**WORLD TRADE ORGANIZATION**

**WT/DS399/R**
13 December 2010

(10-6582)

Original: English

# UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA

***Report of the Panel***

**TABLE OF CONTENTS**

## LIST OF ANNEXES

### ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES



### ANNEX B

EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS



### ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF



### ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

## ANNEX E

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES



## ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF



## ANNEX G

REQUEST FOR CONSULTATIONS AND REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

## TABLE OF CASES CITED IN THIS REPORT

| Short Title | Full Case Title and Citation |
|---|---|
| *Argentina – Footwear(EC)* | Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575 |
| *Argentina – Footwear(EC)* | Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515 |
| *Canada – Autos* | Appellate Body Report, *Canada – Certain Measures Affecting the* Automotive *Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985 |
| *EC – Countervailing Measures on DRAM Chips* | Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671 |
| *EC – Hormones* | Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135 |
| *EC – Tube or Pipe Fittings* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613 |
| *India – Patents (US)* | Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9 |
| *Japan – DRAMS (Korea)* | Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, 2805 |
| *Korea – Commercial Vessels* | Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749 |
| *Mexico – Anti-Dumping Measures on Rice* | Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007 |
| *Mexico – Anti-Dumping Measures on Rice* | Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853 |
| *Mexico – Steel Pipes and Tubes* | Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207 |
| *US – Carbon Steel* | Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779 |
| *US – Corrosion-Resistant Steel Sunset Review* | Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WTDS244/AB/R, DSR 2004:I, 85 |
| *US – Corrosion-Resistant Steel Sunset Review* | Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3 |

| Short Title | Full Case Title and Citation |
|---|---|
| *US – Countervailing Duty Investigation on DRAMS* | Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131 |
| *US – Customs Bond Directive* | Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R, WT/DS345/AB/R |
| *US – Lamb* | Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051 |
| *US – Line Pipe* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002 |
| *US – Line Pipe* | Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R |
| *US – Shrimp* | Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755 |
| *US – Softwood Lumber VI (Article 21.5 – Canada)* | Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865 |
| *US – Steel Safeguards* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117 |
| *US – Steel Safeguards* | Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R, and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, 3273 |
| *US – Upland Cotton* | Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3 |
| *US – Upland Cotton* | Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299 |
| *US – Wheat Gluten* | Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R |
| *US – Wheat Gluten* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717 |

| Short Title | Full Case Title and Citation |
|---|---|
| *US – Wool Shirts and Blouses* | Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323 |
| *US – Zeroing (EC) (Article 21.5 – EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009 |

## TABLE OF ABBREVIATIONS USED IN THIS REPORT

| Abbreviation | Full Reference |
|---|---|
| *AD Agreement* | Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 |
| COGS | Cost of Goods Sold |
| DSB | Dispute Settlement Body |
| DSU | Dispute Settlement Understanding |
| EU | European Union |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| Non-subject imports | Imports of certain passenger vehicle and light truck tyres from sources other than China |
| OEM | Original Equipment Manufacturers |
| *Safeguards Agreement* | Agreement on Safeguards |
| *SCM Agreement* | Agreement on Subsidies and Countervailing Measures |
| Subject imports | Imports of certain passenger vehicle and light truck tyres from China |
| Subject tyres | Certain passenger vehicle and light truck tyres |
| The Protocol | Protocol on the Accession of the People's Republic of China |
| *Tyres* case | The investigation regarding imports of certain passenger vehicle and light truck tyres from China before the USITC |
| *Tyres* measure | The additional duties imposed on imports of subject tyres for a three year period at: 35 per cent *ad valorem* in the first year, 30 per cent *ad valorem* in the second year; and 25 per cent *ad valorem* in the third year. |
| USITC | United States International Trade Commission |
| USW | United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union |
| *Vienna Convention* | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

