the duty on each imported part is the amount by which China has breached its tariff bindings.

13. (All parties) Regarding the notion of "circumvention":
(a) Please explain what "circumvention" means; and
(b) Please explain whether, and if so, how, under the WTO law, a Member is allowed to take an anti-circumvention measure. If possible, please support your response with relevant GATT/WTO jurisprudence.

11. The United States respectfully refers the Panel to the U.S. Response to Question 9. To summarize, the United States does not know what China means by its use of the term "circumvention," other than that China believes that it is "circumvention" for automobile manufacturers to request the tariff treatment that China promised to provide to automotive parts.

As also noted, the WTO Agreements contemplate that Members may enforce their Customs laws, so long as Members comply with relevant WTO obligations, such as Article X of the GATT 1994.

> **Q14. In paragraph 21 its first written submission, China indicates that between 2001 and 2004, the value of imported parts and components increased by 300%.**
> **(a) (*Complainants*) Please comment on this statement, including whether, and if so, how, these types of data are relevant to the measures at issue; and**

12. The United States fails to see how the trade data presented by China is relevant to any matters at issue in this dispute. The United States has *prima facie* established breaches of various provisions of the WTO Agreement, including Article III of the GATT 1994 and the TRIMs Agreement. China's trade data is not relevant to these claims. The United States does note, however, that data on trade flows could be relevant for determining the level of nullification and impairment under Article 22 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

13. The United States understands that China relies on these data in support of its theory that automobile manufacturers began to split their CKD kits into separate shipments in order to avoid the whole vehicle rate that China claims it is allowed to apply to such kits. As an initial matter, the United States does not agree with China's views on the classification of separate shipments as a single CKD. But even leaving this aside, China's data on total imports of parts and components do not support China's factual assertions. China has presented no data showing that imports of CKD kits fell over the same period. And, more importantly, China has presented no evidence that these imported parts and components were destined for facilities that assembled "kits", as opposed to being destined for either (a) replacement parts or (b) manufacturing plants that imported bulk parts and components in the normal course of operations.

> **17. (*Complainants*) China submits in footnote 14 in its first written submission that "the complainants appear to have mistaken the rules applicable to bonded areas as applicable to bonded entries" and that "pursuant to Art. 12 of Decree 125 importers provide comprehensive import bonds commensurate with their stated plans for importing and assembling auto parts that have the essential character of a motor vehicle". Please comment on China's statement.**

14. China – both in the above cited footnote 14 and in its answers at the first substantive meeting – has presented a clarification of its bonding requirements on imported auto parts. This clarification further supports the position of the United States that the additional charges imposed by China's measures are internal charges, not Customs duties.

15. In particular, China has clarified (1) that all automotive parts covered by China's measures enter under a bond based on the 10% rate for auto parts, and (2) that the bond is simply a financial guarantee, and does not involve any control by Chinese Customs on the importers disposition of the part. That is, if the importer sells the part as a spare part, or if for any reason

the part is not used in the manufacture of a vehicle within one year, then the 10% parts rate applies. Only if the part is used in the manufacture of a vehicle not meeting local content requirements will China proceed to impose the 25 percent "whole vehicle" rate on the part.

> **Q32. (*Complainants*) In paragraphs 62-67 of its first written submission, China cites examples of customs practices from certain WTO Members, including from the complainants, to demonstrate the existence of the "widespread" and "consistent practice of WTO Members in imposing customs duties after the 'time and point of importation'". Please comment on the accuracy of these examples and their relevance to the characterization of the measures.**

16. Paragraph 62 refers to "the consistent practice of WTO Members in imposing customs duties after "the time or point of importation" in order to demonstrate that, as stated in paragraph 63, Article II of the GATT "is not limited to charges that are collected 'on or at the point of importation.'" Contrary to China's characterization of U.S. practice in paragraph 63, the imposition of customs duties occurs at the time of importation of goods that are entered into the United States. Specifically, 19 C.F.R. § 141.1(a) provides that duties and liability for their payment accrue upon imported merchandise on arrival of the importing vessel or other means of transport within the United States. Additional duty liability does not accrue based upon the usage of the goods after entering the United States.

17. The classification of the goods is based on the condition of the goods when imported and entered for consumption in the United States. The classification and corresponding amount of duties owed must be identified and deposited at the time of importation, when the importer files an Entry Summary. This is the point at which customs duties are imposed. China implies that the United States "imposes" customs duties beyond the point of importation into the United States by alleging "customs authorities are not required to make a final classification determination and assessment of duty liability until one year after the merchandise has entered the customs territory of the United States." 19 C.F.R. § 159.11.

18. The United States mandates a one-year time frame for liquidation, to which China refers in paragraph 62, for the purpose of providing an adequate amount of time to verify the accuracy of the information provided by the importer concerning the nature of the imported goods, including the correctness of their classification based upon their condition at the time of importation. Liquidation means the final computation of the duties that accrued on an entry of imported merchandise, 19 C.F.R. § 159.1, which are based solely on the condition of the merchandise at the time of importation, 19 C.F.R. § 141.1(a). The one-year time frame for liquidation is necessary due to the sheer volume of goods arriving at the ports, for which the United States is not in a position to instantaneously review entry documents and determine their accuracy at the time of importation.

19. China also notes in paragraph 64 that the United States only requires the deposit of estimated duties at the time of importation, pending the finalization of those duties within one year from the date that the goods are entered for consumption into the United States. This practice does not undermine the legal requirement that the imposition of customs duties occurs at the time of importation. Estimated duties are deposited in lieu of the final imposition of duties, per 19 C.F.R. § 141.101, because (as explained above) the United States is unable to verify the accuracy of the classification and amount of duties alleged by the importer based on the condition of the goods at the time of their importation. The one-year time frame within which the United States will verify the accuracy of the amount of the estimated duties is not a time frame within which the United States may impose additional customs duties, unless such duties are based upon the condition of the goods at the time of their importation.

20. Paragraph 65 alleges that "many countries specify more specialized circumstances in which duties can be assessed after the time or point of importation." The first example cited by China is the allegation that Canada "retains the authority to reconsider the origin, classification, and value of imported goods for a period of up to four years after liquidation." The other examples also involve like provisions under the laws of the EC, New Zealand, Australia, and India, all of which permit a final determination of duty liability after the goods have been imported. Retaining the right to verify the accuracy of origin, classification, valuation, and other facts that may affect the dutiability of goods is fundamentally different from China's measure, which changes the level of a charge based on the local content thresholds of an internal manufacturing operation. In contrast, the imposition of customs duties must be based upon the condition of the goods at the time of importation. If an importer misrepresents that condition (by misstating the origin, classification, value, etc. of the goods), then proper enforcement of the trade laws requires the imposition of the additional duties that were properly owed based on the condition of the merchandise at the time of importation.

21. In paragraph 67, China identifies an alleged nexus between "widespread and consistent practices of WTO Members" (as described in the preceding paragraphs) that impose "charges after 'the time or point of importation'" when "the charge bears an objective relationship to the administration and enforcement of a valid customs liability." These "widespread" and "consistent" practices of WTO Members, as described by China in paragraphs 62-67, are relevant to China's position concerning the permissibility of its classification of auto parts only to the extent there is a valid customs liability. In regard to the classification of goods, this determination is a valid customs liability when it is based on the condition of the goods at the time of importation. The examples cited by China merely demonstrate that other WTO Members enforce this particular valid customs liability by verifying that the classification of the goods is correctly based upon their condition at the time of importation.

Q33. (*Complainants*) In your view, should imported CKD or SKD kits be classified differently than the auto parts included in such kits if such auto parts were to be imported separately?

22. Yes, the classification should be different. Under the Harmonized System, a good should be classified in its condition as imported. Assuming that an imported CKD or SKD kits 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.

Q37. (*All parties*) Please explain the relationship between the obligations respectively under Article II and Article III of the GATT 1994 in light of the Appellate Body's statement in Japan - Alcoholic Beverages II that "the broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement." Further, how do you relate this statement to the instant case?

23. As explained in *Japan-Alcohol*, Article III "obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products."[1] Article II has a different purpose and imposes different obligations – under Article II, Members bind their tariff rates on specific goods, and are obliged to charge no higher Customs duties than the level set out in their respective schedules. Since Article II is an additional obligation, nothing in Article II is intended to, or indeed could, undermine the national treatment obligations set out in Article III.

24. The following paragraph from *Japan-Alcohol* is directly relevant to the disposition of this dispute.

> The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II" should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation

[1] *Japan-Alcohol*, at 17.

> clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III.[2]

In particular, the reasoning in this paragraph highlights that China's measures – which favor the use of domestic parts over imported parts by imposing higher charges on other imported parts, as well as through the imposition of extra administrative burdens, if local content thresholds are not met – are independent breaches of Article III:4, regardless of any question under Article II with regard to whether China has breached its tariff concessions on auto parts. The independent scope of Article III, and in particular the fact that Article III applies regardless of any question of tariff bindings, is the basis for the U.S. position during the first substantive meeting that the Panel should begin its analysis with China's breaches of Article III:4.

Q39. (*Complainants*) Please comment on the tariff classification decisions of the complainant governments referred to by China in relation to Explanatory Note VII to Rule 2(a) of the General Interpretative Rules in paragraphs 102-103 and footnote 74 of China's first written submission.

25. The United States does not understand China's reliance on the U.S. ruling (HQ 960242), as the classification decision did not address whether the imported goods should be considered parts or incomplete, unassembled goods. The facts in the U.S. ruling indicate that all of the slipper components (vamps and soles) were entered together and that there were no excess components.

Q47. (Complainants) Please explain how CKD and SKD kit imports are classified in your country.

26. The terms "CKD" and "SKD" are not terms that are defined or used in the Harmonized System, nor are they defined or used by the United States in its administration of the Harmonized Tariff Schedule of the United States. To the extent that the United States understands these terms as defined by China in Decree 125, Annex I of Exhibit 3-CHI, we classify merchandise in its condition as imported. For example, a single component entered is classified under the terms of a heading that describes that component. If a group of components are entered together that may form an assembly, we would classify it under the heading that describes that assembly. If a group of components do not form an assembly, they are individually classified (e.g., a crankshaft and side panel would not constitute an assembly and would be individually classified). Given the limited description in Annex 1, the following chart explains how the United States would classify these assemblies and sub-assemblies:

[2] *Japan-Alcohol*, at 17 (emphasis added).

