China – Measures affecting Imports of Automobile Parts

(WT/DS 339, 340, 342)

Replies of the European Communities to the Questions of the Panel after the first substantive meeting

Geneva, 11 June 2007
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MEASURES AT ISSUE AND PRODUCTS AT ISSUE

Question 1(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 European Communities is not aware of any other WTO member using the same or similar criteria and such criteria are certainly not used by the EC.

2. Leaving aside that China is using the criteria internally within China, the use of the criteria in tariff classification would lead to a violation of Article II GATT as they do not respect the HS nomenclature (in particular rule 1 of the general rules for the interpretation of the Harmonized System and, to the extent rule 2(a) is relevant, the "as presented" and "essential character" criteria there under).

3. The only circumstances in which parts could be classified as the complete article could be in the context of certain knocked down kits, but that would require a case-by-case analysis. In this respect reference is made to the reply to question 47.

Question 3

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?

4. The answer as to whether automobile manufacturers themselves also assemble or manufacture the so-called "assemblies" listed in Article 4 of Decree 125 depends on the business strategy of each manufacturer. However, the European Communities understands that in the most typical situations at least some elements of the "assemblies" would be manufactured by the manufacturer of the complete vehicle. This concerns in particular the vehicle body, which is an element of a vehicle that is usually separate for each model. In contrast, for example the steering system and the brake system are typically assembled and manufactured by suppliers and sold to the vehicle manufacturer. However, there are no general rules that apply to all manufacturers and all models.
5. There is no difference between the automobile industry in general and the Chinese automobile industry with the very important exception of the way in which the contested measures affect the strategy of vehicle and parts manufacturers in China. As explained by the European Communities in its first written submission the Chinese measures force vehicle manufacturers to depart from their normal business strategies in the rest of the world (in particular paragraphs 68 to 74). The Measures require in all situations that the vehicles contain a certain proportion or combination of locally made parts and components (or "assemblies"). If the necessary local content is not ensured, the manufacturer will be obliged to pay the 25 % duty on all imported parts, which due to very small profit margins will mean that the given model will not be competitive in the Chinese market.

6. With regard to the distinction between vehicle manufacturers and parts manufacturers the answer again depends on the specific context. Sometimes parts manufacturers may belong to the same industrial group as the vehicle manufacturers but more often the parts manufacturers are independent and provide parts to many different vehicle manufacturers. Indeed, there are far more parts manufacturers than vehicle manufacturers. Of course, due to constant changes in the industry a part manufacturer may become part of the same group as the vehicle manufacturer and vice versa. Mergers and acquisitions are an every day phenomenon in most industries. However, it is also important to underline that a vehicle manufacturer often acts as the supplier of a given part or "assembly" to another vehicle manufacturer. Even competitors in the same market may co-operate in the context of certain vehicle models. All of this depends on the strategy of the manufacturers. The Chinese measures seriously compromise the ability of the foreign industry to choose the most efficient business strategies in the Chinese market.

Question 8

*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.*

7. It is important to put this question into its proper context. The considerable complexity of the measures in itself affects the launching of a new model in the
Chinese market. The bottom line for most manufacturers is that they must avoid the 25% duty since otherwise it will simply not be commercially worthwhile to even begin the administrative procedure under the measures. The conception and launching of a new model can thus be delayed by 2-3 years, as vehicle manufacturers will have to look for domestic suppliers able to provide the required proportion of domestic parts or assemblies, and test their reliability. Establishing the self-verification report required by Article 7 of Decree 125 may take an additional six months for a team of 10-15 highly skilled experts. After a manufacturer decides to begin the procedures for introducing a new model, which it believes and hopes to be subject only to the 10% duty as regards imported parts, it can in reality take up to one year before all the procedures are finalised. The measures thus also results in having to launch in a context of legal uncertainty that may persist for months and sometimes even for years.

8. At the stage of the assembly operations, the measures impose a considerable administrative burden and, as a consequence, additional costs. It should be emphasised that 30% to 35% of parts are common to different models. For a vehicle manufacturer, the most efficient way is to ship parts together and use them depending on the production needs which may easily vary from the initial plan. There may be a need to increase the production of a specific model as a result of sales higher than anticipated; there may be a need to replace urgently deficient parts. Because China's measures impose to declare for which model the parts will be imported (Article 15 of Decree 125), vehicle manufacturers have to unnecessarily define in detail for which model each part is imported. The flexibility required for an economically sound management of parts supply is taken away.

Question 9

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?

9. Since a country's tariff schedule has to be interpreted in the light of the Harmonized System, any 'flexibility' must be in accordance with HS nomenclature and its rules. To the extent the question refers to Article XX(d) of the GATT, the 'flexibility'
must comply with the requirements of that provision and in particular be necessary to secure compliance with laws or regulations which are not inconsistent with the GATT and fulfil the criteria laid down in the *chapeau* of Article XX.

**Question 10**

*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 European Communities profoundly disagrees with the statement of China in paragraph 15 of its first written submission. Rule 1 of the General Rules for the interpretation of the Harmonized System states that

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

As explained by explanatory note V to Rule 1, "...the terms of the headings and any relative Section or Chapter notes are paramount, i.e. they are the first consideration in determining classification".

11. The position of China is in direct contradiction with Rule 1.

12. The Appellate Body has also clearly recognised the importance of the terms of the specific tariff headings in the context of an analysis under Article II of the GATT. In this respect reference is made to Appellate Body Reports in *EC- Computer Equipment* and *EC – Chicken Cuts*.

13. If the measures are considered to be imposing an internal charge as the European Communities considers, the details of the tariff headings would not be relevant. The rates are relevant as the internal charge is the difference between the full vehicle rate and the part rate.

**Questions 13(a) and (b)**

*All parties* Regarding the notion of "circumvention":

(a) Please explain what "circumvention" means; and
14. The ordinary meaning of 'circumvention' according to the Shorter Oxford English Dictionary is "deceitful or fraudulent conduct perpetrated against a facile person" while 'circumvent' is defined as "deceive, outwit, overreach, find a way round, evade (a difficulty)". The ordinary meaning of the term appears to contemplate both situations where there is criminal or fraudulent intent behind the action and situations where such criminal or fraudulent intent is not necessarily present and where circumvention would not per se be illegal.

15. In the context of Anti-Dumping EC law defines circumvention as follows (Article 13(1) of regulation 384/96 as amended by regulation 461/2004): "Circumvention shall be defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2." To understand this provision in its context reference is made to replies to questions 132 and 141.

(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.

16. Anti-circumvention measures are explicitly contemplated under WTO law under Article 10 of the Agreement on Agriculture and in the context of Anti-Dumping. The Ministerial Decision on Anti-Circumvention adopted by the Trade Negotiations Committee on 15 December 1993 noted that the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994 but the negotiators were unable to agree on specific text. The European Communities is of the view that anti-circumvention measures are permissible for the purposes of enforcing Anti Dumping duties within the framework of Article VI of the GATT 1994 and the Agreement implementing Article VI of the GATT. In
respect of Anti-Dumping the EC is not aware of other GATT or WTO jurisprudence except for the GATT panel report EEC – Parts and Components.

17. To the extent the question refers to Article XX (d) of the GATT, reference is made to the reply given to question 9.

Question 14

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

18. The European Communities does not consider that such statistics are relevant to the measures at issue. The European Communities is of the view that the Schedule of concessions of China or the Harmonised System under chapters 84 and 87 do not provide for the anti-circumvention measures argued by China. Hence, there is no need to consider trade statistics.

19. However, in general the European Communities is of the view that such statistics could at most demonstrate that after WTO accession, trade has increased in imported parts and components. This is a direct consequence of China's commitment to reduce the tariff rate for parts and components to a bound level of 10% or less. If the expected effect of a commitment could serve as a justification for not respecting this commitment any longer, this would entirely undermine the legal value of WTO commitments. Any possible changes in trade patterns should also be examined in the light of all relevant data including the changes in imports of complete vehicles, production of complete vehicles in China, production of auto parts in China (which may require imports of parts further processed in China) and the number of vehicles in circulation in China (which affects the demand for imports of parts for repair and maintenance).

Question 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.

20. The European Communities does not believe it has misunderstood the Chinese rules. It seems that the suspending regime allegedly applied by China concerning bonded goods at issue is a hybrid one, which confuses international customs practice regarding bonded areas with the "bond" imposed on vehicle manufacturers in the amount of the relevant duty on automotive parts on importation. China refers to the word “bonded” in relation to both situations (guarantee – transit procedure) and this has a misleading effect. The "bond" (i.e. the guarantee or security deposit) is made on the basis of the duty rate for parts (generally 10%), i.e. on the basis of the characteristics of the goods as presented to customs. The European Communities also refers to the more detailed answer given by Canada.