# I. INTRODUCTION

1.1 On 14 September 2009, the People's Republic of China ("China") requested consultations with the United States pursuant to Article XXIII:1 of the GATT 1994, Articles 1 and 4 of the DSU and Article 14 of the *Safeguards Agreement*, with regard to certain measures taken by the United States allegedly affecting the import of certain passenger vehicle and light truck tyres from China.[1] China and the United States held consultations in Geneva on 9 November 2009, but failed to resolve the dispute. At the DSB meeting on 19 January 2010, China requested the establishment of a Panel pursuant to Article XXIII:2 of the GATT 1994, Articles 4.7 and 6 of the DSU and Article 14 of the *Safeguards Agreement*.[2] At that meeting, the DSB established a panel pursuant to the request of China.

1.2 The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS399/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.3 On 2 March 2010, China requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.4 On 12 March 2010, the Director-General accordingly composed the Panel as follows:[3]

Chairman: Professor Celso Lafer

Members: Professor Donald M. McRae
Mr. Luis M. Catibayan

1.5 The European Union, Japan, Chinese Taipei, Turkey, and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

1.6 The Panel met with the parties on 1-2 June 2010 and 20-21 July 2010. The Panel met with the third parties on 2 June 2010. The Panel issued its interim report to the parties on 24 September 2010. The Panel issued its final report to the parties on 8 November 2010.

[1] WT/DS399/1.
[2] WT/DS399/2.
[3] WT/DS399/3.

## II. FACTUAL ASPECTS

2.1 This case is about a transitional product-specific safeguard measure under Paragraph 16 of the Protocol that has been applied on imports of certain passenger vehicle and light truck tyres from China pursuant to Section 421 of the Trade Act of 1974.

2.2 A petition was filed by the USW on 20 April 2009, requesting the USITC to initiate an investigation under Section 421(b) of the Trade Act of 1974. The USITC instituted the investigation effective on 24 April 2009. The USITC determined that there was market disruption as a result of rapidly increasing imports of subject tyres from China that were a significant cause of material injury to the domestic industry. Following a Presidential decision additional duties have been imposed on imports of subject tyres for a three-year period, in the amount of 35 per cent *ad valorem* in the first year, 30 per cent *ad valorem* in the second year, and 25 per cent *ad valorem* in the third year. The *Tyres* measure took effect on 26 September 2009.

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

### A. CHINA

3.1 China has seven specific claims in this dispute and requests the Panel to find that:

(i) the United States failed to evaluate properly whether imports from China were in "such increased quantities" and "increasing rapidly" as required by Paragraphs 16.1 and 16.4 of the Protocol;

(ii) the U.S. statute implementing the causation standard of Paragraph 16 into U.S. law is inconsistent "as such" with Paragraphs 16.1 and 16.4 of the Protocol;

(iii) the United States failed to evaluate properly whether imports from China were a "significant cause" as required by Paragraphs 16.1 and 16.4 of the Protocol;

(iv) the United States has imposed a transitional safeguard measure that goes beyond the "extent necessary", and thus it is inconsistent with Paragraph 16.3 of the Protocol;

(v) the United States has imposed a transitional safeguard measure for a three-year period that is beyond "such period of time" that is "necessary", and thus it is inconsistent with Paragraph 16.6 of the Protocol.

3.2 China also claims that the transitional safeguard measure is inconsistent with the GATT 1994 and requests the Panel to find that:

(vi) the transitional safeguard measure is inconsistent with Article I:1 of the GATT 1994 as the United States does not accord the same treatment that it grants to passenger vehicle and light truck tyres originating in other countries to like products originating in China;

(vii) the transitional safeguard measure is inconsistent with Article II:1(b) of GATT 1994 as the tariffs consist of unjustified modifications of U.S. concessions on passenger vehicle and light truck tyres under the GATT 1994.

3.3 China asks that the Panel find that the United States is not in conformity with Paragraph 16 of the Protocol and Articles I:1 and II:1(b) of GATT 1994. China asks that the Panel recommend that the United States promptly comply with its obligations and withdraw the challenged measures.