Assembly Name	Description	Sub-assembly Letter	U.S. Classification
Vehicle Bodies	Class M1	A	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class M1	B	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class M1	2 A's & 1 B	If entered together, then we would classify under heading 87.07, as bodies by application of GIR 2(a)
	Class M2	A	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class M2	B	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class M2	A&B	Given the descriptions of the sub-assemblies, we do not see how 2 A sub-assemblies can be combined as Sub-assembly A covers roof box.
	Class M3	A	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class M3	B	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class M3	A&B	Given the descriptions of the sub-assemblies, we do not see how 2 A sub-assemblies can be combined as Sub-assembly A covers roof box.
	Class N	A	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class N	B	If sub-assembly is entered separately, we would classify under subheading 8708.29 (if for the vehicles of headings 87.01 to 87.05) or under subheading 8709.90 (if for the vehicles of heading 87.09)
	Class N	A&B	Given the descriptions of the sub-assemblies, we do not see how 2 A sub-assemblies can be combined as Sub-assembly A covers roof box.
Engine Assemblies	Diesel Engine	A	If sub-assembly entered separately, we would classify under subheading 8409.99
	Diesel Engine	B	If sub-assembly entered separately, we would classify under subheading 8409.99
	Diesel Engine	A&B	If sub-assemblies A and B are entered together, then we would classify under subheading 8408.20, by application of GIR 2(a)

	Gasoline Engine	A	If sub-assembly entered separately, we would classify under subheading 8409.91
	Gasoline Engine	B	If sub-assembly entered separately, we would classify under subheading 8409.91
	Gasoline Engine	A&B	If sub-assemblies A and B are entered together, then we would classify under subheading 8407.31 to 8407.34 (depending upon cylinder capacity), by application of GIR 2(a).
Transmission Assemblies	MT	A	If sub-assembly entered separately, we would classify under subheading 8708.93 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
	AT	A	If sub-assembly entered separately, we would classify under subheading 8708.93 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
	AT	B	If sub-assembly entered separately, we would classify under subheading 8708.40 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
	AT	A&B	If sub-assemblies A and B are entered together, then we would classify under subheading 8708.40 by application of GIR 2(a)
Vehicle axle of Class M1, M2, M3 and N vehicles	Driving axle		We would classify under subheading 8708.50 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
	Driven axle		We would classify under subheading 8708.50 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
Frames			We would classify under subheading 8708.99 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
Braking Systems			Assuming that all components are entered together as an assembly, we would classify under subheading 8708.30. If components entered separately, then classification may be under provisions of chapters 84, 85, 87, or 90.
Steering Systems	Power steering		We would classify under subheading 8708.94 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)
	Non-power steering		We would classify under subheading 8708.94 (if for the vehicles of headings 87.01-87.05) or subheading 8709.90 (if for the vehicles of heading 87.09)

Q51. (*Complainants*) Do the complainants agree with the translations provided by China of the challenged measures in Exhibits CHI-2, CHI-3, CHI-4? If not, please indicate specific provisions of the measures to which the complainants do not agree.

27. In furtherance of the Complainants' decision to submit an initial set of joint exhibits, including translations of China's measures in Exhibits CHI-2, CHI-3, CHI-4, the United States respectfully refers the Panel to the EC's response to this question.

55. (All parties) Please explain in detail what customs "clearance" means.

28. In the United States, "clearance" is a legal term that may apply to passengers, vessels, and goods entering (and, in some cases, exiting) the customs territory of the United States. With respect to the importation of goods, "clearance" is not formally defined under the customs laws of the United States. The United States defines "entry" into the United States not merely as the arrival of goods at a port, but as the process of presenting documentation for clearing goods through Customs. Imported goods are considered cleared for entry into the United States when the proper entry documentation has been filed and the goods are released from customs custody (into the custody of the importer) on the basis of that documentation.

Q60. (Complainants) China submits in footnote 65 of its first written submission that the complainants' customs authorities routinely classify CKD kits as "complete vehicles". Please comment on this statement

29. The United States does not agree with the characterization in footnote 65 that U.S. customs authorities routinely classify CKD kits as "complete articles". The U.S. issues over 10,000 classification rulings each year, but China cites only to a single ruling, and that ruling involves an unassembled pistol, not an automotive vehicle. As explained in the United States answer to Question 47, the terms "CKD" and "SKD" are not defined or used by the United States in its administration of the Harmonized Tariff Schedule of the United States. As further explained in the answer to Question 47, any classification decision by U.S. Customs would depend on the specific details concerning the items (whether the importer labels them as a "CKD" or "SKD" or something else) as actually entered.

Q61. (*Complainants*) Paragraph 93 of the Working Party Report states that if China were to have created a separate tariff line for CKD and SKD kits, the duty rate would be 10 per cent.
(a) (*All parties*) Has China created separate tariff lines for CKD and SKD kits?; and
(b) (*Complainants*) If a separate tariff line for CKD and SKD kits has not been created, what is the relevance of paragraph 93 of the Working Party Report to this dispute?

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

line that specifically mentions CKDs and SKDs. Thus, the *de facto* result of China's measure is as if China created a new tariff line for CKDs and SKDs.

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

Q67. (*Complainants*) If China was imposing an anti-dumping duty on complete vehicles, would China in your view have the right to impose such duty upon imports of CKD and SKD kits?

32. A Member's ability to impose antidumping duties is governed by Article VI of GATT 1994 and the AD Agreement. The investigating Member has the right to impose anti-dumping duties on imports of those products for which it has made a determination that there was dumping of the products under investigation, injury to domestic producers of the like products, and a causal link. The investigating Member is not required to impose these duties on the basis of tariff lines and, in fact, investigating Members rarely do. Typically, the duties are applied to the products covered by the investigating Member's determination, which can be defined in numerous ways. The product coverage can be defined to apply to some but not all products that fall under a particular tariff line or to products falling under or within a variety of tariff lines. In addition, the product coverage can apply to finished products or to parts or both. That is what the rules of GATT Article VI and the Anti-Dumping Agreement allow. The only requirements are the findings of dumping, injury and causal link.

33. Thus, with regard to the hypothesized anti-dumping order imposing duties on complete vehicles, it would depend on precisely how the product coverage of the anti-dumping order was defined as to whether duties could be applied to CKD kits and SKD kits. If the product coverage

expressly included the kits, and the requisite findings of dumping, injury and causal link had been made, it would be appropriate to impose duties on the kits. If it was unclear whether the product coverage included the kits and the investigating authority made an appropriate circumvention finding, it would again be appropriate to impose duties on the kits. If, however, the product coverage of the anti-dumping order expressly excluded the kits, it would not be appropriate to impose duties on them.

Q68. (*All parties*) Please comment on the view that if WTO Members are allowed to resort to the notions contained in Rule 2(a) of the General Interpretative Rules, such as "as presented" and "essential character", in relation to tariff classification, it could have serious implications on the world trading system in light of today's commercial reality that manufacturers import parts and components from different sources and assemble them together.

34. If China's view were adopted, then no producer would ever be able to rely on the tariff bindings set out in a Member's schedule. In every case, producers would face the possibility that an importing Member (as China has done) would adopt thresholds that arbitrarily defined some collection of imported parts as having the character of a whole product, and would thus begin assessing duties on the parts as if they were the whole product. Moreover, if China's view were adopted, every Member (regardless of the specific details of their tariff bindings on parts and whole products) would be entitled (as China has done) to impose higher charges on imported parts (as long as the rate of duty was equal or lower to the binding on the finished product) used in domestically manufactured products if those products failed to meet domestic content thresholds . In other words, every Member would be entitled to adopt local-content based TRIMs, despite the prohibition on such measures in the TRIMs Agreement.

Q69. (*All parties*) When you refer to CKD and SKD kits in relation to the assembly of automobiles, are they always composed of the same combination of auto parts or is there a range of combinations of auto parts that could comprise such CKD and SKD kit? Please also provide definitions of CKD and SKD kits respectively.

35. This response is based on the understanding of the United States regarding general industry usage of the terms "CKD" and "SKD." As noted in response to Question 47 above, these terms are not used by the U.S. Customs Service for the purpose of tariff classification. In addition, the United States is not aware of any formal, published definition of these terms.

36. CKD stands for "complete knocked-down" and SKD stands for "semi knocked-down." Completely knocked-down kits" ("CKDs") are parts imported together in unassembled condition that provide the necessary parts in order to manufacture a whole vehicle. The kit may include not only parts, but also sub-assemblies and assemblies such as engine, transmission, axle assemblies,

chassis and body assemblies. Semi knocked-down kits" ("SKDs") refers to partially assembled combinations of parts that can be used to manufacture a whole vehicle..

Q70. (*All parties*) In light of your response to the previous question, please clarify whether you agree with the European Communities' explanation on CKD and SKD kits in paragraph 267 of its first written submission, including its reference to "all the parts necessary to manufacture not only a vehicle, but also an 'assembly'"?

37. The United States notes that the EC statement in paragraph 267 is describing the EC view of how "CKD" and "SKD" are used in Decree 125. The EC notes that China's measure does not exhaustively define these terms, and the EC "assumed" that such kits "consist of "all the parts necessary manufacture a vehicle or an 'assembly"." The United States believes these assumptions are reasonable, given the lack of clarity in China's measures.

Q71. (*All parties*) Please explain in detail what kind of manufacturing processes are usually involved to make a complete vehicle using CKD or SKD kits?

38. It is not possible to give a general answer as the level of fitting and equipping will vary depending on the circumstances and the content of the kit. An SKD with a high level of assembly (or, put another way, very little disassembly) may require relatively simple assembly operations. In contrast, assembling a complete knock down kit (CKD) will be more complex.

Q72. (*All parties*) Do the complainants agree with the description of SKD kits as illustrated in Exhibit CHI-5. If not, explain why.

39. Exhibit CHI-5 appears to illustrate a complete vehicle rather than an SKD kit. It appears to show a fully finished vehicle with its tires strapped to the shipping skid and not yet mounted.

Q73. (*All parties*) Canada submits in footnote 1 of its first written submission that "in this submission, except where the Measures specifically provide for other categories of goods, "parts" includes all auto parts and components associated with the production of whole vehicles or individual assemblies." In light of this statement, please clarify the exact scope of the products at issue in this case. Please explain in detail by referring to, inter alia, HS headings.

40. This footnote in Canada's first submission sets out a working definition of "parts," and the United States agrees with this definition. The United States notes, however, that the scope of this dispute is not established by any disputing party's working definition of "parts" as set out in a submission. Rather, the scope of this dispute is set out in the terms of reference, which in turn refers to matters (including the measures) set out in the request for an establishment of a panel.

Thus, the products at issue in this dispute are the products subject to China's measures (Order No. 8, Decree 125, and Announcement No. 4). The product coverage of China's measures appears to be very broad, and to include any piece (part, assembly, or anything else) used in the production of complete vehicles.

41. The United States understands that at the four digit level, the products at issue fall generally into the following HS headings: (1) complete vehicles (under headings 87.01 to 87.05 of which headings 87.02 to 87.04 are most relevant in view of the scope of the Measures); (2) intermediate products such as the body and the chassis fitted with engine (under headings 87.06 and 87.07); (3) parts and accessories of the motor vehicles of headings 87.01 to 87.05 (under heading 87.08); and (4) parts and accessories of motor vehicles classified elsewhere than chapter 87 (in particular Chapters 84 and 85; in this respect most relevant are headings 84.07, 84.08, 84.09, 84.83 and 85.11 but also other headings may be relevant depending on the vehicle type).

42. Nonetheless, the tariff classification (either asserted by complainants or asserted by China) does not determine the scope of the products covered within the scope of this dispute. As noted, the United States is challenging the consistency of the measures with covered agreements, and the scope of the products encompassed in this dispute are any products that China subjects to its measures identified in the request for establishment of a panel.

Q74. (*Complainants*) Please comment on China's statement in footnote 129 to its first written submission, which was made in response to the complainants' reference to Exhibit JE 25 (p. 189).

43. Footnote 129 of China's first written submission addresses statements about CKD and SKD kits made in a book cited by the complainants. The statements at issue appear to be correct.