**Question 32**

*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.*

21. China misinterprets the customs legislation it cites by trying to mix up ordinary tariff classification with the customs procedures related to the post clearance recovery of the customs debt. When goods are imported into the EC in order to be released for free circulation, a customs declaration is lodged with the customs administration. It contains the precise physical description of the goods that is sometimes also supported by pictures or laboratory analysis. The importer will propose a tariff code (CN code in the EC) where to classify such goods. The customs administration will then “take a snapshot” of the customs declaration related to the goods at issue and classify them according to the HS rules in force at the time of importation. These are transposed into the EC’s Combined Nomenclature (or, we understand, the US’ HTSUS). Only rarely are goods physically inspected at the border. If it turns out that the tariff classification at the time of importation has been done by relying upon incorrect documentation submitted by the importer (for instance misleading laboratory analysis, different
characteristics of the goods imported that do not correspond to those indicated in the import declaration), the customs administration is allowed to check the goods and re-classify them accordingly because the goods that have been imported are different from those declared in the customs import declaration lodged by the importer at the time of importation. As it is apparent from the above, China's examples are based on the rules in force concerning the post clearance recovery of the customs debt that have nothing to do with the ordinary tariff classification done at the border at the time of importation. In other words, the imposition and collection of customs duties is always made on the basis of the status of goods at the time of importation or in other words as presented at the border.

22. The EC understands that the same applies for the customs systems of the US and Canada. Even if there was, in the legal system of an individual WTO member, a practice of classifying goods based on events after importation, such practice would not be "widespread and consistent" and would certainly not fulfil the test of Article 31(3)(b) of the Vienna Convention.

**Question 33**

*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?*

23. To the extent that a CKD or SKD kit would be subject to a separate tariff line or be classified *in casu* as the complete vehicle because all the parts of a complete vehicle are presented to customs at the same time, there could be a difference between the classification of separately imported parts and a CKD or SKD kit. However, depending on the particular case it can also be that both the kits and the parts imported separately would be classified as parts. It is therefore not possible to treat such kits in a generalised manner as imports of complete vehicles as is the case with the contested measures.

**Question 37**

*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?*
24. The statement of the Appellate Body in *Japan – Alcoholic Beverages II* demonstrates that the purpose of Article III is broader than guaranteeing that internal measures of WTO members do not undermine their commitments under Article II. This demonstrates that the Measures and in particular the cumbersome procedural requirements that go manifestly beyond any general customs procedures would violate the national treatment obligation under Article III even if China had no bound tariffs on the products at issue. This statement would also seem to lend support to a position that the same measures could breach both Article II and Article III of the GATT 1994 depending on the emphasis and angle of the analysis. The European Communities would also like to refer to *EC – Export Subsidies on Sugar* where the Appellate Body considered that Article II:1(b) does not permit members to qualify their obligations under other provisions of the GATT (paragraphs 217 to 219).

**Question 39**

*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 description provided by China of judgment of the Court of Justice of the European Communities in case 165/78 *Michaelis* under paragraphs 102 and 103 of its first written submission is misleading and taken out of context.

26. First, the Schedule of concessions of the then EEC in 1978 contained a special tariff heading "for the parts of an unassembled or disassembled article" (see question 1 referred to the Court of Justice by the national court).

27. Second, all the parts were presented to the customs at the same time. China entirely ignores this fundamentally important element.

28. Third, the Court explicitly came to the conclusion that the parts as presented to the customs would allow the assembly of a complete article i.e. all the parts necessary to make the complete article were presented to the customs. Hence, the unfinished article had the essential character of the complete or finished article.
Question 47

Complainants: Please explain how CKD and SKD kit imports are classified in your country.

29. The European Communities does not have a tariff line for CKD and SKD kits. There is no established legal definition for such kits but as indicated under paragraph 267 of its first written submission, the European Communities understands these concepts under the Measures as referring to kits that consist of all parts necessary to make a complete automotive product, in most cases a complete vehicle. In view of the Chapter note to Chapter 87 of the Harmonized System, which provides for a specific application of Rule 2 (a) of the Harmonized System in this context, the classification of CKD and SKD kits in an individual case is a difficult question as the Chapter note uses concepts such as "fitting" and "equipping" putting therefore emphasis on the state of assembly and manufacture of the relevant product. An SKD kit that by definition denotes 'semi-knocked down' kits would from a general point of view appear more likely to fulfil the conditions to be classifiable as a complete vehicle (or other relevant product) as the parts would be presented to the customs with a certain degree of "fitting and equipping". A CKD kit that denotes a 'completely knocked down' kit is in principle further away from the examples provided for by the Chapter note to chapter 87 as the parts presented to the customs are in a completely unassembled state. However, a CKD kit that consists of all the parts necessary to assemble a complete vehicle may in some circumstances be classified as the complete vehicle provided that no working operation beyond assembly for completion into a complete vehicle is necessary in accordance with explanatory note VII to rule 2 (a). In this respect it should be emphasised that different kits intended to become complete vehicles may need different further working operations depending e.g. of the level of high technology electronics in the final vehicle. Therefore, the classification of a kit must always be made on a case by case basis and not generally as China does unless the member's schedules provide for tariff lines for different kind of kits.

Question 51

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.
30. During the consultations the co-complainants requested several times the translation of the Measures from China. China committed to provide us with a translation during the consultations. This commitment was not kept. Therefore we have been obliged to do the translations ourselves. There has been a considerable investment of time and effort to make the translation as accurate as possible. With this background the European Communities considers that it is not in accordance with the principle of due process to require the complainants to now rely on translations that China provided only in its first written submission i.e. 5 weeks after submitting our own first written submission. It would therefore be for China to argue why the translations submitted by the complainants may not be accurate.

31. In the alternative and to reply to the specific question of the Panel, we have listed the points on which we disagree with the translations provided by China in a separate document attached to the replies to the questions (Exhibit JE – 38).

**Question 55**

*All parties Please explain in detail what customs "clearance" means.*

32. The concept relates to the fact that goods, once the customs clearance has taken place, are in free circulation within the customs territory of the importing country. In order to be released for free circulation all the import formalities will have to be completed: goods will have to be classified according to HS rules and the corresponding customs duty (customs debt) will have to be paid by the importer or at least be secured by a guarantee.

**Question 60**

*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.*

33. The European Communities is not aware of any such 'routine' by its customs officials. China does not present any evidence in respect of the practice of the EC. Reference is also made to the reply given to question 47.

**Question 61**

*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

34. No, the European Communities is not aware of any formal tariff line created by China for CKD and SKD kits. However, as stated in its first written submission, the European Communities is of the view that for all practical purposes China has introduced a disguised tariff line on such kits.

(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?

35. The European Communities considers that without prejudice to a potential direct violation of the commitment made by China under paragraph 93 of the Working Party Report, or nullification or impairment of benefits in the meaning of Article XXIII:1 (b) of the GATT 1994, this commitment provides crucial context for interpreting China's Schedule of commitments upon accession to the WTO. The commitment to apply 10% duty if it were to create a tariff line on such kits lends strong support to an argument that China has considered such kits as akin to automotive parts upon accession to the WTO.

Question 67

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?

36. Such measures should be applied in accordance with the relevant WTO rules most notably Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994. In any event, any such duties should not affect the normal application of the provisions in force concerning ordinary customs duties.

Question 68

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.

37. These notions cannot be taken out of their proper context. Rule 2 (a) very clearly demonstrates that all of its elements must be fulfilled at the same time. Taking any of these notions out of their context entirely undermines the whole system of tariff
classification and results in tariff classification at will. Members may of course use Rule 2(a) in its proper context to assist in individual cases that fulfil all the conditions of the Rule. However, China ignores the very basic rule that is Rule 1 of the HS system by jumping directly into rule 2 (a) and then picks and chooses what in that rule fits to its anti-circumvention theory. This would seriously compromise "the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" (Appellate Body e.g. in EC – Chicken cuts, at para. 243).

Question 69

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.

38. There are no established legal definitions of CKD and SKD kits. In the language of the industry CKD or SKD kits may denote a combination of parts that make up a certain more general part of a vehicle ("assembly" using the language of Decree 125) or a combination of parts that make up a complete vehicle. Therefore, in the industry the concepts are used in a variety of ways. However, the European Communities understands that CKD and SKD kits under the measures comprise all the parts necessary to make a complete vehicle.

Question 70

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'"?

39. The European Communities understands that this question is addressed to the other parties.

Question 71

All parties Please explain in detail what kind of manufacturing processes are usually involved to make a complete vehicle using CKD or SKD kits?
40. It is not possible to give a general answer as the level of fitting and equipping will by definition vary. The example of a SKD kit provided in Exhibit CHI-5 would not require complex manufacturing processes provided all the electronic equipping and calibration is already done and only the fitting of the tyres would be necessary. In contrast, the difference between manufacturing a CKD kit into a complete vehicle may not differ considerably from the manufacturing of a complete vehicle generally. However, this will depend on the manufacturing facilities of the manufacturer and the complexity of the relevant model. Modern vehicles that typically contain elements of computer technology require various types of calibration during the manufacturing process. Most body and chassis components will also need further working operations in the form of rust treatment, painting and polishing.