B. THE UNITED STATES

3.4 The United States asks the Panel to reject China's claims in their entirety.

## IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and in their answers to questions. Executive summaries of the parties' written submissions, and executive summaries of their oral statements are attached to this report as annexes (see List of Annexes, pages vi and vii).

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 The European Union, Japan, Chinese Taipei, Turkey and Viet Nam reserved their rights to participate in the Panel proceedings as third parties. Chinese Taipei, Turkey and Viet Nam did not submit third party written submissions or make oral statements. The arguments of the European Union and Japan are set out in their written submissions and oral statements. Executive summaries of the third parties' written submissions and third party oral statements, or executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages vi and vii).

## VI. INTERIM REVIEW

6.1 On 24 September 2010, the Panel issued its Interim Report to the parties. On 8 October 2010, both parties submitted requests for the review of precise aspects of the Interim Report. On 25 October 2010, the parties submitted comments on one another's request for review.

6.2 This Interim Review section summarises the parties' requests for review and comments thereon, as well as our responses. Because the footnote numbering (but not the paragraph numbering) of our Report has changed due to changes made at the interim review stage, for the sake of clarity the footnote references in this section reflect the numbering in the Final Report.

6.3 The Panel is grateful to the parties for their assistance in identifying a number of typographical errors in the Interim Report.

A. REQUEST FOR REVIEW SUBMITTED BY CHINA

### 1. Increasing rapidly

(a) Para. 7.83

6.4 **China** claims that the Panel is going beyond merely presenting the facts in providing the data for the increases of subject and non-subject imports and recommends that the Panel "simply report the data for subject and non-subject imports." China continues that if the Panel "wishes to go beyond merely summarising the data", the Panel should make two changes. First, the Panel should report parallel figures for subject and non-subject imports. Second, China argues that if the Panel includes percentage increases, it should also include the volume change from one year to the next for both subject and non-subject imports. China continues that percentage increases alone are misleading and "the Panel should either present no percentage changes, or present both percentage changes and volume changes from year to year."

6.5 **The United States** claims that, under the standard of review in Article 11 of the DSU, "the Panel will necessarily need to 'go beyond' a 'mere presentation' of the facts on the record; instead, the Panel is expected to evaluate whether the ITC's analysis was 'reasoned and adequate' in light of the record evidence." The United States does not consider that parallel data on non-subject imports is necessary to make the Panel's analysis any clearer. The United States accuses China of attempting to place weight on the comparative levels of subject and non-subject volumes, an approach it did not take during the proceedings.

6.6 We do not consider it necessary to include any further data on non-subject imports. The obligation in the Protocol is to consider whether subject imports are "increasing rapidly" on an absolute or relative basis. On China's first point regarding the data for increases in non-subject imports, we note that we address the role of non-subject imports throughout the report[4] and specifically in paras. 7.364 to 7.367. Paragraph 7.83 focuses on absolute increases. However, in order to address China's concerns we have deleted the third table in paragraph 7.83, with appropriate adjustments to the text at the beginning of that paragraph, and added a citation in new footnote 176 .

6.7 Regarding China's second point and its desire to include volume changes from year to year, we note that China argued the relevance of year-on-year increases in annual volumes at para. 120 of its First Written Submission and in para. 28 of its Oral Statement at the First Panel Meeting. We consider this to be an argument associated with the rate of increase. As we have noted in para. 7.92 of our Report, under the Protocol the rapid increase need only be on an absolute or relative basis. China does not contest this. As such, we do not consider inclusion of this data adds anything further to what we have already said about the rate of increase in paras. 7.87 to 7.93.