44. Prior to its WTO accession on December 11, 2001, the Chinese government generally did not allow the importation of CKD or SKD kits with essentially all of the parts required to assemble a complete vehicle. However, if an automobile manufacturer committed to the establishment of significant manufacturing facilities in China, China sometimes would allow the importation of these kits as needed to get the operations started.

39. With regard to kits that did not contain essentially all of the parts required to assemble a complete vehicle (meaning kits that lack major assemblies such as engines or other parts required to meet the criteria for having the "essential character" of a complete vehicle within the meaning of the General Interpretive Rules and their explanatory notes), China applied import duties at rates that varied depending on whether the automobile manufacturer was sourcing 40, 60 or 80

percent of its parts locally - the higher percentage of parts sourced locally, the lower the duties on the imported parts.

45. In footnote 129 of its first submission, China notably does not dispute the accuracy of these facts. Rather, China disputes whether or not the groups of components mentioned in the source should be called "kits." But whether China calls them "kits" or not is beside the point. The source supports the Complainants' assertion that the groups of components being imported into China prior to accession were being assessed duties at rates far below the whole-vehicle rate, and again illustrates that the purpose of paragraph 93 of the Working Party report was to ensure that groups of parts and components imported into China after accession would be assessed as parts, and not at the higher whole-vehicle rate.

> **Q75. (*All parties*) Are there any differences between CKD kits and SKD kits? If so, please explain.**

46. Please see the response to question 69 above.

<u>Nature of the measures</u>

> **Q78. (*All parties*) Please comment on the following argument contained in paragraph 14 of Australia third party oral statement, made in relation to China's claim that a charge imposed after the time or point or importation can still be a border charge if it relates to a condition of liability that attached at the time of importation:**
>
> > **"Presumably, in an attempt to establish a nexus with importation, the measures at issue include a declaration made at the time of importation. However, this declaration appears to be entirely focused on the way in which the imported parts will be used internally within China, rather than on the contents of a consignment upon importation. ... Therefore ... the liability attaches internally, after the vehicle has been manufactured." (emphasis added)**

47. The United States agrees with this statement, and believes that this position is consistent with the reasoning of the United States showing that China's charges are internal ones, and not customs duties.

> **Q80. (Complainants) Would the complainants consider that the payment by the vehicle manufacturer of the 25% charge on CKD and SKD kits at the border, as contemplated in Article 2 of Decree 125, be characterised as a "border measure" or**

"ordinary customs duty"? If so, would it be appropriate for the Panel to consider this specific case under Article II GATT?

48. If the enterprise agrees to pay a 25% charge on an CKD or SKD at the border, the other aspects of China's measures (such as verification of local content) would not apply. In this limited case, the charge would appear to be a customs duty. The issue would therefore be whether it is in accordance with Article II of the GATT 1994 to classify CKD and SKD kits always and automatically as complete vehicles, without regard to whether, for example, only assembly operations were involved in completing the whole vehicle. In addition, the United States contends that such tariff treatment of CKDs/SKDs is inconsistent with China's obligations under paragraph 93 of the Working Party Report.

Q82. In paragraph 4 of its oral statement, China referred to an example of an auto manufacturer whose imports of parts and components come "from its own affiliates and from a single country" (emphasis added).

. . .

(b) (All parties) Canada refers to factors such as "origin" of imported parts, "who" purchases those parts, and whether there was an earlier investigation (paragraph 24 of Canada's oral statement) and "the timing of shipments or their frequency" (paragraph 34 of Canada's oral statement). Please explain whether, and if so, to what extent, these factors are relevant to the consideration of the nature of the challenged measures.

49. Canada in its opening statement was responding to China's premise that its measure was intended to stop importers, who were in the practice of importing CKDs, from evading the whole-vehicle tariff applied to CKDs by splitting the CKD into two separate boxes. As the United States has noted, the premise of China's argument is false: modern, full-scale manufacturing operations are not in the business of importing CKDs; instead, as a matter of course, manufacturers purchase bulk shipments of parts from various sources. And, nothing in China's measures is limited to, or targeted at, some hypothetical manufacturer who is splitting a CKD shipment into two or more separate boxes.

50. Presumably, if a Customs authority were involved in an investigation as to whether an importer was engaged in such a practice, it might examine factors such as those set out in the above question. However, China's measures are not in fact aimed at such practices, and – as Canada rightly pointed out -- the fact that China's measures do not take account of these factors further shows that China's measures were not in fact intended to stop the alleged practice of splitting a CKD into separate boxes.

Q84. (Complainants) The Panel in EEC - Parts and Components used the expression "conditioned upon the importation of a product" (paragraph 5.5). In

this connection, please comment on China's position that the term "on their importation" can be interpreted to encompass charges that Members impose as a condition of the importation of products from other countries (China's oral statement, paragraph 25).

51. The United States does not agree that the term "on their importation" in Article II, first sentence, includes measures that Members impose "conditional upon the importation of a product." There is no textual or contextual basis presented by China (or otherwise) for such an interpretation. To the extent that these two phrases have different meanings, the one chosen by China (and the one not actually used in the GATT) is much broader, and seems to be chosen by China in an attempt to argue that its internal charge is a customs duty. In fact, China's phrase ("conditional upon") is so broad that it would seem to allow an internal sales tax to be different for domestic products and imported products (because the higher tax on imported products would be "conditional" upon the fact that the product had been imported). Such an interpretation would, of course, be impermissible because it would conflict with (and make inutile) Article III:2.

52. China's suggested interpretation is also inconsistent with the context of Article II:1(b) as a whole. The first sentence of Article II:1(b) associates the phrase "on their importation" with "ordinary customs duties." The second sentence of Article II:1(b) uses a broader term – "imposed on or in connection with the importation" – with the catch-all concept of "all other duties or charges of any kind." But China's interpretation would destroy this structure – it would (without reason) associate the arguably even broader phrase "conditional upon importation" with ordinary customs duties, thus rendering ineffective the decision by the drafters to use the broad concept "on or in connection with" in association with "other duties and charges."

Q85. (All parties) The complainants have presented their claims in such way that the Panel would be required to examine their claims under Articles III and the TRIMS Agreement only if the measures at issue were to be considered as internal measures. In your view, if the measures were to be considered as border measures, would the Panel still be required to address the complainants' claims under Article III and Article 2 of the TRIMs Agreement?
In this connection, would the fact that the Appellate Body (para. 211) upheld the Panel's finding in EC - Bananas III that, inter alia, "border measures may be within the purview of the national treatment clause" (Panel Report, para. 7.176) be of any relevance to this question? Please explain.

53. As the United States stressed in its oral statement, the United States did not intend for its first submission to indicate that Article III and the TRIMs Agreement only apply if China's charge is an internal one, instead of a customs duty. To the contrary, the United States submits that regardless of whether the charge is considered an internal one or a customs duty, the measures are a straightforward breach of Article III:4, Article III:5, and the TRIMs Agreement. The thresholds established by China's measures must be met in order to avoid the increase in the

amount of 15 percentage points of the charge on imported auto parts. As such, manufacturers have a strong incentive to purchase local parts, which results in less favorable treatment under Article III:4, a mixing requirement under Article III:5, and a prohibited local content requirement under the TRIMs Agreement.

54. Paragraph 211 of *EC-Bananas III* is directly supportive of this point. In that dispute, the Appellate Body explained as follows:

> "211. At issue in this appeal is not whether any import licensing requirement, as such, is within the scope of Article III:4, but whether the EC procedures and requirements for the distribution of import licences for imported bananas among eligible operators within the European Communities are within the scope of this provision. The EC licensing procedures and requirements include the operator category rules, under which 30 per cent of the import licences for third-country and non-traditional ACP bananas are allocated to operators that market EC or traditional ACP bananas, and the activity function rules, under which Category A and B licences are distributed among operators on the basis of their economic activities as importers, customs clearers or ripeners. These rules go 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, and therefore fall within the scope of this provision. Therefore, we agree with the conclusion of the Panel on this point."

55. As the Appellate Body described, the EC measures (licensing requirements) were border measures, but the criteria for allocating the licenses affected the internal sale, offering for sale, and purchase within the meaning of Article III:4. The analysis in the current dispute is the same: even if China's charges are considered customs duties, the fact that the level of these charges are conditioned upon the amount of local content used by the manufacturer affects the internal sale, offering for sale, and purchase of imported and domestic parts. As such, they are subject to analysis under Article III:4. And, because the measures favor manufacturers who use an amount of domestic parts that meets China's thresholds, the measures accord less favorable treatment to imported parts and thus breach China's obligations under Article III:4.

Q87. (All parties) In light of the language of GATT Articles I, II, III as well as the Interpretative Note Ad Article III, how relevant, in your view, is the precise time

and place of the collection of a charge, or the enforcement of a law or regulation, to the characterization of such charge or law/regulation?

56. The United States considers that the precise time and place of the collection of a charge is relevant to the characterization of such charge as an internal one or as a border charge. However, as the question notes by its reference to Ad Article III, an internal tax applied to imported products at the border is still considered an internal tax, despite that the time and place of its collection are at the border and upon importation. The United States submits that this question must be examined based on the particular facts and circumstances of each case. In this dispute, as the United States has explained, the key factors in favor of finding China's charge to be an internal charge include (1) that the level of the charge depends on details of the manufacturing operations that take place within China, after importation; (2) that the level of that charge cannot be determined until the manufacturing process is complete; (3) that the charge is imposed on manufacturers, not importers; (4) that the charge is imposed even on imported parts that have been imported and processed in China by unrelated manufacturers; (5) that the parts deemed to be a single "whole vehicle" may have been sourced from different exporters and imported at separate times; and (6) that such parts may indeed even have been sourced from different countries. Moreover, identical imported parts in the same shipment can be subject to different charges (that are allegedly "customs duties") depending on their internal use – for example, if one part is used within China as a replacement part and the other part is used within China to manufacture a vehicle that fails to meet China's local content requirement.

Q88. (All parties) Please explain whether a charge, law or regulation must apply to both domestic and imported products to be considered internal in light of the language of Note Ad Article III as well as the Panel's findings in EC - Asbestos (paras. 8.93-8.95), EEC - Animal Feed (para. 4.16-4.18) and Dominican Republic - Import and Sale of Cigarettes (paras. 7.25).

57. The language of Article III does not require that a charge, law or regulation must apply to both domestic and imported products to be considered internal under Article III of the GATT 1994. In fact, under Article III:1 and III:2, reference is made explicitly to "imported *or* domestic products." Moreover, if the charge had to be applied to both imported and domestic products to be within the scope of Article III, Members freely could favor domestic products – contrary to the intent of Article III – through the simple expedient of imposing a high internal charge (a sales tax for example) that applied only to imported products, while completely exempting domestic products from the sales tax. In fact, the charge in *Belgian Family Allowances* exempted domestic products, and the GATT 1947 Panel nonetheless found that it was an internal charge that was inconsistent with obligations under Article III:2.

Q89. (All parties) What is the meaning of "at any time on the importation" in the chapeau of GATT Article II:2 and "at the time or point of importation" in the

GATT Interpretative Note Ad Article III? Do they convey the same or different notion of time and space? Can these provisions be of any guidance for the Panel in its characterization of the nature of the challenged measures?