**Question 72**

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

41. The European Communities agrees that the description in Exhibit CHI-5 illustrates a particular type of an SKD kit provided all of the parts are presented to the customs at the same time.

**Question 73**

**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.

42. 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)
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).

Question 74

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. This statement would appear to confirm that China considers CKD and SKD kits as consisting of all the parts necessary to manufacture a vehicle. Furthermore, China appears to admit that a significant combination of parts necessary to manufacture a vehicle presented at the same time to customs at the border was classified as parts prior to China joining the WTO.

Question 75

All parties Are there any differences between CKD kits and SKD kits? If so, please explain.

44. The difference between the concepts is the different level of assembly and manufacture or "fitting and equipping" to use the specific language used under chapter 87 of the HS system. A CKD is a 'completely knocked-down' kit in which nothing or very little is fitted or equipped while an SKD or a 'semi knocked-down kit' consists of partially assembled, fitted, equipped and/or processed combinations of parts that together would make up a complete vehicle. Reference is also made to the reply provided to question 47.

Nature of the Measures

Question 78

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 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)
45. The European Communities entirely agrees with the argument contained in paragraph 14 of Australia's third party oral statement. In this respect, the European Communities refers to the examples provided in paragraph 66 of its first written submission, which clearly illustrate that the 15% additional charge on auto parts is not dependent on the importation of the part, but on the use to which this part was put in China. If a WTO Member could transform a measure triggered by the internal use of imported products into a border measure just by imposing a declaration at the border, Article III of the GATT would be reduced to nullity.

**Question 80**

Complainants Would the complainants consider that the payment by the vehicle manufacturer of the 25% charge on CKD and SKD kits at the border, as contemplated in Article 2 of Decree 125, be characterised as a "border measure" or "ordinary customs duty"? If so, would it be appropriate for the Panel to consider this specific case under Article II GATT?

46. Provided the regular customs procedures are used in that context, the European Communities agrees that it would be appropriate for the Panel to consider this specific case under Article II GATT. The issue would therefore be whether it is in accordance with Article II of the GATT to classify CKD and SKD kits always and automatically as complete vehicles. As stated under paragraph 275 of the EC's first written submission, such a general and automatic classification would not be consistent with China's obligations under Article II.

**Question 82**

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.

47. These factors demonstrate that the Chinese measures are much broader than the "circumvention" charges that were examined in EEC-Parts and Components. Therefore they must a fortiori fall under Article III of the GATT.
Question 84

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).

48. The European Communities does not believe that the panel used the expression "conditional upon the importation of a product" as a legal test in EEC- Parts and Components. In paragraph 5.5 of the panel report the panel appears to cite or at most rephrase the arguments made by the EEC at the time. The actual test the panel used seems to be contained in paragraphs 5.6, 5.7 and 5.8 of the panel report.

49. However, the European Communities understands that China aims at extending the time and place at which the determination of a customs liability is normally made to a time well beyond the time of the product being presented to customs on importation and even beyond the time of the product being used internally in the manufacture of other products. The European Communities fundamentally disagrees with this position of China. As China considers that the charges in question are 'ordinary customs duties' they should be due 'on importation' not 'in connection with importation' or be 'conditional upon importation' of a product. In reality the charges and administrative requirements are internal measures imposed on the basis of the use of the parts in China. There is no 'connection' or 'condition' that relates to importation despite the ostensible formal link made with customs authorities and customs procedures.

Question 85

All parties The complainants have presented their claims in such way that 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.
50. The European Communities does not believe that it has presented its claims under the TRIMs Agreement and Article III of the GATT in a way that would require the Panel first to decide whether the measures at issue are to be considered as internal measures or not. Indeed, the European Communities explicitly stated in its oral statement under paragraphs 13 and 21 that an analysis under the TRIMs Agreement does not require such an ex ante preliminary consideration. It is China that has decided to base its defence on a premise that the Panel must first decide whether the measures at issue are internal or border measures.

51. The European Communities considers that the Appellate Body's finding in EC – Bananas III is relevant in this context. China appears to consider that the general description of a Measure as a "border measure" or "border charge" automatically excludes an analysis of that measure under Article III of the GATT and/or under the TRIMs Agreement. In other words, China appears to argue that a 'border measure' in the case at hand equals 'subject to Article II of the GATT'. The European Communities considers that a measure that attempts to operate ostensibly at the border but which in reality applies internally is subject to an analysis under Article III of the GATT and the TRIMs Agreement.

**Question 86**

*European Communities* China contends that the challenged measures, which it has adopted to prevent circumvention of its tariff rates for motor vehicles, operate on the same basis as the EC’s anti-circumvention measure that was revised as a result of the panel’s findings in EEC – Parts and Components. (first written submission of China, paras.57-61) Please comment in detail on this statement, including the differences and similarities between the challenged measures and the old and revised EEC measures related to EEC – Parts and Components.

52. The Anti-Dumping rules of the European Communities are not before the Panel. In any event, the European Communities considers that the premise of China's argument is fundamentally flawed. Even if it were to be considered (quod non) that the Chinese measures enforce Customs duties, trying to extract from EC AD anti-circumvention rules or any other such rules general principles legitimising anti-circumvention rules of Customs duties would be totally inappropriate. Anti Dumping measures are subject to entirely separate obligations within the covered agreements which are defined in Article VI of the GATT and the Agreement on the Implementation of Article VI of the GATT 1994. Furthermore, the Ministerial
Decision on Anti-Circumvention adopted by the Trade Negotiations Committee on 15 December 1993 explicitly recognises that uniform rules on anti-circumvention of anti-dumping measures have not been defined. Any comparison is therefore bound to be compromised by this fundamental problem with the premise of the comparison.

53. If one ignores this very basic problem for the comparison, there is perhaps a very general similarity between the old EEC measures that were subject to the panel report in EEC – Parts and Components and the Chinese measures in the sense that the final determination on the applicable duties was made after the assembly operations.

54. Under the new AD anti-circumvention rules, the possible AD duties on the parts will be imposed at the border, and not anymore once they are assembled in the finished product.

55. Reference is also made to the reply given to question 132.

**Question 87**

*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 precise time and place of the collection of a charge, or the enforcement of a law or regulation may be relevant for the characterization of such charge or law/regulation under Articles I, II and III of the GATT. It is not possible to give a "quantitative" answer that applies across the board. However, for instance the actual payment of a charge i.e. the transfer of the monies due to importation of a good may occur after importation but the determination of the amount due must be made on importation.

**Question 88**

*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" (emphasis added). Therefore, a charge, law or regulation does not need to apply to both domestic and imported products to be considered internal and subject to Article III of the GATT. The Ad Note to Article III concerns specific situations where both the domestic and the imported like good are subject to charges, laws, regulations or requirements but are collected or enforced in respect of the imported good at the time or point of importation. If the scope of Article III was limited to situations where internal charges, laws, regulations or requirements are applied to both domestic and imported goods, it would render the most blatant discriminations (i.e. situations such as is the case with the Chinese measures where the internal charges, laws, regulations or requirements apply internally only to imported goods) outside the scope of Article III.

Question 89

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 words "at any time" in the chapeau of Article II:2 GATT would seem to refer to the general right of members to impose the relevant charges, duties and fees at any time. In other words, "at any time" refers back to the words before them and not to the words "on importation" that come after. The words "at the time or point of importation" in Ad Article III in turn seem to refer to the time or point of importation. The words "at any time" and "at the time" in these provisions convey therefore a completely different notion of time and space. Comparing these formulations would not seem to provide any guidance for the Panel.

Question 90

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:
59. The factors mentioned by China in paragraph 67 of its first written submission clearly aim at extending the scope of Article II GATT into measures that should be examined under Article III GATT. Article II:1(b), first sentence does not contain any language that would allow the unprecedented extension of its scope in the way China suggests in paragraph 67. As considered by the Appellate Body in EC – Bananas, rules that are attached to a border measure should be considered under Article III if they affect internal sale.

(a) bear an objective relationship to the administration and enforcement of a valid customs liability; and

60. Even if the criterion suggested by China would be accepted, the Measures do not bear an objective relationship to the administration and enforcement of a valid customs liability since the liability is established only after the manufacture of the final product.

(b) relate to a condition of liability that attached at the time of importation.

61. The Measures do not relate to a condition of liability that attached at the time of importation since the liability is triggered only after the manufacture of the final product and depending on the internal use of the imported product in China. Reference is also made to the reply given to question 84.