(b) Para. 7.84

6.8 **China** argues that the statement by the Panel "that 'the greatest increase occurred in the last two years of the period' ... inappropriately accepts the U.S. efforts to combine the final two years of the period."[5] China submits that the Panel should delete this statement or "present a more in-depth explanation" given that the "statement, as written, is misleading and masks the actual amount of increase in 2008, which was the smallest increase of any year of the period." China continues that if "the Panel is to note that the largest increase in the period occurred in 2007, then the Panel should also note that the smallest increase of the entire period, in terms of both quantity and percentage increase, occurred in the last year of the period – 2008."[6]

6.9 **The United States** argues that the Panel did not focus only on the increases in import volumes in 2007 and 2008. Rather, the Panel conducted a detailed analysis of the increase in subject imports in 2008. The United States does not think any revision is necessary, but should the Panel believe further clarification is justified it suggests replacing the sentence: "The greatest increase occurred in the last two years of the period" with "The greatest increases (14.5 million units) occurred in 2007. This was followed by a further significant increase (4.5 million units) in 2008."

6.10 We note that the jurisprudence states that consideration should be given to trends over the investigation period, as well as to the recent period.[7] In that regard it is entirely appropriate that we consider what was happening to imports in the final two years of an investigation *as well as* considering trends during the course of the period of investigation. China's argument in these proceedings was to look at the *most* recent period, which it considered to be 2008. The Panel has

[4] *See* for example paras. 7.95, 7.203-7.204, 7.293, and 7.301.
[5] China's comments on the Interim Report, para. 10.
[6] China's comments on the Interim Report, para. 11.
[7] We refer to para. 7.88 of the Interim Report and footnote 187.

determined that a focus solely on 2008 was not appropriate.[8] In any case, paragraph 7.93 of the Report recalls that in each year of the period of investigation, there was an increase that was *in addition* to the increase in the previous year. However, to address China's request we have added a footnote to the end of the sentence in paragraph 7.84.

(c) Para. 7.86

6.11 **China** argues that the Panel "concludes its review of the import data without ever addressing the quarterly or monthly data for 2007 and 2008 which was presented by China." China continues that this is "a major omission that should be corrected." China argues that "[i]mports dropped on a quarterly basis in three of the four quarters in 2008, and dropped 7.8 per cent in Q3 and Q4 2008 relative to Q2 2008."[9] China claims that this "drop off in subject imports at the end of the period is directly applicable to the question of whether subject imports are 'increasing rapidly' under the Protocol."[10]

6.12 **The United States** argues that the Panel did not need to dwell on China's arguments based on quarterly data as the arguments "were of a subsidiary nature and not persuasive."

6.13 We consider that China's argument regarding the use of quarterly data is connected to China's argument regarding the rate of increase, which was addressed in the Report in paragraphs 7.87 to 7.93. However, to reflect China's concerns we have added a footnote to the end of paragraph 7.86.

(d) Para. 7.87

6.14 **China** argues that the Panel mischaracterises China's argument regarding the meaning of "increasing rapidly" when it states that China "argues that for imports to be 'increasing rapidly' there must be an increasing rate of increase in 2008, the final year of the period of investigation, compared to 2007." China claims that it never stated that the rate of increase "must" be higher than that of 2007. China continues that it stated "that such a scenario *could* be indicative that imports are 'increasing rapidly' under the Protocol." China claims that its argument regarding the rate of increase "is simply that the effects of a significant decline in the rate of increase in 2008 should be taken into account when assessing the issue of whether or not subject imports are 'increasing rapidly'."

6.15 **The United States** notes that at footnote 134 in paragraph 7.87 of the Interim Report (now see paragraph 7.87 and footnote 182 of the Final Report) "the Panel expressly recognised that China had outlined two scenarios for the meaning of 'rapidly,' and acknowledged that other scenarios might be possible". The United States argues that the Panel's analysis and focus on the rate of increase accurately characterised the "thrust of China's arguments on this issue throughout its submissions and statements."

6.16 To take into account China's concerns that its arguments be reflected accurately, we have modified paragraphs 7.87 and 7.92 of our Report.