58. The United States is not aware of how these provisions could be helpful in a characterization of the challenged measures. Neither the complainants nor China contends that the measures fall within the scope of Article II:2 or Note Ad Article III. Instead, the provisions at issue are Article II:1 and Article III:2. To be sure, the language of other GATT provisions (such as Article II:2 or Note Ad Article III) might be referred to for context, but it is unclear how those provisions provide context for any interpretative issues in this dispute.

Q90. (Complainants) Do you consider that the factors mentioned by China in paragraph 67 of its first written submission are relevant to the characterization of a measure as a border measure. If so, please explain whether the challenged measures:
(a) bear an objective relationship to the administration and enforcement of a valid customs liability; and
(b) relate to a condition of liability that attached at the time of importation.

59. The United States does not agree with China's contentions in paragraph 67 of its first written submission. In fact, China's assertions are entirely circular – China starts with an assumption that its charges are "valid customs liabilities" and a "liability that attached at the time of importation." Neither of these assumptions is true. As the United States has explained, the charges are internal ones, and the liability actually attaches not at the time of importation, but only after manufacturing. In fact, China requires a bond at the proper 10 percent parts rate, and the manufacturer is only liable for the 25 percent "whole-vehicle rate" if the imported part is used to produce a vehicle that does not meet China's local content thresholds.

60. In the response to Question 32, the United States explains in detail why the customs enforcement mechanisms that China refers to in paragraph 67 have no relation to the Chinese measures at issue in this dispute.

Q94. (United States) In paragraph 143 of its first written submission, China refers to an argument made by the United States in EEC - Parts and Components that "[i]t was a general principle of international customs practice that substance should prevail over the form of a transaction. In certain situations assembly operations could constitute a sham to evade the payment of anti-dumping duties. This was no different from the routine problems faced every day by all contracting parties of preventing efforts to evade the collection of legitimate customs tariffs on merchandise." Based on this statement, China argues that the United States has directly analogized the circumvention of AD/CV duties to the circumvention of ordinary customs duties.

Please comment on China's position in this regard.

61. The above summary of a statement made by the United States in a submission in a GATT 1947 dispute does not in fact compare AD/CVD circumvention to "circumvention" of customs duties. To the contrary, it refers to the routine issue of customs enforcement – there is no reference to any action by U.S. Customs authorities to condition the level of a charge – as China has done – based on the detailed conduct of internal manufacturing operations.

Q96. (All parties) In respect of Article II:1(b) of the GATT 1994:
(a) What is the definition of "ordinary customs duties" within the meaning of Article II:1(b), first sentence?; and
(b) What is the definition of "other duties or charges" within the meaning of Article II:1(b), second sentence?

62. The GATT 1994 does not define the term 'ordinary customs duty'. The United States understands an ordinary customs duty means a tax imposed on a good upon its importation, and calculated based on the quantity or value of the good at the time of importation. Ordinary customs duties can be specific, ad valorem or mixed. A specific customs duty on a good is an amount based on the weight, volume or quantity of that product upon importation. An ad valorem customs duty on a good is an amount based on the value of that good upon importation. A mixed duty is a combination of an ad valorem duty and a specific duty.

63. "Other duties or charges" in Article II:1(b), second sentence is intended as a catch-all phrase to prevent the avoidance of a Member's bindings on ordinary customs duties. According to paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 "in order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any 'other duties or charges' levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of 'other duties or charges' ".

Q97. (All parties) What is the difference between a charge imposed "on ... the importation" and a charge imposed "in connection with the importation" within the meaning of Article II:1(b), second sentence of the GATT?

64. Please see the U.S. response to Question 84.

Q99. (All parties) What is the difference between a law or regulation enforced "on the importation" and a law or regulation enforced "in connection with the importation"?

65. The first phrase – "on their importation" – is narrower in scope than "in connection with importation." Aside from this view, however, the United States is not aware of any issue in this dispute with regard to laws and regulation which relates to this distinction.

> **Q100. (All parties) Please explain whether, and if so, how, the phrases "on importation" or "in connection with importation" as indicated in the second sentence of Article II:1(b), second sentence are respectively relevant in defining the scope of "ordinary customs duties" under Article II:1(b), first sentence.**

66. As the United States explained in its response to Question 84, the United States submits that it is significant that the drafters of the GATT matched "upon importation" to "ordinary customs duties", while the broader phrase "in connection with importation" is matched to "other duties and charges." This matching indicates that there is a tighter nexus between "ordinary customs duties" and importation than between "other duties and charges" and importation.

> **Q101. (All parties) In the parties' view, could different aspects of the measures be respectively considered as either internal measures or border measures? In other words, could one part of the measure be a border measure while the other part be an internal measure?**
> **Also, would the fact that CKD and SKD kits can be exempted from the measures at issue under Article 2 of Decree 125 be relevant to this consideration in any manner? Likewise, would charges levied under Article 29 of Decree 125 be relevant to this consideration in any manner?**

67. In principle, it is possible that the same measure would impose both internal taxes and customs duties.

68. As the United States has noted, where an importer declared a CKD at the border and paid a 25 percent tax, this aspect of the measure would appear to be a customs duty, to be examined under Article II.

69. As noted in the U.S. oral statement, China appears to concede that Article 29 (in so far as it applies to parts sourced from manufacturers in China) imposes an internal charge that is inconsistent with Article III:2.

70. It bears repeating that, in the view of the United States, <u>any</u> charge imposed by China's measures above the 10 percent duty owed (and for which a bond is posted) on imported parts is an internal charge, not just the additional charge imposed on parts sourced from manufacturers pursuant to Article 29.

> **Q103. (Complainants) Do you agree with the statement made by China in paragraph 41 of its first written submission that the Panel must at the outset decide on whether the measures concerned are border or internal measures. If not, why?**

71. As the United States emphasized in its oral statement, the United States does not agree. China's measures are plain breaches of Article III:4, Article III:5, and the TRIMs Agreement, regardless of whether the charges are internal ones subject to Article III:2 or customs duties subject to Article II.

Q105. (Complainants) Are the charges levied in relation to imports of CKD and SKD kits under the second paragraph of Article 20 of Decree 125 "border charges"? If so, do such charges come within the disciplines of Article II of the GATT? If so, are they "ordinary customs duties" within the meaning of GATT Article II:1(b), first sentence, or "other duties or charges" under GATT Article II:1(b), second sentence?

72. The United States understands this question to refer to Article 2 (not 20) of Decree 125. As the United States explained in response to Question 80, this would appear to be an ordinary customs duty.

Q106. (Complainants) If the charges levied in relation to imports of CKD and SKD kits under the second paragraph of Article 2 of Decree 125 are "border charges" under Article II of the GATT, would the Panel have to still decide on the claims under Article III:4 and III:5 of the GATT and Article 2 of the TRIMs Agreement?

73. Yes, these claims would still apply, because – as the United States has explained – an ordinary customs duty can be applied inconsistently with Article III:4, III:5 and the TRIMs Agreement if the level of the duty depends on local content or local mixing requirements.

Q107. (*Complainants*) In paragraph 20 of its written oral statement, China interprets the word 'commerce' in GATT Article II:1(a) 'to be synonymous with 'imports.'" Do you agree? Please explain you answer.

74. The United States does not agree – "commerce "is a broader term than "imports." In fact, the United States understands that Members may bind in their schedules export duties as well as import duties.

Q109. (*All parties*) Do you agree, and why, with the following argument contained in paragraph 14 of Australia's third party oral statement, which was made in relation to China's claim that a charge imposed after the time or point of importation can still be a border charge if it relates to a condition of liability that attached at the time of importation:

> **"Presumably, in an attempt to establish a nexus with importation, the measures at issue include a declaration made at the time of importation. However, this declaration appears to be entirely focused**

> **on the way in which the imported parts will be used internally within China, rather than on the contents of a consignment upon importation. ... Therefore ... *the liability attaches internally*, after the vehicle has been manufactured." (emphasis added)**

75. Please see the United States response to Question 78.

Article II of the GATT 1994

> **Q110. (All parties) Rule 2(a) of the General Interpretative Rules states, inter alia, that " 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." Please explain what "as presented" means as referred to in Rule 2(a)?**

76. For purposes of Rule 2(a), "as presented" refers to the condition of the article at the time of its importation. Under U.S. Customs law, it is well settled that classification is based upon the condition of goods at the time of importation.

> **Q111. (Complainants) Please comment on China's statement in paragraph 160 of its first written submission and in paragraph 13 of its oral statement in relation to the WCO affirmed decision concerning Rule 2(a) of the General Interpretative Rules. In particular, please clarify the legal status of this WCO decision, including whether it is binding on the parties to the WCO or the WTO Members.**

77. 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 considers 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, it, then 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. Since its implementation of the Harmonized System in 1989, the U.S. Customs administration has cited this T.D. in almost every administrative ruling on tariff classification matters.

78. 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" in the Explanatory Note to General Interpretative Rule 2(a). In regards to the first "decision", U.S. Customs gives this decision considerable weight and has classified goods in accordance with the WCO's decision to remove the reference to "simple assembly".

79. The second "decision" described in paragraph 10 of Annex IJ/7 to Doc. 39.600 is merely a discussion of the contracting parties as to how the Harmonized System Committee views "split shipments". 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, U.S. Customs finds that paragraph 10 has little weight. Also, paragraph 10 *does not mean* that a member administration can abrogate the requirements of the General Interpretative Rules by regulation at the domestic level.

Q112. (All parties) How should General Interpretative Rule 2(a) be interpreted in light of this decision?

80. The WCO decision removed the reference to "simple assembly" from the Explanatory Notes from General Interpretative Rule 2(a). As an explanatory note can neither expand nor restrict the terms of the Harmonized System, U.S. Customs believes that the interpretation of General Interpretative Rule 2(a) has been unaffected. In applying General Interpretative Rule 2(a), it suggests that customs officials can see the entire article at the time of entry. If an article is not classifiable by General Interpretative Rule 2(a), then General Interpretative Rule 1 requires the separate classification of the components.

Q113. (Complainants) Please comment on China's position that Note VII of the Explanatory Notes to Rule 2(a) of the General Interpretative Rules is relevant in delineating the boundary between complete articles and parts of those articles (paragraph 100 of China's first written submission).

81. General Interpretative Rule 2(a) provides for the classification, at the time of entry, of complete unassembled motor vehicles as if they were assembled under the same heading. Explanatory Note (VII) to General Interpretative Rule 2(a) gives guidance for situations where if the component parts are in excess of the number required for that article when complete, that the component part should be classified separately. General Interpretative Rule 2(a) does not refer to "split shipments" nor does it purport to create the authority for allowing split shipments. The Explanatory Notes for General Interpretative Rule 2(a) infer that the goods are presented as a single shipment.

Q114. (Complainants) In the complainants' view, do the General Rules for the Interpretation of the HS constitute context for the interpretation of a term in a Member's Schedule within the meaning of the Vienna Convention on the Law of Treaties?

82. This indeed was the finding of the Appellate Body in *EC – Chicken Cuts* (Appellate Body Report, at para.199). As an initial point, the United States notes that the United States is not a party to the Vienna Convention, but that the United States does accept that the Vienna Convention reflects customary rules of interpretation of public international law. More importantly, the United States notes that although the Appellate Body found that the HS provides context for interpretation of a Member's schedule, the Appellate Body did not fully explain its reasoning and the United States does not agree with this Appellate Body finding.