**Question 91**

*European Communities* In paragraph 27 of its written oral statement, China considers that a charge is "conditional upon" the importation of a product if the charge bears an "objectively ascertainable relationship to the fulfilment of a customs liability". Footnote 4 to that paragraph suggests that China's statement has been inspired by an EEC comment on the findings of the Panel Report in EEC – Parts and Components. Please comment on the relevance of that comment to the instant case, in particular to the characterization of the measures as internal or border measures.

62. As is often the case the EEC as the losing party was not pleased with the panel report and made comments accordingly. These comments were made exclusively in the context of Anti-Dumping anti-circumvention measures. Subsequently the EEC accepted to adopt the report. The comments made by the EEC at the time are therefore entirely irrelevant for the present case.
Question 96

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

63. The GATT 1994 does not define the concept of 'ordinary customs duty'. However, it generally denotes financial charges in the form of a tax imposed on products "on importation" and the liability to which is created by the importation. Ordinary customs duties can be specific, ad valorem or mixed. A specific customs duty on a product is an amount based on the weight, volume or quantity of that product while an ad valorem customs duty on a good is an amount based on the value of that good. A mixed duty is a customs duty comprising of an ad valorem duty to which a specific duty is added or subtracted. The ordinary customs duties, which are due on importation are set out in a country's tariff schedules. Most national tariffs such as China's follow the structure set out by the Harmonised System.

(b) What is the definition of "other duties or charges" within the meaning of Article II:1(b), second sentence?

64. The reference to 'other duties or charges' in Article II:1(b), second sentence aims generally at preventing undermining the prohibition of Article II:1(b), first sentence, of the GATT 1994, to impose ordinary customs duties in excess of the bindings. 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' ".

Question 97

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?
65. In view of the obligation to record the nature and level of any "other duties or charges" in the Schedules of concessions in accordance with paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT, the difference does not seem to have any practical meaning beyond the difference of scope between Article II:1(b), first and second sentence. In any event, there is no difference from the point of view of making the relevant customs classification of the product, which is to be made in accordance with the objective characteristics of the product as presented at the border and on the basis of the declaration to the customs.

Question 98

European Communities Responding to the above question the European Communities stated during the first substantive meeting, inter alia, that there was no GATT/WTO jurisprudence on the meaning of the term "in connection with the importation". Please elaborate more on this in light of the fact that the decision in the GATT Panel Report in EEC – Parts and Components examined an EEC argument that its measure was a border measure precisely because it was levied "in connection with the importation" (see, inter alia, paras. 5.5 and 5.7 of that Panel Report).

66. The European Communities is not aware of jurisprudence that would define the words "in connection with importation" generally. In para 5.5 of EEC – Parts and Components the panel appears to simply quote or at most rephrase the arguments made by EEC at the time. Under paragraphs 5.6 and 5.7 the panel considered that the policy purpose of a charge, the mere description or categorization of a charge under the domestic law of a contracting party or the treatment of the goods "as not being in free circulation" are not relevant to provide the required 'connection with importation'. To apply this reasoning to the present case, the description or categorization of the charges made under Chinese law is not relevant for determining whether the charges are levied "in connection with importation". In particular, the fact that Chinese customs authorities are involved in the procedures and that the charge to be paid by the manufacturer on the imported parts is called a duty is irrelevant for determining whether there is a connection with importation within the meaning of Article II:1(b) of the GATT. If one were to accept China's arguments that the imported auto parts are subject to bonding requirements or that the measures are addressing circumvention of customs duties, both arguments would be equally irrelevant.
Question 99

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"?

67. It would seem that outside the concept of duties and/or charges, this language is only used under provisions indirectly related to this case i.e. Articles I and XI GATT. Article II:1(b), second sentence refers to "in connection with the importation" but only in respect of "other duties or charges". If this is the context of the question i.e. the Panel seeks to know the view of the Parties on a law or regulation that enforces the payment of other duties or charges in connection with the importation of a product as opposed to a law or regulation that is enforced "on the importation", the European Communities refers to the difference between the first and second sentence of Article II:1(b). A law or regulation that is enforced "in connection with the importation" can only enforce "other duties or charges" not "ordinary customs duties".

68. Reference is also made to the reply given to question 87 and the examples provided there under.

Question 100

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.

69. The first sentence of Article II:1(b) only refers to "on importation" whereas the second sentence of Article II:1(b) refers to both "on importation" and "in connection with importation". The prohibition to impose ordinary customs duties in excess of those set forth in the Schedule applies "on importation" whereas the prohibition to impose "other duties and charges" applies also to situations "in connection with importation". A position such as China's that the 25 % duty imposed on imported automotive parts is an "ordinary customs duty" but imposed "in connection with importation" would seem contradictory on the face of the text of Article II:1(b) of the GATT 1994. In other words, "ordinary customs duties" cannot be imposed "in connection with importation".
Question 101

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?

In principle this would be possible. However, the Measures would seem to be written as a whole and splitting their provisions into separate parts is difficult. Nevertheless, the option given under Article 2 of Decree 125 to manufacturers that import CKD or SKD kits to conduct the clearance procedure and pay duties at the Customs office where the manufacturer is located and thus avoiding the further application of the Measures could be singled out as a matter to be examined under Article II of the GATT while the rest of the Measures would be subject to the TRIMs Agreement and Article III of the GATT. In contrast, Article 29 of Decree 125 is not a provision that can be separated from the other provisions of the Measures. This is a general provision that applies to automobile manufacturers that purchase automotive parts from suppliers and/or do not use the imported parts within a year from importation. Article 29 uses the general language of the Measures on "deemed whole vehicles" and is directly connected with the overall logic of the Measures according to which the classification of the imported parts depends on their internal use in China. This is an intrinsic part of the mechanism set up by the measures to discriminate against the use of imported auto parts in the manufacture of complete vehicles, and ensures in this way the development of the Chinese vehicle and auto parts industry.

Question 103

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?

As the European Communities stated already in paragraphs 13 and 21 of its oral statement, the TRIMs Agreement does not require a preliminary assessment as to whether a measure is a "border measure" or an "internal measure". Furthermore, the fact that a given measure might be generally described as a "border measure"
in the sense of being enforced "on or in connection with importation" does not necessarily preclude an analysis under Article III of the GATT. In any event, the European Communities is of the view that the Measures at issue in this case are subject to the TRIMs Agreement and Article III. This suggests that the Measures are generally rather "internal measures" than "border measures" even if they are contained in customs language.

Question 105

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 European Communities understands that reference is made to the second subparagraph of Article 2 of Decree 125 and not Article 20. If this is the case, the European Communities is of the view that if the importer uses the option under Article 2 of Decree 125 to declare CKD and SKD kits to customs under standard customs procedures and the classification is made on the basis of standard customs rules i.e. according to the objective characteristics of the products as presented, the charges imposed are "border charges" under Article II of the GATT. China has indicated that the charges would be "ordinary customs duties". In view of the fact that the charges imposed on such kits have not been recorded in China's Schedules of concessions in accordance with paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, the charges cannot be "other duties of charges". Therefore, the European Communities can agree with China that in this specific instance the charges would be "ordinary customs duties".

Question 106

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. Provided that China confirms that only the normal general customs procedures are applied in the context of the second paragraph of Article 2 of Decree 125 and
- a CKD or SKD kit consists of all the parts necessary to manufacture a vehicle presented to customs at the same time and in a single consignment.

it would be sufficient for the Panel to decide whether it is in accordance with China's Schedule of commitments to apply to such kits generally and in all cases the duty on complete motor vehicles in the case of the second subparagraph of Article 2. This reply is to be understood in the light of the fact that the European Communities has not made a separate claim under paragraph 93 of China's Accession Protocol.

Question 107

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 your answer.

74. It is not clear to the European Communities why China wishes to interpret the word 'commerce' to be synonymous with 'imports'. The ordinary meaning of 'commerce' is "buying and selling; the exchange of merchandise or services, especially on a large scale" (Shorter Oxford English Dictionary).

Question 109

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. The European Communities entirely agrees with the argument made by Australia in paragraph 14 of its oral statement. See also reply to question 78.

ARTICLE II OF THE GATT 1994

Question 110

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
76. When goods are classified in the Harmonised System it is always done on the basis of the objective characteristics of the product at the time of importation, that is, as imported and presented to Customs on a shipment-by-shipment basis. The intentions of the importer and differing duty rates are irrelevant. This is the essence of the words "as presented" in Rule 2(a).

Question 111

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 general, the WCO’s decisions do not bind the contracting parties of the WCO.\(^1\)

78. Exhibit CHI-29 to which reference is made in paragraph 160 of China's first written submission must also be put in its proper context. Paragraphs 1 to 8 of the decision have nothing to do with the issue of "split consignments". Paragraphs 1 to 8 relate to the judgment of the European Court of Justice in case C-35/93 Dr Eisbein (ECR 1994, p. I-02655) where the issue was the relevance of the complexity of the assembly operation in the context of rule 2 (a) of the Harmonised System.