6.17 **China** also claims that it has "simply argued that the steep drop-off in 2008 (just a 10.8 per cent increase as opposed to the 53.7 percent increase in 2007) casts doubt on whether imports can still be properly found to be 'increasing rapidly'." China argues that the "mischaracterization of China's

[8] Paras. 7.87 to 7.93 of the Interim Report.

[9] China's comments on the Interim Report, para. 12. Refers to China's First Written Submission, paras. 127-128.

[10] China's comments on the Interim Report, para. 12. Refers to China's Second Written Submission, paras. 119-122.

argument on this issue resulted in the Panel impermissibly glossing over the 2008 drop in the rate of increase, when instead the rate trends should have been examined closely and put into context."[11] China claims that its argument regarding the rate of increase "is simply that the effects of a significant decline in the rate of increase in 2008 should be taken into account" in determining whether imports are "increasing rapidly".

6.18 **The United States** disagrees that the Panel glossed over the drop in the rate of increase in 2008. The United States notes that the Panel considered the absolute and relative increases in import volumes in 2008, and refers to paras 7.87 to 7.93 of the Report to argue that the Panel considered and rejected China's claim "that the decline in the rate of increase in Chinese import volumes in 2008 meant that imports were not 'increasing rapidly' in 2008".

6.19 We consider there is ample basis in the Report to negate any accusation that the Panel "glossed" over the 2008 drop in the rate of increase. On the contrary, given China's focus on the rate of increase, there was considerable attention given to the data in 2008 in paragraphs. 7.83 to 7.105. Therefore, on this point we make no further changes to paragraph 7.87.

**2. "As such" causation**

(a) Paras. 7.138-7.140

6.20 **China** contends that the Panel sets up a false straw man by stating that China is arguing "cause" is capable of "producing or bringing about a result on its own" while "contribute" would require the contribution of other causal factors for an event to occur. China submits that it never argued that "significant cause" must be the sole cause. China asserts that the Panel's creation of this straw man led the Panel to sidestep the real issue – that of whether "to contribute" *requires less* than "to cause."

6.21 **The United States** asserts that the Panel accurately reflected China's arguments. The Panel clearly explained that the focus of China's argument was that "the term 'contribute' is less stringent than 'cause,'" just as China now asserts.[12] Moreover, after noting that China had relied on specific dictionary definitions of these terms, the Panel then concluded that, "[l]ooking exclusively at these terms, one might legitimately conclude that a 'contribution' has a lesser causal effect than a 'cause,'" because "implicit in the definitional differences invoked by China is the notion that the term 'contribute' allows for multiple factors to each 'play a part in' bringing about a result, whereas 'cause' means that the triggering event is in and of itself capable of bringing out, or producing that result."[13] The Panel's assertion that the definitions cited by China could be read to imply that a "cause" be the "sole" cause of injury were simply its own reasoned way of evaluating the merits of China's arguments and entirely appropriate.[14]

6.22 The Panel sees no need to make changes in the light of China's request. The Panel did not state that China argued that "significant cause" must be the sole cause. It reflected China's argument accurately in footnote 248 of the Report. The Panel's analysis of the meaning of the term "cause" in the context of Paragraph 16.4 of the Protocol and its relationship with the term "contribute" is dealt with in paragraphs 7.138 – 7.146 of the Final Report.

[11] China's comments on the Interim Report, para. 6.
[12] Interim Report, para. 7.137.
[13] Interim Report, para. 7.138.
[14] The United States makes this point, even though it does not fully agree with the Panel's assertion that "cause" could, in some cases, be read as having a different definition or meaning than the word "contribute" in situations involving descriptions of causal effect.

(b) Para. 7.158

6.23 **China** claims that the Panel mischaracterizes China's argument on what "significant cause" requires. In particular, China denies that it had argued that "significant cause" means that rapidly increasing imports must be "the most" significant cause of market disruption.