83. In fact, during the *EC – Chicken Cuts* proceeding, the United States disagreed with the proposition that the HS qualifies as "context" under Article 31(2). The HS is neither an agreement relating to the WTO Agreement that all the Members made in connection with the conclusion of the WTO Agreement, nor an instrument made by one or more Members in connection with the conclusion of the WTO Agreement and accepted by the other Members as an instrument related to the WTO Agreement. The United States does consider that the HS and its Explanatory Notes could be deemed as part of the "circumstances of the conclusion" of China's accession negotiations within the meaning of Article 32 of the Vienna Convention and, therefore, could be used as a "supplementary means of interpretation" of China's Schedule.

Q115. (Complainants) If the charges at issue were considered as tariff duties, do the complaining parties agree that Rule 2(a) of the General Interpretative Rules is relevant context for the interpretation of the term "motor vehicles" in China's Schedule?

84. Please see the response to Question 114.

Q116. (Complainants) Please comment on China's statement in paragraph 147 of its first written submission in relation to Rule 2(a) of the General Interpretative Rules. In particular, with respect to your own policies, do the complainants agree with the statements made by China on the policy practices of other Members in the last three bullet points in paragraph 147?

85. The United States has not applied the interpretive rules of General Interpretative Rule 2(a) to classify multiple shipments of parts and components as having the essential character of the complete article. Instead, U.S. Customs has found that bulk shipments for inventory

purposes are not covered by General Interpretative Rule 2(a), as bulk shipments for inventory are not for the convenience of packing, handling or transport.

86. Duty liability arises at the time of importation. The assessment of duties is not based on the actual use of the merchandise after importation. The Harmonized Tariff Schedule of the United States does contain a very limited number of provisions known as "actual use provisions," but these provisions classify the good as entered based on the stated intention of the importer. Under these provisions, the importer may claim a reduced rate of duty if the importer claims that the good will be used only for a specific purpose. For goods classified under actual use provisions and entered for consumption, any use contrary to that which is specified in the HTSUS provision is contrary to law.

87. With respect to its own policies, the United States has not "adopted measures that track the final use of imported parts and components as a means of evaluating whether the parts and components were imported for the purpose of circumventing duty liability on the complete article." The United States has not adopted any such measures because duty liability is based upon the classification of the article in its condition as imported. Once an article has been entered for consumption into the United States, its subsequent use is not relevant for purposes of duty liability. For example, it is not considered a circumvention of duty liability when parts of a machine, subject to a lower rate of duty than the final machine, are separately imported in different shipments into the United States (and entered at their respective lower rates of duty) for subsequent assembly or manufacture into the final machine.

88. China also alleges in paragraph 147 that "Member [sic] have imposed bonding or other security requirements to ensure collection of any duty liability on the completed article" into which "parts and components were imported for the purpose of circumventing duty liability on the complete article." As explained above, given that the United States does not specifically track the post-importation usage of goods classifiable as parts or components, there are no bonding or other security requirements based on the classification and corresponding rate of duty of a completed article into which a part or component could be integrated.

Q117. (All parties) The European Communities explains in paragraph 262 of its first written submission that a situation foreseen under Article 21(2)(a) of Decree 125, namely importation of both an engine assembly and a body assembly together, is far away from the categories foreseen by the Chinese tariff schedule examined in the light of the general Explanatory Notes for Chapter 87 whereby an incomplete or unfinished vehicle may be classified as the corresponding complete or finished vehicle provided it has the essential character of the latter.

(a) Do you consider that the two examples of incomplete or unfinished vehicles in the General Notes for Chapter 87 correspond to any of the criteria set out in Article 21 of Decree 125?; and

(b) In your view, what auto part products, other than those referred to in the general Explanatory Notes for Chapter 87, would qualify as an "incomplete or unfinished vehicle having the essential character of a complete or finished vehicle"? Please explain by referring to specific examples.

89. Response to Q117(a): The criteria set out in Article 21 of Decree 125 for determining when parts are Deemed Whole Vehicles in most cases go far beyond what can appropriately considered to be parts with the "essential character" of a motor vehicle, under the Harmonized System (including application of the Chapter note to Chapter 87). There might be a few combinations of parts Deemed Whole Vehicles by Article 21 that could conceivably properly be classified under the Harmonized System as whole vehicles if presented together in one shipment at the border. For example the body, chassis-frame, transmission, steering system and both axles (which would be one "Main Assembly" and four other "Assemblies" within the meaning of Article 21) might appropriately under the Harmonized System be classified as a whole vehicle, based upon the General Chapter Note example ("a motor vehicle not equipped with its engine"). However, that would require an individual assessment that the additional Assemblies and other parts were enough to constitute the "essential character" of a motor vehicle. But in the vast majority of cases, parts Deemed Whole Vehicles under Article 21, even if they were presented together at the border, could only be classified as intermediate products or parts.

90. With respect to Decree 125, three options to determine if an article constitutes an incomplete vehicle were established. These are:

Option 1: body and engine
Option 2: body or engine plus three more other assemblies (chassis-frame, steering system, transmission, brake system, drive axle, and non-driving axle).
Option 3: five or more other assemblies.

91. Taking into account Examples A and B of an incomplete vehicle in the General Explanatory Notes to Chapter 87, neither Option 1 nor Option 3 would meet the requirements of either example.

92. In the case of Option 2, if the article comprised the body, chassis-frame, transmission, steering system and both axles it would satisfy Example B which reads: "A motor vehicle not equipped with its engine or with its interior fittings."

93. Response to Q117(b): U.S. authorities have found the following goods constitute "incomplete or unfinished vehicles having the essential character of a complete or finished vehicle":

> Four-wheel drive luxury motor vehicle imported without the engine, transmission, as well as other minor components described as "minor elements of design" was classified under heading 87.03 as having the essential character of a complete vehicle by application of General Interpretative Rule 2(a).
>
> A dump hauler cab with instruments, front frame portion, front axle and suspension, diesel engine, transmission, differential gear, plus electrical and hydraulic system was classified under heading 87.04 as having the essential character of a complete vehicle by application of General Interpretative Rule 2(a) because it contained both the motive power source and the cab from which the vehicle is operated, as well as the transmission which reduces the speed between the crankshaft and the rear drive axle and the hydraulic braking system for the entire vehicle.
>
> Cab assemblies consisting of the basic shell (including doors), certain glass (e.g., windshield and windows), windshield wipers, headlights, and parts of the dashboard (steering column, signal indicator, possibly the steering mechanism) was classified as having the essential character of a cab under heading 87.07 by application of General Interpretative Rule 2(a), because they possess the aggregate of distinctive component parts which establish their identity as driving cabs. The parts or components added after importation are in the nature of accoutrements which furnish or otherwise outfit the cab assemblies whose identity is already clearly established.
>
> Motor chassis with enclosed cabs for dump trucks or dumper cab chassis and dumper bodies that were disassembled prior to shipment, was classified under heading 87.04 by application of General Interpretative Rule 2(a) as the cab chassis are complete subassemblies clearly dedicated to receiving dumper bodies.

94. U.S. authorities have found that the following types of goods do not constitute incomplete or unfinished motor vehicles of chapter 87 by application of General Interpretative Rule 2(a):

> Bulk parts consisting of panel parts, frame, engine assembly, transmission assembly, trim parts, chassis parts (other than the frame), and other miscellaneous parts (nuts, bolts, washers, bushings and similar miscellaneous fasteners and pins), shipped in unequal numbers and shipped either together or at different times to be put into inventory for eventual assembly with U.S. components and components produced in a foreign trade zone. The United States determined that parts imported in bulk and principally used for inventory purposes do not impart the essential character of a motor vehicle as the imported components were not advanced to the point that they were recognizable as a

motor vehicle. Further there was no evidence that any of these components were intended to be assembled into a specific motor vehicle, nor was there any evidence that they constitute something other than discrete components intended for inventory for a manufacturing operation.

The United States determined that parts imported in bulk and principally used for inventory purposes do not impart the essential character of finished cab assemblies and that the components needed to be individually classified, regardless of whether the shipment of cabs, frames assemblies, and miscellaneous parts were entered on the same day or entered on different dates.

Q121. (Complainants) Do you agree with China's illustration of the relationship between substance and form of importing activities in paragraph 97 of its first written submission? If not, why?

95. As an initial matter, the United States again notes that China's example – premised on separating CKDs into split shipments – has nothing to do with the measure that China actually adopted. China's measure applies to all automotive manufacturing operations – including operations that import bulk components from all over the world to produce vehicles in China.

96. The United States does not agree with the illustration stated in paragraph 97 as it overly simplifies the number of components and sub-assemblies that comprise a complete motor vehicle. The illustration as presented also appears to breach the obligations of contracting parties to the Harmonized System to apply the General Interpretative Rules 1 and 2(a), because it ignores the specific tariff headings set out in China's schedule, and applies GIR 2(a) to separate shipments at the whim of China's authorities, without any regard to how the goods were presented to Customs authorities.

Q126. (United States) The final determination on imported "Large Newspaper Printing Presses and Components" as provided in Exhibit CHI-25 states, inter alia, that "to facilitate the Department's performance of the value test, all foreign producers/exporters and U.S. importers in the LNPP industry shall be required to provide various information as indicated in the notice "on the documentation accompanying each entry" from Germany and Japan of elements pursuant to a LNPP contract." Please explain the exact point in time "each entry" in this notice is referring to. In other words, when do exporters and importers have to provide information to the DOC?

97. There are several reasons why the U.S. anti-dumping duty orders on large newspaper printing presses (LNPPs) from Germany and Japan, which were revoked effective 1999 and 2001, respectively, are irrelevant to this dispute. As an initial matter, in its response to Question 67 above, and in response to Question 140 below, the United States explains at length why

"circumvention" in the antidumping context is not relevant to this dispute. The United States also has the following comments that are specific to the antidumping duties imposed on LNPPs.

98. First, unlike automobiles, which are routinely imported fully assembled, it is not feasible to import fully assembled LNPPs, which must be housed in significantly sized buildings. Given the unique nature of this product, and to ensure the effective administration of the anti-dumping order, the U.S. Department of Commerce developed the product coverage of the LNPPs investigations to include LNPP systems, additions and the five major press system components, whether assembled or unassembled, that are capable of printing or otherwise manipulating a roll of paper more than two pages across. Because even the five major components were typically imported unassembled, the Department of Commerce provided for the "value test" cited by China in its first written submission. Specifically, if the sum of the value of elements imported to fulfill a LNPP contract was at least 50 percent of the value, measured in terms of the cost of manufacture, of any of the five named components covered by the scope into which they are incorporated, then the imported elements were covered products.

99. Second, while the potential of circumvention of an anti-dumping duty order always exists and was referred to by the Department of Commerce in the LNPPs determination, the value test was actually part of a process the Department of Commerce provided so that importers could demonstrate that their merchandise was not subject to the anti-dumping duty order. In other words, the requested entry documentation was required if producers or importers intended to demonstrate that the relevant entries should not be subject to the anti-dumping duty order. If such documentation was provided no later than 75 days prior to the intended date of entry, the Department of Commerce could preliminarily determine that such merchandise was outside the product coverage of the order and instruct the U.S. Customs Service to suspend liquidation at a zero deposit rate. Under the Department of Commerce's procedures, this ruling would become final unless subjected to administrative review.