79. As a completely separate issue the committee decided to include the Nomenclature Committee's decision relating to split consignments into its report. However, Rule 2 (a) has not been amended in any way pursuant to the discussion in the committee. Therefore China's submission that the decision of the committee would somehow affect the "as presented" criterion under Rule 2 (a) in the context of split consignments is entirely without merit.

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\(^1\) Even the most authoritative WCO’s acts i.e. classification opinions are not binding in the EC legal order and this has been confirmed by the European Court of Justice in case C-206/03, Commissioners of Customs & Excise v SmithKline Beecham plc (European Court reports 2005 Page I-00415).
Question 112

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

80. That decision has no influence on the interpretation of GIR 2(a).

Question 113

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. Note VII of the Explanatory Notes to Rule 2(a) is generally relevant in delineating the boundary between complete articles and parts of those articles provided that the basic conditions of Rule 2(a) are respected. However, as China fundamentally disregards the basic elements of Rule 2(a) and in particular the "as presented" condition, the way in which China uses Note VII is necessarily fundamentally erroneous.

82. China also struggles to apply Note VII even under the erroneous terms China wishes to give it. Under paragraph 101 of its first written submission China states that the separate tariff heading for parts therefore encompasses the importation of parts "other than for the purposes of assembling a complete article from imported parts" This statement is difficult to square with the fact that under the Measures parts that are imported for the purposes of assembling a complete car are classified as parts if the necessary local content is ensured.

83. Furthermore, as explained already under question 39 the description provided by China of judgment of the Court of Justice of the European Communities in case 165/78 Michaelis under paragraphs 102 and 103 of its first written submission is misleading and taken out of context.

Question 114

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?

84. Yes. This has been confirmed by the Appellate Body e.g. in EC – Chicken Cuts (paragraph 199) where it stated that "the above circumstances confirm that, prior
to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to use the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an "agreement" between WTO Members "relating to" the WTO Agreement that was "made in connection with the conclusion of" that Agreement, within the meaning of Article 31(2)(a) of the Vienna Convention. As such, this agreement is "context" under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules."

85. The European Communities considers that the Harmonised System could also fulfil the criteria in Article 31(3)(c) of the Vienna Convention as a "relevant rule[] of international law applicable in the relations between the parties".

Question 115

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?

86. Rule 2(a) is not relevant in interpreting a Member's Schedule from a general point of view unless one singles out a very specific product that is assumed to have been presented to the customs. It is a rule that assists the Customs in specific instances where a given incomplete or unfinished article as presented to customs appears to have the essential characteristics of the complete or finished article. It should also be kept in mind that Chapter 87 of the Harmonized System contains a specific chapter note, which according to Explanatory notes IV and VIII is a specific application of Rule 2 (a) in the context of the chapter. In accordance with Rule 1, the Chapter Notes take precedence over the more general formulation of Rule 2 (a).

Question 116

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?
87. No, because China's statement mixes correct and incorrect information on customs classification together with its position on the relevance of anti-dumping rules. For instance China refers erroneously to multiple shipments in connection with anti-circumvention. In the EC GIR 2(a) applies only to goods presented at the same time and place. As stated on numerous occasions, the EC is of the view that anti-dumping measures have nothing to do with tariff classification.

Question 117

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?

88. The criteria set out in Article 21 of Decree 125 are, in essence, totally different from the examples of incomplete or unfinished vehicles in the general notes for chapter 87. For each of the different criteria under Article 21 of Decree 125, the EC has established that the measures require that parts are classified as complete vehicles and impose on them the 25% duty on complete vehicles in breach of China's schedule of concessions and Article II of the GATT (see first written submission of the European Communities, paragraphs 237 to 281).

89. First, parts which were imported at different times, from different origins and by different importers will be combined for classification as complete vehicles, which is in direct contradiction with the "as presented" rule. In that respect, if CKD and SKD kits may in some circumstances be assimilated to the examples in the notes, this may only be if 100% of the parts are presented to customs at the same time. A pre-determination as under Article 21(1) of the Decree 125 that CKD and SKD kits will in all circumstances be classified as a complete vehicle breaches this rule.

90. Second, the measures also require classifying as complete vehicles a combination of parts which is far from having the essential character of a complete vehicle. In each of the combinations provided for under Article 21(2) of Decree 125, imported
parts will be classified as complete vehicles even though parts, or "assemblies" essential for the functioning of a vehicle will be missing in the combination of imported parts. This is further aggravated by the fact that an "assembly" need not be imported in its entirety, or even manufactured in China from exclusively imported parts to be “Deemed Imported” and thus to count against the thresholds set out in the measures. Under Article 22 of Decree 125, it is sufficient that a certain number of key parts, or value of key parts are imported and incorporated in one "assembly" to treat that "assembly" as imported and count it against the thresholds of Article 21(2) of Decree 125. This means that the import of a relatively limited quantity or value of parts is sufficient to impose the classification of those parts as complete Vehicles. Thus, for a class M1 vehicle, the import of five key parts of the vehicle body and six key parts of the engine will be sufficient to make both Deemed Imported Assemblies and all imported parts Deemed Whole Vehicles (see Exhibit EC - 1). Further, from July 1, 2008 and the entry into force of the class A/B distinction, the imports of, e.g., one door, one engine hood, one engine block and one cylinder head will be sufficient to make the vehicle body and the engine Deemed Imported Assemblies (see Exhibit EC - 2). To put these figures in context, the average number of parts in a complete vehicle is in the thousands.

91. In respect of Article 21(3) it is clear that the examples of incomplete or unfinished vehicles in the General Notes for Chapter 87 do not operate on the basis of the aggregate price of the parts, which is an entirely alien concept to customs classification. It is therefore impossible even to begin any reasonable comparison between the examples of chapter 87 of the HS system and Article 21(3) of decree 125 because they are based on completely different criteria the latter having nothing to do with customs rules.

(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.

92. It is possible that an SKD kit and even a CKD kit under Article 21(1) of Decree 125 could in some instances be considered as "an incomplete or unfinished vehicle having the essential character of a complete of finished vehicle" if the kits consist
of all the parts necessary to assemble a vehicle and provided only assembly operations are involved. However, such a determination must be made on a case by case basis and not be required in all cases as is the case with the Chinese measures.

Question 118

European Communities The European Communities has stated in paragraph 270 of its first written submission that CKD and SKD kits cannot be classified as complete vehicles because nothing or very little is fitted or equipped in the case of CKD kits and because SKD kits will not attain the necessary degree of fitting and equipping to be classified as complete vehicles.

(a) In light of this statement, what degree of fitting or equipping of auto parts do you consider as necessary for such parts to be classified as complete vehicles within the meaning of the General Notes for Chapter 87?; and

93. The European Communities has not stated in paragraph 270 of its first written submission what question 118 states. Paragraph 270 concerns only CKDs whereas SKDs are considered under paragraphs 272 and 273 of the first written submission. However, it is true that in respect of CKDs the European Communities has in its first written submission taken the view that the lack of "fitting and equipping" is an obstacle for classifying a CKD as a complete vehicle. This is a borderline question where the presence of all the parts necessary to assemble a vehicle must be weighed against a product that is more advanced from the point of view of "fitting and equipping" but may lack some minor parts when presented to customs. The question therefore is whether the quantitative element of having all the parts necessary presented at the same time can outweigh the lack of the qualitative element i.e. the "fitting and equipping". The European Communities is prepared to accept that in some instances this can be the case and a CKD could be classified as a complete vehicle provided only assembly operations are involved. However, such a determination must be made on a case by case basis and taking into account inter alia the technical complexity of the vehicle type.

94. With regard to SKDs the position of the European Communities is more refined than what the question suggests. This position is explained in paragraph 272 and 273 of the first written submission. The determination whether an SKD can be classified as the complete vehicle must also be made on a case by case basis. In
this respect the European Communities would like to correct the first sentence of paragraph 273 of its first written submission, which should read "SKDs will often not attain the necessary degree of fitting and equipping to be classified as complete vehicles". The word "often" was accidentally omitted from the sentence, which seems relatively evident on the basis of paragraph 272 that discusses the various possible scenarios.

95. A measure that requires to systematically classify CKDs and SKDs as complete vehicles would therefore be in breach of Article II of the GATT.

(b) Please elaborate on your response in light of Rule 2(a) of the General Interpretative Rules and the Panel's statement in Indonesia – Autos that "It appears that, in order to avoid paying 200 per cent duties on CBU passenger cars, EC and US car producers ship to Indonesia virtually complete CKD kits that are effectively "cars in a box". Accordingly, we believe that they can properly be considered to have characteristics closely resembling those of a complete car." (Panel Report, para. 14.197, emphasis added).