6.24 **The United States** disagrees with China. The United States asserts that China did argue, as it now concedes, that the term "significant" necessarily requires a comparison of the effects of Chinese imports "relative to other matters."[15] Moreover, China also made clear in its submissions that it believed that the ITC should have weighed the effects of Chinese imports against other injury causes.[16] Indeed, China specifically argued that the U.S. statute was inconsistent with the Protocol because it permitted the ITC to find that Chinese imports were a "significant cause" of injury even if they were "a less important factor than any other single cause."[17] Given China's arguments, which were not particularly clear, the Panel reasonably concluded that China was suggesting, among other things, that the ITC should have determined whether Chinese imports were a "more important" cause of injury to the industry than other causes.

6.25 We have modified para. 7.158 of the Final Report in light of China's request. We have also included new footnote 268 in our Report.

**3. "As applied" causation**

(a) Paras. 7.140 and 7.169-7.170

6.26 **China** requests clarification as to what the Panel has interpreted the term "significant" in "significant cause" to mean. China asks the Panel to make two changes. First, the Panel should explain what it interprets "significant" in "significant cause" to mean and distinguish "a significant cause" from simply "a cause." Second, the Panel should then apply this interpretation of "significant cause" in each of its findings on causation, noting why certain injury factors indicate that subject imports are a "significant cause" of material injury, and not simply a "cause."

6.27 **The United States** asserts that there is no need for the Panel to clarify its findings on the issue or to change its analysis of the USITC's findings on this score, as the Panel could not have been clearer on its definition of the term. The United States submits that the Panel properly stated that the United States, China and the Panel all agreed that the word "significant," as used in the Protocol, means "important," "notable," or "consequential." Moreover, the Panel also clearly rejected the idea that the U.S. statute or the Protocol contemplated that a "even a minimal cause" of injury might be a "significant cause" of injury under the Protocol. Finally, the Panel made clear that it applied this standard when reviewing the USITC's analysis, stating that it had assessed whether the USITC reasonably found that Chinese imports were a "significant," i.e., "important," "notable" or "consequential," cause of material injury to the industry.

6.28 Regarding para. 7.170 of our Report, the phrase "significant cause" is simply a shorthand reference to the particular causation standard in Paragraph 16.4. The point is that the causal element (as opposed to the "significant" element) of the Paragraph 16.4 causation standard could likely not be established without analysing correlation and the conditions of competition. Since the causation

[15] E.g. China's First Written Submission, paras. 204-207; China's Second Written Submission, para. 155.
[16] E.g. China's First Written Submission, paras. 204-205.
[17] China's First Written Submission, para. 206.

standard in Paragraph 16.4 is "significant cause", it would therefore be difficult to establish "significant cause" without analysing correlation or the conditions of competition.

6.29 We have modified para. 7.159, to state expressly that a "significant" cause is one that is important or notable.

6.30 Regarding China's second request, we note that the Panel's job is to review the determinations (including "significant cause") made by the USITC. It is not for the Panel to itself explain "why certain injury factors indicate that subject imports are a 'significant cause' of material injury". This is the role of the USITC. Accordingly, we see no need to make the changes requested by China.

(b) Paras. 7.174 – 7.177

6.31 **China** requests clarification of the Panel's findings on non-attribution. China notes the Panel's finding that "a finding of causation ... should only be made if it is properly established that rapidly increasing imports have injurious effects that *cannot be explained* by the existence of other causal factors."[18] In China's opinion, the Panel should clarify this "presently-vague" standard, and specify under what circumstances injurious effects *can* be explained by the existence of other causal factors. The Panel should also specify under what circumstances injurious effects *cannot* be explained by the existence of other causal factors. China submits that, in elaborating on this analysis, the Panel should follow the Appellate Body jurisprudence from *US – Hot-Rolled Steel* which states that investigating authorities must "separate and distinguish" the injurious effects of imports from the injurious effects of other factors.