Q128. (Complainants) Please explain under which specific tariff headings of China's Schedule should the categories of auto parts under paragraphs (1), (2) and (3) of Articles 21 of Decree 125 fall?

100. Paragraph (1) of Article 21 of Decree 125 provides that "imported automotive components fulfill the characteristics of a whole vehicle . . . [w]hen completely knocked-downs (CKD) or semi-knocked-downs (SKD) are imported to assemble vehicles." In this category, if the imported articles were truly vehicle CKD or SKD kits, meaning that all of the essential parts and components of the vehicle were included in the import shipment and the only difference between the CKD and SKD designation was the state of disassembly, with CKD being completely disassembled and SKD being only somewhat disassembled, and if only assembly operations were involved in producing a complete vehicle, then the shipments could fall under the headings for motor vehicles, i.e., HS 8703 or HS 8704.

101. Subparagraph (2)(a) of Article 21 of Decree 125 provides that "imported automotive components fulfill the characteristics of a whole vehicle . . . [w]hen the two main assemblies, i.e., vehicle body (including driver's cabin) and engine, are imported to assemble the vehicle." Under longstanding classifications by Customs authorities around the world as well as the tariff classification experts at the World Customs Organization, a vehicle body and an engine for a motor vehicle, even if shipped together, would have to be separately classified. The vehicle body would be classified under HTS 8707 and the engine would be classified under either HS 8407 (petrol) or HS 8408 (diesel). A vehicle body and an engine inherently could never be classified together as a single article. Neither a vehicle body nor an engine would ever be properly considered to have the "essential character" of a motor vehicle, nor would the theoretical combined article of a vehicle body and an engine.

102. Subparagraph (2)(b) of Article 21 of Decree 125 provides that "imported automotive components fulfill the characteristics of a whole vehicle . . . [w]hen either one of the two main assemblies, i.e., vehicle body (including driver's cabin) and engine, as well as 3 or more than 3 other assemblies (systems) are imported to assemble the vehicle." This subparagraph presents the same situation as subparagraph (2)(a). Decree 125 defies the longstanding conventions and principles of classifying imported articles in their condition at the time of importation, as set forth in the General Interpretive Rules and their explanatory notes. A vehicle body or an engine combined with any 3 of the other specified assemblies could never be properly classified as an article with the essential character of a complete motor vehicle. For example, a vehicle body with brakes, a steering system and drive axle, but no engine simply is not a motor vehicle. It is an odd assortment of automotive parts. The same holds true for any other combinations envisioned by subparagraph (2)(b). Proper classification of any combination of the imported assemblies would be according to the individual assembly in its condition at the time of importation, with each assembly separately classified, even if all assemblies were shipped together.

103. Subparagraph (2)(b) of Article 21 of Decree 125 provides that "imported automotive components fulfill the characteristics of a whole vehicle . . . [w]hen the two main assemblies, i.e., vehicle body (including driver's cabin) and engine not being imported, 5 or more than 5 other assemblies (systems) are imported to assemble the vehicle." Classifying the specified assemblies without a body or an engine as a complete motor vehicle or more specifically as having the "essential character" of a complete motor vehicle takes the well-established principles and conventions of tariff classification even further afield. None of these assemblies, even if impossibly classified together as a single article, would ever be considered to have the "essential character" of a complete motor vehicle and, therefore, could never be classified as such.

104. Paragraph (3) of Article 21 of Decree 125 provides that "imported automotive components fulfill the characteristics of a whole vehicle . . . [w]hen the aggregate price of imported components attains 60% or more of the complete vehicle price for the vehicle model in

question." No imported articles are ever properly classified according to their value. The General Interpretive Rules do not provide for this way of classification. Classification addresses the physical qualities and sometimes the function of the article without any regard to its value or its relative value with respect to the nature or purpose of the finished good.

Q129. (All parties) In light of the fact that imports from other WTO Members can only be subject to ordinary customs duties and terms, conditions or qualifications as set forth in a Member's Schedule under Article II:1(b), to what extent is Rule 2(a) of the General Rules for the Interpretation of the HS relevant in interpreting a Member's Schedule?

105. GIR 2(a) could be of some use in clarifying the treatment set out in China's schedule with respect to a collection of unassembled parts as presented to China's customs officials at the border.

106. GIR 2(a), however, cannot be used to interpret the provisions of the GATT itself. Thus, GIR 2(a) cannot be instructive on what is, or is not, an "ordinary customs duty" for the purpose of GATT Article II. Thus, if, as China contends, GIR 2(a) allowed for customs duties to be assessed on the use of a part in manufacturing operations, and with the rate of duty based on the local content of the complete vehicle, the resulting charge could not be an ordinary customs duty under GATT Article II, regardless of the content of GIR 2(a).

107. Likewise, GIR 2(a) cannot be used to impose a "term, condition, or qualification" on China's tariff bindings set out in its schedule that would be inconsistent with GATT obligations. For example, even if GIR 2(a) contained explicit local content requirements (such as contained in China's measures), this would not provide a defense to the breach of Article III and the TRIMs Agreement resulting from the local content requirement.

Q130. (All parties) If the measures at issue did not exist, how would the combinations of auto parts under Article 21(2) of Decree 125 be classified under China's Schedule of Concessions upon their importation into China? Please provide your answer based on specific tariff headings under China's Schedule of Concessions.

108. Please see the following table:

Description (per Decree 125)	**Tariff Heading (per China's Schedule of Concessions)**	**Duty Rate (per China's Schedule of Concessions)**
Engine Petrol Diesel	**8407.31 - .338408.20.10**	**10%9%**
Vehicle Body	**8707.10 or .90**	**10%**
Gear Box Assemblies	**8708.40**	**10%**
Drive Axle Assemblies	**8708.50**	**10%**

Drive Axle Assemblies (non-drive axle)	**8708.60.30 - .90**	**10%**
Frame Assembly	**Not clear**	**Not more than 10%**
Steering System	**8708.94**	**10%**
Braking System	**8708.31 or .39**	**10%**
Passenger Vehicles	**8703**	**25%**

Q133. (All parties) In the parties' view, does the treatment accorded to the products at issue under China's measures correspond to China's concessions for the tariff rates for these products that the WTO Members negotiated at the time of China's accession to the WTO?

109. The United States submits that China’s measures impose an internal charge, over and above the 10 tariff rate for automotive parts negotiated at the time of China’s accession to the WTO. The United States thus views the additional charge as a breach of Article III:2, as opposed to Article II.

110. However, if the Panel were to determine that China’s measures imposed “ordinary customs duties” within the meaning of Article II, then China would not be providing the tariff rate negotiated for parts.

111. In addition, the United States submits that China, in paragraph 93 of the working party report, agreed to provide a 10 percent rate of duty on CKDs and SKDs. Because China’s measures impose a 25 percent rate of duty on CKDs and SKDs, the United States does not consider China to be providing the tariff rate negotiated at the time of accession for these items.

Q136. (European Communities and US) Please comment on the EC and the US regulations allowing classifying multiple shipments as a single entry as referred to by China in paragraphs 157-159 of its first written submission.

112. Paragraph 157 of China's first written submission references 19 U.S.C. § 1484(j)(1) and the publication in the Federal Register of the Final Rule for the regulation that implements the statute, 19 C.F.R. § 141.58, 71 Fed. Reg. 31, 921 (June 2, 2006). Under the limited circumstances set forth therein, the United States permits the single entry of unassembled or disassembled entities imported on multiple conveyances. As explained in the Federal Register publication, "[a]n unassembled or disassembled entry consists of merchandise which is not capable of being transported on a single conveyance, but which is purchased and invoiced as a single classifiable entity. By necessity, due to its size or nature, the entity is placed on multiple conveyances, which arrive at different times at the same port of entry in the United States. The subject arriving portions are consigned to the same person in the United States."

113. China interprets the United States law as permitting an importer to "import a vehicle in unassembled or disassembled condition in multiple shipments, and still have the combined

entries classified as a complete vehicle, even if no one shipment would satisfy the essential character test for the complete vehicle." At a prima facie level, an automobile imported in unassembled or disassembled condition in multiple shipments does not meet the requirements for single entry treatment under the United States regulation because an automobile is capable of being transported on a single conveyance. Under the regulation, the size or nature must necessitate shipment in the unassembled or disassembled condition. Contrast automobiles with fiber production plants, which would likely be eligible for single entry treatment when imported on separate conveyances in unassembled or dissembled condition because of their substantial size. Often times the components of automobiles are sourced from many different countries, and such would disqualify them from eligibility for single entry treatment. As stated in the Federal Register publication, it is the position of the United States that "the legislation [19 U.S.C. § 1484(j)(1) was intended to apply to the components of articles with a single point of origin which are shipped from the same port of export at approximately the same time."

114. China interprets 19 C.F.R. § 141.58 as being "necessarily based on an understanding of the 'condition as imported' rule that looks beyond the contents of a single import entry, and that rests instead on the stated intention of the importer to assemble the separate shipments into a complete article." First, as cited in the Federal Register publication, the United States does not believe that single entry treatment for unassembled or disassembled entities imported on multiple conveyances "should act as a means to control an importer's inventory or manufacturing processes." Second, the "stated intention of the manufacturer to assemble the separate shipments into a complete article" must be manifest from the documents presented at the time of entry. The Federal Register publication notes that "[w]hen making a determination as to whether to approve or deny a particular application, the port director must rely on the information that is supplied on the application." The decision to grant single entry treatment and classify unassembled or disassembled merchandise imported on multiple conveyances is made on the basis of the information available at the time of importation. We also note that all of the multiple conveyances intended to qualify for single entry treatment must be imported within a maximum of 25 days of each other.

115. Paragraph 158 asserts "it was the practice of the U.S. customs [sic] authorities to combine 'split shipments' for tariff classification purposes." In support of this assertion, China relies upon the decision of the Court of International Trade's (CIT) decision in Zomax Optical Media, Inc. v. United States, 366 F. Supp. 2d 1326 (2005), wherein China alleges that the CIT "has observed that this practice represented a departure from the prior practice of basing tariff classification determinations strictly on the condition of merchandise 'as imported.'" The split shipments and practice referred to by the CIT in that case are codified at 19 U.S.C. § 1484(j)(2), which provides for single entry treatment of merchandise that is purchased and invoiced as a single entity but …is shipped in separate shipments due to the inability of the carrier to include all of the merchandise in a single shipment (at the instruction of the carrier)." See 19 C.F.R. § 141.57.

116. This provision covers "split shipments," which "consist [] of merchandise that is capable of being transported on a single conveyance, and that is delivered to and accepted by a carrier in the exporting country as one shipment under one bill of lading or waybill, and is thus intended by the importer to arrive as a single shipment. However, the shipment is thereafter divided by the carrier into different parts which arrive in the United States at different times, often days apart." 68 Fed. Reg. 8713 (Feb. 25, 2003). Single entry treatment for split shipments is also limited to very narrow circumstances, is 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. 19 C.F.R. § 141.57.