96. See reply to point (a).

Question 119

*European Communities* In paragraph 277 of its first written submission, the European Communities states that a criterion of 60 per cent of the aggregate price of the parts not only means that the parts are not necessarily fitted and/or equipped together but also means that fundamentally important parts may be missing. Please explain, in the European Communities' view, what auto parts could be considered as "important parts"?

97. This statement in paragraph 277 of the first written submission is made from a general point of view. Missing parts that consist of 40 % of the aggregate price of all the parts must mean in any possible configuration that the combination of parts would not have the essential character of a complete or finished vehicle. In a complete vehicle, all parts are important for its functioning.

98. As an illustration, the Panel can refer to the example provided by China in paragraph 19 of its first written submission, in which the body (14,25 %), the engine (15,32 %), the transmission (10,02 %), and the non-driving axle (1,17 %) consist of 40,76 % of the aggregate price of all the parts.

Question 120

*European Communities* China states in paragraph 89 of its first written submission that the European Communities contradicts the application of Rule 2(a) of the General Interpretative
Rules to the term "motor vehicles" by stating that there is a clear separation between complete vehicles and the parts and components thereof. Please comment on this statement.

99. China's tariff schedules and chapter 87 of the Harmonised System contains a clear separation between complete motor vehicles (headings 87.01 to 87.05) and the parts and accessories of the motor vehicles of headings 87.01 to 87.05 (heading 87.08). The headings or their interpretative notes do not contain any language that would provide a basis for blurring this clear distinction in the way China does. This clear general categorisation must be separated from an application of the schedules and the HS system in the context of an individual shipment as presented to the Customs. Of course, there are exceptional situations such as CKDs and SKDs where the borderline between complete vehicles and parts thereof may be difficult to draw and must be made on a case by case basis. However, this is a different matter from the general question as to whether the schedules provide for a clear separation between complete motor vehicles and parts thereof.

Question 121

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?

100. This illustration is given by China in a context where China tries to apply GIR 2 (a) of the Harmonised System without respecting the "as presented" condition there under. This amounts to disregarding the very basic rule of tariff classification, i.e. that when goods are classified in the Harmonised System it is always done on the basis of the objective characteristics of the product at the time of importation, that is, as imported and presented to Customs on a shipment-by-shipment basis.

101. The example is also alien to reality. The industry does not function in the way the "illustration" in paragraph 97 suggests. Different automotive parts are manufactured in different parts of the world and are genuinely shipped to the customers in separate shipments. Completely different parts such as windscreens, navigation systems, batteries, tyres or screws are manufactured by completely different companies located in different countries. To suggest that the manufacturer orders all of the parts from one company, then separates the parts
into different containers in order to benefit from the lower duty rates in China for parts is completely alien to reality. However, even if such practices would exist, they would not circumvent the rules on customs classification. Furthermore, even in a simple vehicle type there are thousands of parts. An example of a motor vehicle that consists of 10 components has nothing to do with reality.

102. The example is also totally alien to the Measures. Except under Article 21(1) of Decree 125 (to the extent that CKDs and SKDs are defined as kits including all parts necessary to build a complete vehicle), there is no need under the Measures to import all parts to have them classified as complete vehicles and attract the 25% duty. Under Article 21(2) of Decree 125, the combination of some assemblies will be sufficient. In fact, the import of some parts will suffice as Article 22 deems assemblies imported if a certain number of key parts, or value of parts were imported and incorporated in the assembly (see EC FWS, paras. 40 et seq). Under Article 21(3), it will be sufficient to import parts for 60% of the complete vehicle price.

Question 128

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?

103. Even a simple motor vehicle that does not contain modern electronics would consist of thousands of parts, which in addition are separated into different specific tariff headings depending on the vehicle type. It is therefore not possible to provide an exhaustive answer. Furthermore, automotive parts are rarely imported in the form of the 'assemblies' foreseen under Article 21 of Decree 125. The "assemblies" often consist of many parts imported separately and the "assemblies" normally become such only after manufacture. Furthermore, an "assembly" can be deemed imported when actually only a certain number of key parts, or value of parts were imported and incorporated in the "assembly" (Article 22 of Decree 125). The notion of "assemblies" is a creation of the contested measures, and is not foreseen by the Chinese schedules and the HS system. This demonstrates very concretely how the Chinese measures operate internally in China and depending on the use of the parts after importation.
104. However, some general indications at the four digit level can be given:

**Article 21(1):**

SKDs and CKDs may in some circumstances be classified as the complete vehicle if all the parts necessary to assemble a vehicle are presented to Customs at the same time and provided only assembly operations are involved. In such a case the kits would be classified under headings 87.01 to 87.05 depending on the specific vehicle type in question. If the conditions for classification as a complete vehicle are not fulfilled *in casu*, the parts that were presented to customs would be classified separately under the specific headings for automotive parts. The most relevant four digit headings are 87.08, 84.07, 84.08, 84.09, 84.83 and 85.11 but also other headings may be relevant depending on the vehicle type. In the case of an SKD, also headings 87.06 and 87.07 may be relevant depending on the level of "fitting and equipping".

**Article 21(2):**

Complete engines (the "engine assembly") are classified under headings 84.07 and 84.08 and parts thereof under heading 84.09 at the four digit level.

Complete bodies (the "body assembly") are classified under heading 87.07 and parts thereof under heading 87.08 at the four digit level.

The other "assemblies" under Decree 125 do not have a specific heading under the Chinese Schedules and the HS system because the "assemblies" are a creation of the Measures not foreseen by the schedules and the HS system. In most cases the parts that make up the "assemblies" after manufacture would upon importation be classified under the relevant headings for parts (most relevant four digit headings are 87.08, 84.07, 84.08, 84.09, 84.83 and 85.11). However, heading 87.06 "chassis fitted with engines" is relevant in many combinations foreseen by Article 21(2) because a "chassis fitted with engines" is according to the explicit terms of the heading "a motor vehicle without bodies". In other words, a motor vehicle without its body but containing other parts already fitted and equipped is for the purposes of the Chinese Schedules and the HS system a "chassis fitted with engines", not a
complete motor vehicle. A more detailed analysis has been provided under paragraph 255 to 260 of the first written submission of the EC.

Article 21(3):

This paragraph foresees that any configuration of parts in a random order as long as the aggregate price of the imported parts attains 60% of the complete vehicle parts is classified as the complete vehicle. The applicable headings are therefore the headings of all the parts that make up a given vehicle type. The most relevant are headings 87.08, 84.07, 84.08, 84.09, 84.83 and 85.11 at the four digit level.

Question 129

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. Rule 2(a) assists the Customs in instances where a given incomplete or unfinished article as presented to customs appears to have the essential characteristics of the complete or finished article. This is different from examining the Members' schedules from a general point of view.

106. The European Communities also notes that China's Schedules do not contain any restriction on the use of parts in China.

Question 130

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.

107. Reference is generally made to the answer given to question 128.

108. Complete engines (the "engine assembly") are classified under headings 84.07 and 84.08 and parts thereof under heading 84.09 at the four digit level.

109. Complete bodies (the "body assembly") are classified under heading 87.07 and parts thereof under heading 87.08 at the four digit level.
110. The other "assemblies" under Decree 125 do not have a specific heading under the Chinese Schedules and the HS system because the "assemblies" are a creation of the Measures not foreseen by the schedules and the HS system. In most cases the parts that make up the "assemblies" after manufacture would upon importation be classified under the relevant headings for parts (most relevant four digit headings are 87.08, 84.07, 84.08, 84.09, 84.83 and 85.11). However, heading 87.06 "chassis fitted with engines" is relevant in many combinations foreseen by Article 21(2) because a "chassis fitted with engines" is according to the explicit terms of the heading "a motor vehicle without bodies". In other words, a motor vehicle without its body but containing other parts already fitted and equipped is for the purposes of the Chinese Schedules and the HS system a "chassis fitted with engines", not a complete motor vehicle. A more detailed analysis has been provided under paragraphs 255 to 260 of the first written submission of the EC.

Question 132

European Communities Please comment in detail on China's argument in paragraph 126 of China's first written submission that the European Communities' anti-circumvention measures as embodied in EC Regulations No. 384/96 are indistinguishable from the challenged measures.

111. The European Communities' or any other WTO Member's rules on AD circumvention are not subject to the present Panel.

112. Without prejudice to its position that China's measures fall within the scope of Article III of the GATT and the TRIMs agreement, the European Communities considers that the AD circumvention rules cannot be relied upon to establish a subsequent practice relevant to the interpretation of China's obligations under Article II of the GATT and its schedule of concessions. This would totally ignore that AD duties and customs duties follow a completely different logic and are rooted in 2 different sets of WTO obligations.