6.32 **The United States** contends that there is nothing "vague" about the Panel's description of the standard that it applied to the USITC's analysis. The Panel's explanation of the standard is as specific and clear as statements made by the Appellate Body and WTO panels about the standards to be applied when reviewing non-attribution analyses under other WTO Agreements. Moreover, the Panel's actual review of the USITC's analysis of other injury factors, such as the industry's business strategy and the effects of demand changes, was lengthy, detailed and rigorous,[19] despite China's claims to the contrary.[20] China has provided the Panel with no basis for revisiting or revising its findings on these issues. The United States contends that the Panel correctly found that the specific "separate and distinguish" analysis that has been found applicable under the non-attribution language of these Agreements is <u>not</u> directly applicable to causation analysis under the Protocol, because the Protocol does not contain the sort of non-attribution requirement that is set forth in the *AD*, *SCM* and *Safeguards Agreements*.[21] According to the United States, China itself conceded that, due to the absence of specific non-attribution language in the Protocol, it has "never claimed {in this proceeding} that under Article 16 'the authority must perform the same non-attribution analysis for other factors in the market that it would in a global safeguard proceeding.'"[22] Given this, China has no basis for asking the Panel to now apply the "separate and distinguish" standard to the USITC's analysis of other factors in this proceeding.

6.33 The Panel sees no reason to alter the provisions or paragraphs as requested. The Panel is required to interpret the provisions of the Protocol, and assess the USITC's application of those

[18] Interim Report, para. 7.177 (emphasis added).
[19] Interim Report, paras. 7.262-7.3.78.
[20] China's Comments, para. 20.
[21] Appellate Body Report, *US – Upland Cotton*, para. 436 (stating that absence of non-attribution language in serious prejudice provisions of the Subsidies Agreement indicates that a "panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect of a subsidy is significant price suppression"); Panel Report, *US – Upland Cotton*, para. 7.1343.
[22] China's Second Written Submission, para. 309.

provisions to the facts at hand. The Panel is not required to explain how those provisions may or may not be applied in all circumstances. In addition, the Panel already clearly explained why the *US – Hot-Rolled Steel* "separate and distinguish" standard is not applicable in the present case, and China conceded as much at para. 309 of its Second Written Submission.

(c) Paras. 7.196 – 7.197

6.34 **China** asks the Panel to correct footnote 305 of the Report, regarding the percentage of tier 1 shipments accounted for by subject imports. In addition, China asks the Panel to explain why competition still exists even though subject imports do not compete with domestic tires for over 50 per cent of all shipments. China also asks the Panel to clarify the exact "*variation* in the levels of competition between subject imports and domestic products as between tier 1 and tiers 2 and 3",[23] indicating what the degree of competition was in tier 1, and what the degree of competition was in tiers 2 and 3.

6.35 **The United States** agrees that the Panel should correct footnote 305 of its Report. Otherwise, though, the United States contends that China is doing nothing more than re-arguing its theory that there was minimal competition between Chinese and U.S. tires in the replacement market. The United States believes there is no need to revise the analysis or conclusions.

6.36 We have corrected footnote 305 of the Report, as requested by both parties. The Panel sees no need to make any of the additional changes requested by China.

(d) Para. 7.205

6.37 **China** asks the Panel to clarify what it means by "there was some variation in the levels of competition within the OEM market."[24] The Panel should make a finding as to what degree of competition existed in the OEM market between subject imports and domestic products – simply stating that competition varied is too vague. In stating what degree of competition existed in the OEM market, the Panel should note which facts it is relying upon in making this finding.

6.38 **The United States** submits that the Panel conducted a detailed and fact-specific evaluation of this issue, correctly finding that China's share of this market grew from a relatively small level of 0.2 per cent in 2004 to a more pronounced 4.9 per cent in 2008, the final year of the period.[25] As the Panel also correctly pointed out, the record showed that, during the period, the absolute volumes and market share of the U.S. tires in this sector fell, thus indicating that the "degree of resultant competition between subject imports and domestically-produced tires in the OEM market was increasing."[26] Given the detailed factual nature of the Panel's assessment on this issue and the reasonableness and clarity of its conclusions, the United States does not believe that there is a need for the Panel to revise its findings on the issue, including its correct statement that there was "some variation in the levels of competition over the period."