Q137. (All parties) Please clarify whether, and if so, how, a new tariff line can be de facto created.

117. The United States understands this question to refer to China's obligations under paragraph 93 of the Working Party report, and to China's defense that it did not breach those obligations because China did not create a new tariff line for CKDs/SKDs. The United States submits that paragraph 93, in context, shows that Members were concerned with tariff treatment of CKDs/SKDs, and that those Members wanted to ensure that China did not change its classification policies or practices so as to apply a whole-vehicle rate to those items. Although China did not create a *de jure* new tariff line, China achieved the same result by specifying in Decree 125 that CKDs/SKDs would be deemed whole vehicles, and assessed at the whole-vehicle rate. Thus, China adopted a measure – whether labeled a *de facto* tariff line or anything else – that is contrary to the obligations China assumed with respect to the tariff treatment of CKDs/SKDs.

Q138. (All parties) The Harmonized System Committee Decision on the interpretation of General Interpretative Rule 2(a) (Exhibit CHI-29) refers to the questions of "split consignments" and "the classification of goods assembled from elements originating in or arriving from different country" in paragraph 10. Please explain differences between these two situations.

118. The context of the decision identified in paragraph 10 of the Harmonized System Committee Decision on the Interpretation of General Interpretative Rule 2(a) (Exhibit CHI-29) does not include a definition of "split consignments" or "the classification of goods assembled from elements originating in or arriving from different countries."

119. U.S. Customs authorities have not formally defined "split consignments." A consignment, generally speaking, is a shipment of goods that is imported by or for a consignee who will sell or deliver the goods to or for benefit of a consignor after the importation of the

goods into the United States. A consignment may also refer to a shipment of goods in the custody of a shipper and transported on behalf of another party.

120. Presumably, "the classification of goods assembled from elements originating in or arriving from different countries" refers to the determination of the country of origin of imported goods when such goods consist of parts or components that originated in more than one country."

Q139. (Complainants) The complainants have expressed a view during the first substantive meeting that the General Interpretative Rule 2(a) is irrelevant to Article II of the GATT 1994. Could you please elaborate on your position.

121. Please see the United States response to Question 129.

Q140. (Complainants) China has referenced various antidumping anti-circumvention decisions as support for its contention that Members are permitted to treat "parts" of products the same as the "whole" to prevent circumvention of its appropriately applied duties. The complaining parties have all said that antidumping practice is not relevant to the dispute. Can the complaining parties please give specific reasons why they believe antidumping anti-circumvention practice is distinguishable from the measures concerned?

122. For several reasons, China cannot justify its measures by invoking the practices by which some Members impose anti-dumping duties when they are concerned about circumvention.

123. First, and most fundamentally, China's GATT Article II obligations, not obligations under GATT Article VI, are at issue in this dispute. In other words, anti-dumping duties and the circumvention of such duties are governed by the rules of GATT Article VI and the Anti-Dumping Agreement, not GATT Article II. In addition, Article VI anti-dumping measures are authorized only in certain circumstances, i.e., where the investigating Member makes findings of dumping, injury and causal link (as explained above in response to question 67).

124. Second, under GATT Article VI and the Anti-Dumping Agreement, the investigating Member is not required to impose anti-dumping duties on the basis of tariff lines and, in fact, investigating Members rarely do it. Rather, the anti-dumping duties are applied to imports of the products under investigation, as defined in the scope of the products covered by the anti-dumping order. That product coverage can be defined in numerous ways. It can be defined to apply to some but not all products that fall under a particular tariff line or to products falling under or within a variety of tariff lines. In addition, the product coverage can apply to finished products or

to parts or both. That is what the rules of GATT Article VI and the Anti-Dumping Agreement allow. The only requirements are those set out in the Anti-Dumping Agreement, such as findings of dumping, injury and causal link. Thus, in the anti-dumping context, unlike the GATT Article II context, tariff lines and how tariff concessions are set forth in a Member's Schedule are not relevant.

125. Third, while the WTO Agreement does not define circumvention, Members have traditionally recognized two patterns of trade which they have considered to be circumvention, both of which arise in the context of trade remedies applied under Article VI of GATT 1994, i.e., anti-dumping measures and countervailing duty measures. The first type of trade pattern involves marginal alterations to the product itself, and the second involves marginal alterations in the patterns of shipment and assembly. Most Members recognize that circumvention takes place when such marginal modifications or alterations of the physical characteristics, production or shipment of merchandise otherwise subject to an anti dumping or countervailing duty measure are done in a manner which undermines the purpose and effectiveness of trade remedies provided for under the WTO Agreement. In addition, the concept of circumvention in the antidumping context has also been recognized in a Ministerial Decision, i.e., the *Ministerial Decision on Anti-Circumvention*, adopted by Members at Marrakesh and forming an integral part of the *Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations*. The Decision acknowledged the problem of circumvention in the trade remedies context and recognized the desirability of applying "uniform rules in this area as soon as possible" to prevent the evasion of anti dumping and countervailing measures through circumvention. The Decision confirms that the topic of circumvention formed part of the negotiations which preceded the Anti-Dumping Agreement and referred this matter to the Committee on Anti-Dumping Practices for resolution. To fulfil this mandate, the Committee on Anti-Dumping Practices established the Informal Group on Anti Circumvention to examine and resolve which rules should apply uniformly to address the problem of circumvention. In contrast, the United States is not aware of any generally held concept of circumvention under GATT Article II.

126. Fourth, when anti-dumping duties are imposed in the circumvention context, they are not applied in the way that China seeks to apply its GATT Article II "duties" under the measures at issue. The investigating Member does not impose the same anti-dumping duties on the products governed by a circumvention ruling as it does on the products that were clearly within the scope of the anti-dumping order from the outset. Indeed, there is not one uniform amount of duty imposed on any of the products within the scope of the anti-dumping order (at least under the US system). Rather, the anti-dumping duties are assessed based on the amount of dumping found for particular transactions involving particular products.

127. In sum, China's analogy to Members' anti-dumping practices is irrelevant in the absence of any proceeding initiated by China under the rules of GATT Article VI and the Anti-Dumping Agreement. Simply put, the rules governing anti-dumping are different from the GATT Article II rules, and therefore they have no relevance to China's measures.

Q141. (Complainants) Do the complainants have any specific procedures and criteria for determining whether an antidumping order is being circumvented? Please explain them with citations to the relevant legislation or regulations.

128. The United States has had a statutory provision addressing circumvention since 1988. See 19 U.S.C. 1677j. Under this provision, the U.S. Department of Commerce is authorized to take action to prevent or address attempts to circumvent an outstanding antidumping or countervailing duty order. The statute addresses four particular types of circumvention: (1) assembly of merchandise in the United States, (2) assembly of merchandise in a third country, (3) minor alterations of merchandise, and (4) later-developed merchandise. The Department of Commerce has promulgated implementing regulations, found at 19 C.F.R. 351.225

Q142. (Complainants) Do the complainants have any specific procedures and criteria for determining whether an ordinary customs duty is being circumvented? Please explain them with citations to the relevant legislation or regulations.

129. Importers may try to avoid the payment of the proper amount of ordinary customs duties in any number of ways, such as the undervaluation of the goods, the fraudulent certification of eligibility for duty-free treatment under a free trade agreement, or the misclassification of goods under an incorrect tariff heading with a lower rate of duty.

130. There is no legislation or regulation in which the United States sets forth specific criteria and procedures for determining whether an importer is avoiding payment of the correct amount of ordinary customs duty. Where there is a suspicion that an importer is attempting to avoid the payment of ordinary customs duties owing on imported merchandise, the United States may initiate an audit of its records or initiate a criminal investigation. Depending on the outcome, the United States may then impose penalties or file criminal charges against the importer.

Q143. (United States) Please comment on China's reference to Temporary Importation under Bond ("TIB") in paragraphs 32-35 of its oral statement. Could you also please explain the TIB process in the United States with reference to specific legislation, regulations, and/or Customs procedures.

131. China's statement that a good entered under a TIB entry becomes liable for duty if the importer fails to export or destroy the good within the TIB period is not accurate. The provision that appears to be the subject of the statement is subheading 9813.00.05, HTSUS. The TIB period is set by U.S. Note 1(a) of subchapter XIII, Chapter 98, HTSUS, and is one year, although that period can be extended for up to three years from importation. The procedure for extension is set by 19 C.F.R. § 10.37. If an importer fails to timely export or destroy the article, an

importer becomes liable for liquidated damages under the bond contract, but the importer would not incur any liability for duty. The goods do not become liable for duty as a result of a failure to export or destroy the goods.

132. The last sentence in comment 33 that if the importer does not alter or process the good within one year, the importer will become liable for duty is not accurate. So long as there is no evidence that the importer negligently or fraudulently made the TIB entry, the importer would not incur any liability, even under the bond contract, if the good was timely exported or destroyed. If the importer intended to alter or process the good but was unable to do so, the failure to execute that on intent would not breach the importer's bond obligation or eliminate the importer's entitlement to duty free entry.

Q145. (Complainants) China states in paragraph 82 of its first written submission that the very nature of General Interpretative Rule 2(a) is to establish that there is never a "clear separation" between a complete article and the parts and components of that article. Do the complainants agree with this statement? If not, why?

133. The United States does not agree with the statement in paragraph 82 because it is contrary to the terms of General Interpretative Rule 2(a) and 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. General Interpretative Rule 2(a) requires that customs officials make a determination as to whether components entered 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 by specifically naming 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). To classify all parts eventually incorporated into complete motor vehicles as motor vehicles would empty many headings and subheadings of the goods specified therein.

Article III of the GATT 1994

Q149. (Canada and the United States) The Panel notes that the European Communities has submitted an alternative claim under Article III:2 GATT, second sentence, in the case the Panel was to consider that the measures at issue do not violate Article III:2, first sentence GATT. Canada has explicitly reserved itself the

right to return to this issue in its rebuttal submission. Could Canada and the United States please clarify their positions on this issue?

134. The United States, like Canada, intends to address this matter further in its rebuttal submission, including in particular China's argument that GIR 2(a) presents a defense to China's breaches of Article II with respect to any charges imposed under China's measures that might be considered "ordinary customs duties" under Article II.

Q150. (Complainants) In respect of imported products to be compared to like domestic products in the context of Article III of the GATT 1994,
(a) Is it the complainants' view that the imported products that should be compared to domestic products under Article III:2 GATT are "all imported auto parts" and not "imported auto parts characterized as complete vehicles"?;
(b) Please clarify what imported products are taxed "in excess of" domestic auto parts within the meaning of Article III:2, first sentence; and

135. With respect to subquestion (a), yes, the United States considers the proper comparison as between "all imported auto parts" and domestic parts. With respect to subquestion (b), the excess of charges on imported parts as compared to domestic parts, as prohibited by Article III:2, occurs whenever China characterizes an imported part as a having the essential characteristic of a complete vehicle.

(c) Is the complainants' position on this issue the same with respect to their claims under Article III:4?