113. AD duties are not Customs duties, or other duties or charges falling within the scope of Article II of the GATT. This is explicitly provided for in Article II:2 of the GATT and was confirmed by the AB in Chile – Price Band System, which distinguished between Customs duties, other duties or charges and AD duties (para. 276). As an exception to Article II of the GATT and to the MFN principle,
AD duties may be imposed after an investigation establishing that dumped imports are causing injury. AD duties aim at re-establishing fair trade conditions between the dumped imports and the domestic like products and protecting the domestic industry from the injury caused by the dumping. They are subject to detailed obligations defined in Article VI of the GATT and the Agreement on implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement").

114. Anti-Circumvention rules on AD measures find their legitimacy in Article VI of the GATT, the Anti-Dumping Agreement and the Ministerial Declaration on this issue. They enforce and relate to a different set of rights and obligations, and are not relevant to the interpretation of the rights and obligations of WTO Members under Article II GATT.

115. In contrast, customs duties are defined in the country's schedule of concessions. They are levied on the basis of the classification of the product in that schedule and the various interpretative notes thereof. A country may also introduce reservations or qualifications in its schedule, but in the absence of such reservations or qualifications, the purpose for which the merchandise is imported is not relevant for the tariff classification.

116. The purpose of the rules set out in Art. 13(2) of the EC anti-dumping regulation 384/96 (as amended by regulation 461/2004) is to act against shipments of parts which are either assembled in the Community or in a 3rd country if these shipments of parts replace the shipment of products which had previously been found dumped and shipped in an assembled form. All this is linked and must take place in the context of an AD measure on the assembled product with a view to undermining the remedial effect of these duties.

117. The Chinese measures are totally different. The level of customs duty depends on whether the parts end up in an assembled car with sufficient local content and/or whether they are used as a spare part. China is not acting against imports of parts which have previously been imported in the form of assembled cars. The measures act against parts as such with a view to increasing local content and developing a domestic industry for auto parts and complete vehicles.
118. EC’s anti-circumvention measures do not change the customs classification. Applied to the example of AD measures against bicycles from China and the anti-circumvention measures against imports of major bicycle parts, this would mean that the imports of parts would be subject to an AD duty for bicycles, but the customs duty will remain the one applicable for bicycle parts. This is explicitly stated in Article 13(5) of regulation 384/96.

119. The anti-circumvention duty is never applied on products leaving the assembly factory in the EC. Rather, an investigation is carried out and if it is found that the imports of parts constitute circumvention, the Antidumping Duty is extended to the parts.

**Question 133**

*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?

120. No. The European Communities has provided the details how China breaches its commitments in its First Written Submission relating to Article II of the GATT (paragraphs 237 to 281).

**Question 136**

*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.

121. In the EC (and we understand also in the US) the customs authorities allow the importer of multiple shipments to choose between the application of ordinary tariff classification rules (each shipment is classified alone at the time of importation as presented to customs) and special rules designed to favor importers who prefer that the goods at issue should be considered and classified as if they were presented to customs at the same time and place.

**Question 137**

*All parties* Please clarify whether, and if so, how, a new tariff line can be de facto created.
122. A tariff commitment can be created when a member, which committed itself to provide certain tariff treatment if it creates a tariff line for a specific good in effect does so by enacting a measure that pronounces how that good is to be treated. The European Communities also refers to the more detailed reply provided by Canada.

**Question 138**

_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.

123. These are inter-related issues that concern trade facilitation. In the context of some very large or complex machinery that are difficult to transport in one single consignment the importer may wish to declare the product as a single product irrespective of the fact that the elements of the product are split into different consignments and may not be presented to customs precisely at the same time. In some instances an element of the product may need to be transported from two or more countries or may originate from two countries. The classification of split consignments as the complete product even when some elements arrive from different countries is an option for the importer.

**Question 139**

_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.

124. Rule 2(a) is not relevant in interpreting a Member's Schedule generally unless one assumes a very specific product that is presented to customs at the same time. It is a rule that assists the Customs in instances where a given incomplete or unfinished article as presented to customs appears to have the essential characteristics of the complete or finished article. See also the reply to question 115.

**Question 140**

_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?

125. See reply to question 132.

Question 141

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.

126. Article 13 of regulation 384/96 as amended by regulation 461/2004 on protection against dumped imports from countries not members of the European Community, which reads as follows:

"Circumvention

1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries, of the like product, whether slightly modified or not; or to imports of the slightly modified like product from the country subject to measures; or parts thereof, when circumvention of the measures in force is taking place. Anti-dumping duties not exceeding the residual anti-dumping duty imposed in accordance with Article 9(5) of this Regulation may be extended to imports from companies benefiting from individual duties in the countries subject to measures when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

The practice, process or work referred to in paragraph 1 includes, inter alia, the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics; the consignment of the product subject to measures via third countries; the reorganisation by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the Community through producers benefiting from an individual duty rate lower than that applicable to the products of the manufacturers; and, in the circumstances indicated below under Article 13(2), the assembly of parts by an assembly operation in the Community or a third country.

2. An assembly operation in the Community or a third country shall be considered to circumvent the measures in force where:

(a) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures; and
(b) the parts constitute 60% or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost, and

(c) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

3. Investigations shall be initiated pursuant to this Article on the initiative of the Commission or at the request of a Member State or any interested party on the basis of sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission Regulation which may also instruct the customs authorities to make imports subject to registration in accordance with Article 14(5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Council, acting on a proposal submitted by the Commission, after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. The extension shall take effect from the date on which registration was imposed pursuant to Article 14(5) or on which guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

4. Imports shall not be subject to registration pursuant to Article 14(5) or measures where they are traded by companies which benefit from exemptions. Requests for exemptions duly supported by evidence shall be submitted within the time limits established in the Commission Regulation initiating the investigation. Where the circumventing practice, process or work takes place outside the Community, exemptions may be granted to producers of the product concerned that can show that they are not related to any producer subject to the measures and that are found not to be engaged in circumvention practices as defined in Article 13(1) and 13(2). Where the circumventing practice, process or work takes place inside the Community, exemptions may be granted to importers that can show that they are not related to producers subject to the measures.

These exemptions are granted by decision of the Commission after consultation of the Advisory Committee or decision of the Council imposing measures and shall remain valid for the period and under the conditions set down therein.

Provided that the conditions set in Article 11(4) are met, exemptions may also be granted after the conclusion of the investigation leading to the extension of the measures.

Provided that at least one year has lapsed from the extension of the measures, and in case the number of parties requesting or potentially requesting an exemption is significant, the Commission may decide to initiate a review of the extension of the measures. Any such review shall be conducted in accordance with the provisions of Article 11(5) as applicable to reviews pursuant to Article 11(3).

5. Nothing in this Article shall preclude the normal application of the provisions in force concerning customs duties.”

127. For explanation, reference is made to the reply given to question 132.
Question 142

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.

128. No. In EC Customs law the concept of “circumventing a customs duty” does not exist. There are situations in which operators could try to avoid paying the ordinary customs duties such as for instance falsely declaring that the goods they are importing come from a country that has a preferential trade agreement with the EC and therefore such goods are subject to 0% custom duty. Such false declaration can give rise to sanctions and penalties that are however applied at the national level in the EC and they are more related to fraud than to circumvention.

Question 144

European Communities Please elaborate on your statement in paragraph 247 of your first written submission that "[a] part of a whole vehicle has no use as such and its only function is to be fitted together with other parts in order to build a whole vehicle." Does this statement extend to auto parts used as repair parts? If this statement were to be accepted, does this mean that it can be assumed that all imported parts have only one purpose – i.e. to be used for assembling a whole vehicles?

129. This statement extends also to spare parts i.e. the word "build" should be understood as meaning "be part of". It is a general consideration on the nature of automotive parts that have no function without being a part of a complete vehicle.

Question 145

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?

130. As already touched upon in replies to questions 129 and 139 Rule 2(a) is not relevant in interpreting a Member's Schedule generally. It is a rule that assists the Customs in instances where a given incomplete or unfinished article as presented to customs appears to have the essential characteristics of the complete or finished article.

131. China is attempting to use rule 2(a) for the purposes of blurring the clear basic distinction between complete motor vehicles and part thereof at the level of
China's schedules. Rule 2 (a) operates at a different level namely as tool for assessing situations in casu.

**ARTICLE III OF THE GATT 1994**

**Question 150**

*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"?*

132. Article III:2 GATT requires a comparison between imported and domestic products that are "like". The European Communities set out in its first written submission that imported and domestic auto parts are "like products" within the meaning of Article III:2 GATT since the only distinction made in the Measures is on the basis of the origin of the auto parts (EC's first written submission, paras 164 to 167). Consequently, all imported auto parts are "like" domestic auto parts. In the view of the European Communities, the imported products that should be compared to domestic products under Article III:2 GATT are therefore "all imported auto parts".

(b) *Please clarify what imported products are taxed "in excess of" domestic auto parts within the meaning of Article III:2, first sentence; and*

133. In its first written submission, the European Communities compared the internal taxation of imported and domestic auto parts and found that imported auto parts can be subject to the charges pursuant to Article 28 of Decree 125 whereas this is not the case for domestic auto parts (see first written submission of the European Communities, paragraphs 57 to 58 and 168 to 170). Thus, all imported auto parts can be subject to internal charges "in excess of those applied (…) to like domestic products". According to Article 28 of Decree 125, these charges are actually imposed, on those imported auto parts that were assembled and manufactured into vehicles with an insufficient level of local content.

(c) *Is the complainants' position on this issue the same with respect to their claims under Article III:4?*
134. With respect to its claim under Article III:4, the European Communities equally considers that the imported products to be compared with domestic products are "all imported auto parts".

135. Concerning the second aspect of the issue, the European Communities is of the position that all imported auto parts are "accorded treatment (…) less favourable" than that accorded to like domestic auto parts in respect of internal regulation within the meaning of Article III:4. As set out in the EC first written submission, the Measures negatively modify the conditions of competition for all imported automotive parts since all imported auto parts may be subject to the internal charges pursuant to Article 28 of Decree 125 and because all imported auto parts are subject to stringent administrative procedures (see first written submission of the European Communities, paras 153 to 158).

**Question 151**

*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?

136. In the view of the European Communities, the Chinese Measures in their entirety are inconsistent with Article III:2 and Article III:4 GATT. If the Panel finds that the internal charges to which imported auto parts can be subject are inconsistent with Article III:2 GATT, it would not be necessary – albeit possible - to also find that this aspect of the Measure, i.e. the internal charges, are also inconsistent with Article III:4 GATT. In this scenario, the Panel would however still need to examine whether the other aspects of the Measures, in particular the internal administrative burden on vehicle manufacturers using imported parts, violate Article III:4 GATT.

137. Were the Panel to find that the Measures "in their entirety", i.e. the internal charges and the internal administrative burden, both violate Article III:4 GATT, it would for the Panel to consider whether it wishes to examine the charges also under Article III:2 GATT.
Question 152

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. The panel in US – Tobacco stated that “both Article III:5 and Article III:4 deal with internal regulations, but that Article III:5 is the more specific of the two provisions”. Therefore, the European Communities considers that a finding of inconsistency with the general provision of Article III:4 would not render unnecessary a finding under the more specific provision of Article III:5 since the latter provision contains criteria that are not contained in Article III:4.

139. Alternatively, a finding of inconsistency with the specific provision under Article III:5 would necessarily indicate that the Measures are also inconsistent with Article III:4. Any internal quantitative regulation that requires specific proportions of a product to be supplied from domestic sources (within the meaning of Article III:5) discriminates merely on the basis of the origin of these products and, thus, necessarily treats imported products less favourably than like domestic products (within the meaning of Article III:4).

140. However, other aspects of the measures in particular the administrative burden of the general system of registration, controls etc. would still need to be examined under Article III:4.

**China's Accession Protocol**

Question 154

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?

141. The European Communities confirms 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.
142. The legally binding nature of these commitments follows from Part I, paragraph 1.2 of the Accession Protocol which provides that "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement". Being an integral part of the WTO Agreement which is one of the "covered agreements" listed in Appendix 1 to the DSU, the aforementioned commitments are also enforceable in WTO dispute settlement proceedings.

**SCM Agreement**

**Question 157**

*Complainants* With respect to "revenue foregone" under Article 1.1(a)(i)(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?;

143. The European Communities has not argued that 25% would be "the default rate" of charges applied to imported auto parts and that the 10% rate would "only be available upon demonstration that local content requirements were met".

144. In its first written submission, the European Communities set out, following the Appellate Body Report in *United States – FSC*, that in order to determine whether “government revenue that is otherwise due is foregone or not collected” it is necessary to compare the revenues due under the contested measure and the revenues that would have been raised otherwise taking into account a normative benchmark governing such comparison.3

145. Under the contested Chinese Measures, imported auto parts that satisfy the local content requirements of Article 21 of Decree 125 are charged at a rate of generally 10%. This rate of 10% does not depend on any "demonstration", as the Panel's question suggests, but is available for imported parts "that have been verified as

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3 See first written submission of the European Communities, paras 285 to 288.
not being Deemed Vehicles" (see Article 28 of Decree 125). In order to determine
the revenue "otherwise due", the European Communities had recourse to the
normative benchmark provided by the Chinese treatment of imported auto parts
that do not satisfy the local content requirements of Article 21 of Decree 125 and
which are charged at a rate of typically 25%. This rate of 25% is no "default rate",
as the Panel's question implies, but is available for imported parts "that have been
verified by the Center as Deemed Whole Vehicles" and that are charged
"according to the duty rate for whole vehicles" (see Article 28 of Decree). As this
25% rate is explicitly foreseen for certain imported auto parts in the Chinese
Measures, it is, in the words of United States – FSC, no "entitlement in the
abstract" but a "definitive, normative benchmark". By charging imported auto
parts that satisfy the local content requirements "only" with a 10% rate, China has,
in the words of United States – FSC, "given up an entitlement to raise revenue that
it could 'otherwise' have raised".

(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. No, the question of the bonding rate is not relevant for the "normative benchmark"
indicating whether revenue is foregone within the meaning of Article 1.1(a)(1)(ii)
of the SCM Agreement. As set out in response to the previous sub-question, the
normative benchmark provided by the Chinese Measures is the treatment of
imported auto parts that do not satisfy the local content requirements of Article 21
of Decree 125. Pursuant to Article 28 of Decree 125, charges "according to the
duty rate for whole vehicles" (i.e. 25%) are imposed on such parts, after their
manufacture, if they were verified as "Deemed Whole Vehicles". The bonding rate
does not have any impact on this normative benchmark.

(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

147. The Appellate Body in United States – FSC interpreted Article 1.1(a)(1)(ii) of the
SCM Agreement in the following way:

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In our view, the "foregoing" of revenue "otherwise due" implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, "otherwise". Moreover, the word "foregone" suggests that the government has given up an entitlement to raise revenue that it could "otherwise" have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax all revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised "otherwise". We, therefore, agree with the Panel that the term "otherwise due" implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. We also agree with the Panel that the basis of comparison must be the tax rules applied by the Member in question.5

148. On the basis of this test, the European Communities considers that the revenues actually raised need to be compared not with "an entitlement in the abstract" but with "some defined, normative benchmark" as already existing in the legal system of the Member in question.

149. In the present case, China's treatment of imported auto parts that do not satisfy the local content requirements of Article 21 of Decree 125 provides such a benchmark. It is not "an entitlement in the abstract", but a pre-existing "defined" rule in the Chinese legal system.

Question 158 (the European Communities understands that the question that begins under question 157 (d) is put to it under question 158)

**European Communities** The European Communities argued that:

"Only the [imported parts] that will be used in complete vehicles that do NOT attain the necessary domestic content will be subject to the higher duty on complete vehicles" (EC oral statement, paragraph 55, italic emphasis added); and "...[China] will ... verify whether the [parts] will be used in a complete vehicle or not and whether the complete vehicle will contain sufficient local content before deciding whether to apply an additional charge on the products after they have already been manufactured in China" (EC oral statement, paragraph 57, emphasis added)

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?

150. In the view of the European Communities, there is no contradiction between these quotes from the EC oral statement and its position that China foregoes revenue

"otherwise due" when it charges imported auto parts that satisfy local content requirements at a rate of (only) 10% whereas it charges imported auto parts that do not satisfy local content requirements at a rate of 25%.

151. As set out in response to the previous sub-questions, the European Communities has not argued that the 25% rate is a "default rate" applying to "all imported parts unless there is a demonstration that local content requirements are fulfilled" and does not consider this to be part of the relevant legal test in order to determine the "normative benchmark" under Article 1.1(a)(1)(ii) of the SCM Agreement.

OTHER CLAIMS

Question 166

European Communities In its request for the establishment of the Panel, the European Communities submitted that, with the adoption of the measures at issue, China has nullified or impaired the benefits accruing to the European Communities under Article XXIII:1(b) GATT, in conjunction with China's Protocol of Accession and in particular paragraph 93 of the Working Party Report. Could the European Communities please confirm that it is not pursuing a claim under Article XXIII:1(b) GATT.

152. The European Communities confirms that it is not pursuing claims under Article XXIII:1(b) GATT.
LIST OF EXHIBITS

Exhibit JE -38  List on the points on which the complainants disagree with the translations provided by China.

Exhibit EC – 1  Example 1 of imports of parts that are classified as imports of a complete vehicle.

Exhibit EC – 2  Example 2 of imports of parts that are classified as imports of a complete vehicle.