136. The comparison is the same: that is, under Article III:4, the United States considers the proper comparison as between "all imported auto parts" and domestic parts. The scope of the auto parts subject to the breach, however, is wider under Article III:4. That is, China's measures adversely affect the internal sale, purchase and use of <u>all</u> imported parts, <u>regardless of whether those parts are treated as whole vehicles</u>. This is true for two reasons: first, every imported part used by a manufacturer will bring the manufacturer closer to the thresholds (and thus to the additional charges), regardless of whether in any particular instance the thresholds are exceeded. Thus, the measures create a strong disincentive to the use of imported parts. Second, so long as a vehicle manufactured in China contains a single imported part, the manufacturer of that vehicle is faced with all of the administrative burdens inherent in China's measures. A manufacturer can only avoid those burdens by solely using domestic parts.

Q151. (Complainants) If the Panel were to find that the disputed "charge" is in violation of Article III:2 GATT, would the complainants consider it necessary for the Panel to also examine their claims relating to "the charge" under Article III:4

GATT? Or in the alternative, if the Panel were to find that "the challenged measures in their entirety" are inconsistent with Article III:4 GATT, would the complainants consider it necessary for the Panel to also examine "the charge" under Article III:2 GATT?

137. The United States considers the most essential claims in this dispute as the breach of Article III:4 and/or the TRIMs Agreement, because China's measures impose a local content requirement that discriminates against all imported parts as well as administrative burdens that discourage the use of imported auto parts, and Article III:2, because China imposes an internal charge on certain imported parts in excess of any charges with no comparable charge on like domestic parts. With respect to other claims, the United States understands that questions of judicial economy are to be decided at the discretion of the panel, so long as the all findings are made that are necessary for the resolution of the dispute.

Q152. (Complainants) What is the view of the complainants on the relationship between Article III:5 and Article III:4 GATT? Would a finding under Article III:4 render unnecessary a finding under Article III:5? Or, alternatively, would a finding under Article III:5 render unnecessary a finding under Article III:4?

138. Article III:4 and Article III:5 have different elements. In the circumstances of this dispute, however, the United States understands that a breach of Article III:4 would also indicate a breach of Article III:5, and *vice versa*. Aside from this, the United States again notes its understanding that questions of judicial economy are generally left to the discretion of the panel.

Q153. (Canada and the United States) On the basis of the Appellate Body statement in Bananas III (paras. 202-204). that the agreement which is more specific to the claim before the Panel should be considered first, the European Communities has presented its legal arguments under Article 2 TRIMs first and then its arguments under Article III of the GATT 1994. What is the position of Canada and the United States in relation to the European Communities' approach?

139. The United States considers that Article III:4 and TRIMs Article 2 are closely related, and in these circumstances, the United States considers that the order of analysis is within the discretion of the Panel.

China's Accession Protocol

Q154. (All parties) Could the parties confirm that the commitments found in China's Accession Protocol, including the specific commitments referred to in paragraph 342 of the Working Party Report, are legally binding upon China and enforceable in WTO dispute settlement proceedings?

140. As set out in the first U.S. submission, the United States believes that commitments in paragraph 342 of the Working Party Report are legally binding upon China.

SCM Agreement

> **Q156. (United States) Could the United Sates clarify whether its claims under the SCM Agreement are in the alternative to its claims under Articles II and III GATT as well as those under the TRIMs Agreement.**

141. The U.S. claims under the SCM Agreement are not stated in the alternative – that is, they do not depend on whether or not China's charges are internal taxes or "ordinary customs duties." As noted above, however, questions of judicial economy are generally left to the discretion of the panel, so long as the findings resolve the issues in dispute.

> **Q157. (Complainants) With respect to "revenue foregone" under Article 1.1(a)(1)(ii) of the SCM Agreement, could the complainants please clarify the following:**
> **(a) What is the specific factual basis for your argument that the default rate of import duties and charges that would apply to imported parts and components would be 25 per cent, and that the lower rate of 10 per cent would only be available upon demonstration that local content requirements were met?;**

142. The "normative benchmark" concept described by the Appellate Body in *US - FSC* (Article 21.5 - EC) does not require reference to a default rate, as implied in the above question, when determining whether revenue has been foregone. The Appellate Body stated that Article 1.1(a)(1)(ii) of the SCM Agreement does not require panels to identify a "general" rule of taxation and "exceptions" to that "general" rule. Rather, panels should compare the domestic fiscal treatment of "legitimately comparable income" to ascertain whether the measure under consideration involves the foregoing of revenue that is "otherwise due." The Appellate Body further considered that the comparison ought to be made with respect to taxpayers in "comparable situations."

143. In this dispute, taxpayers in comparable situations pay different amounts of money to the Chinese government, depending on whether or not they source a sufficient amount of goods locally. That is, automobile manufacturers that use imported parts in quantities that exceed certain thresholds when assembling complete vehicles pay a combination of import duties and internal charges to the Chinese government equal to 25 percent of the value of all imported parts used in the assembly of a complete vehicle. Specifically, these automobile manufacturers pay import duties equal to 10 percent of the value of all imported parts used in the assembly of a complete vehicle and internal charges equal to 15 percent of the value of all imported parts used in the assembly of a complete vehicle. In contrast, automobile manufacturers that use sufficient quantities of domestic parts when assembling complete vehicles pay import duties equal to 10

percent of the value of all imported parts used in the assembly of a complete vehicle and no internal charges. As a result, automobile manufacturers that use imported parts in quantities that exceed certain thresholds when assembling complete vehicles pay internal charges that the Chinese government entirely foregoes in the case of automobile manufacturers that use sufficient quantities of domestic parts when assembling complete vehicles.

144. According to China, the measures at issue only impose payment requirements in the form of import duties, not internal charges. However, even if all of the payments due to the Chinese government are classified as import duties, it is still clear that the Chinese government foregoes revenue. Specifically, automobile manufacturers that use imported parts in quantities that exceed certain thresholds when assembling complete vehicles pay 25 percent duties on all imported parts used in the assembly of a complete vehicle, while the Chinese government foregoes revenue by only requiring payment of 10 percent import duties on all imported parts used in the assembly of a complete vehicle in the case of automobile manufacturers that use sufficient quantities of domestic parts when assembling complete vehicles. The amount of the revenue foregone equals the difference between the 25 percent import duties and the 10 percent import duties.

145. From a practical standpoint, there are situations where it may make sense to talk in terms of a "default rate," and there are situations where it will not. The concept of a default rate implies that it is the rate that is normally applied or applied in most situations. In the case of measures like those at issue in this dispute, the rate normally applied will likely change as business practices change in response to those measures, so that it does not make sense to talk in terms of a default rate. For example, when measures like those at issue in this dispute are first enforced, the rate normally applied will likely be the higher payment rate - in the case of China's measures, this default rate would be the combination of import duties and internal charges payable to the Chinese government in an amount equal to 25 percent of the value of all imported parts used in the assembly of a complete vehicle. The reason for this situation is obvious. The purpose 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. Over time, unless the measures are withdrawn, manufacturers will change their business practices and source more parts locally in order to avoid the higher payment rate and remain competitive. As this change in business practices takes place, the rate normally applied under the measures will change as well. Manufacturers will normally pay the lower payment rate because they have responded to the incentive to source more parts locally - in the case of China's measures, this new default rate would be the payment of import duties to the Chinese government in an amount equal to 10 percent of the value of all imported parts used in the assembly of a complete vehicle, with no internal charges.

(b) Is it relevant to the Panel's analysis of the question of the "normative benchmark" in the context of the claims under the SCM Agreement that the bonding rate on imported parts and components is, according to the parties' oral arguments, 10 per cent?;

146. The 10 percent bonding rate on imported parts is not relevant, regardless of whether the domestic fiscal treatment at issue is considered to be a combination of import duties and internal charges (in the complainants' view) or only import duties (in China's view). As explained above, the Appellate Body has stated that Article 1.1(a)(1)(ii) of the SCM Agreement does not require panels to identify a "general" rule of taxation and "exceptions" to that "general" rule, but rather allows panels to compare the domestic fiscal treatment of "legitimately comparable income," with respect to taxpayers in "comparable situations," to ascertain whether the measure under consideration involves the foregoing of revenue that is "otherwise due." In other words, it is not necessary to identify a default rate, which this question implies could be the bonding rate.

147. Furthermore, in the complainants' view, the import duties imposed under China's measures total 10 percent of the value of all imported parts used in the assembly of a complete vehicle, regardless of the local content used by an automobile manufacturer when assembling a complete vehicle in China. As explained above, automobile manufacturers that use imported parts in quantities that exceed certain thresholds when assembling complete vehicles pay import duties equal to 10 percent of the value of all imported parts used in the assembly of a complete vehicle, plus internal charges equal to 15 percent of the value of all imported parts used in the assembly of a complete vehicle. Automobile manufacturers that use sufficient quantities of domestic parts when assembling complete vehicles similarly pay import duties equal to 10 percent of the value of all imported parts used in the assembly of a complete vehicle; the difference is that they do not pay any internal charges.

(c) What is the legal test to be applied to determine the normative benchmark in a subsidy claim in which the alleged financial contribution takes the form of revenue foregone in the sense of SCM Article 1.1(a)(1)(ii)?; and

148. Please see the response to subquestion (a) above.

(d) In your oral statements, in the context of other claims, you have characterized the measures in question as involving the additional "charge" of 15 per cent on imported auto parts only when those parts are treated as whole vehicles. For example, the United States argued that:

> **"the additional charge only applies if domestically-produced autos include an amount ... of imported auto parts that exceeds specified thresholds" (US oral statement, paragraph 3, emphasis added); and "the measures ... require that a specified amount or proportion of an automobile be supplied from domestic sources or else a penalty in the form of an additional charge is assessed" (US oral statement, paragraph 18, emphasis added).**

[Concluding paragraph from Question 158: How can these arguments be reconciled with your position that the 25 per cent rate is the "normative benchmark" or default rate that would apply to all imported auto parts unless there is a demonstration that local content requirements are fulfilled?]

149. Please see the response to subquestion (a) above.

Q164. (United States) In its request for the establishment of the Panel, the United States submitted that the measures at issue were inconsistent with inter alia Article 2 TRIMs in conjunction with paragraph 2(a) of the Illustrative List. Could the United States confirm that it is not pursuing an additional claim under Article 2 TRIMs in conjunction with paragraph 2(a) of the Illustrative List.

150. Please see the following response to Question 165.

Q165. (United States) In its request for the establishment of the Panel, the United States submitted that the measures at issue were inconsistent with inter alia Article XI:1 GATT. Could the United States please confirm that it is not pursuing a claim under Article XI:1 GATT.

151. The United States included claims under Article XI of the GATT 1994 and paragraph 2(a) of the TRIMs Agreement Illustrative List in the event that China tried to buttress its argument that its charges were "ordinary customs duties" by claiming that China's measures actually prohibit the import of auto parts until after the parts were used in the manufacture of a complete vehicle. In that case, China's measures would indeed result in breaches of the two above-cited provisions. Given that China is not pursuing such an argument, and on the condition that China does not in the future pursue such an argument, the United States likewise is not pursuing its claims under these two provisions.

152. It is worth noting, however, that the existence of an Article XI obligation means that China necessarily must agree that the auto parts at issue in this dispute are in fact "imported" when the parts are presented at the border. Otherwise, as noted, if China's measures forbid the importation of auto parts until after those parts were assembled into complete vehicles, China's measures would result in a breach of Article XI of the GATT 1994.