6.39 The Panel sees no reason to alter the Report as requested.

[23] Interim Report, para. 7.197 (emphasis added).
[24] Interim Report, para. 7.205.
[25] Interim Report, para. 7.202.
[26] Interim Report, para. 7.204.

(e) Para. 7.229

6.40 **China** submits that the Panel mischaracterizes China's argument on correlation. China asserts that it never argued that, for there to be correlation between imports and injury factors, "a precise correlation between the degree of change in imports and the degree of change in the injury factors" is necessary.[27] To the contrary, China argued that simple temporal correlation is insufficient.[28] There should be a general correlation in degree between the increases in imports and the decreases in injury factors – but it need not be precise.[29]

6.41 In **the United States'** view, the Panel correctly summarized China's arguments on correlation in its report by stating, for example, that China argued that "the degree of the respective annual increases {in Chinese imports} must correspond generally with the degree of the respective declines in injury factors."[30] Given that China itself stated during the proceeding that, when evaluating the Commission's correlation analysis, the Panel must assess whether the "degree of the respective annual increases {in imports} ... correspond generally with the degree of the respective declines in injury factors,"[31] China's claim that the Panel mis-characterized or misunderstood its arguments is simply unfounded.

6.42 The United States further contends that the Panel does not attribute to China the claim that a "precise correlation" between import and injury factor trends is required.[32] Instead, the Panel was setting forth its own view that a correlation analysis is not an exact science and that it is therefore unrealistic to expect or require a precise correlation between the degree of changes in imports and the degree of change in the injury factors.[33]

6.43 We have amended para. 7.229 of our Report to clarify our understanding of China's arguments.

(f) Paras. 7.307 – 7.312

6.44 **China** contends that, in addressing the plant closures, the Panel never puts these closures in proper context and never accounts for the closures as an effect of the globalization of the tyre industry and not as an effect of a rapid increase in subject imports (as is necessary if the plant closures are to be attributed to subject imports). The Panel found that all three closures were announced in, and stem from, 2006[34] when subject imports were minimal, yet nonetheless found two of the three closures to be attributable to subject imports.[35] There is a disconnect, however, from the 2006 closures to what the Panel is fundamentally assessing – whether subject imports are rapidly increasing during the recent period and causing injury due to this rapid increase. In attributing the closures to subject imports, the Panel totals data of subject imports for all of 2006, even though the closures were

[27] Interim Report, para. 7.229.
[28] China's Oral Statement at the Second Panel Hearing, paras. 62-63.
[29] China's Oral Statement at the Second Panel Hearing, para. 64 ("The only way for these statements to be significant in the context of a proper coincidence analysis, however, is for the degree of the respective annual increases to correspond *generally* with the degree of the respective declines in injury factors") (emphasis added).
[30] Interim Report, para. 7.217.
[31] China's Oral Statement at the Second Panel Hearing, para. 64 (emphasis in original). China went on to point out that "[t]he orders of magnitude [of these changes] are key." *Id*.
[32] Interim Report, para. 7.229. On the contrary, the Panel correctly states that China argued that "the degree of the increases in imports should correspond with the degree of declines in injury factors." Interim Report, para. 7.228.
[33] Interim Report, para. 7.229.
[34] Interim Report, para. 7.307.
[35] Interim report, para. 7.312.

announced in June and July of 2006 – only halfway through the year.[36] This is therefore an inaccurate reading of the record. Because the plant closures were announced only halfway through 2006, these decisions were based on data from 2005 – not totals for the whole year 2006. Thus, the Panel should re-assess the closures and do so based off subject import data for 2005 only. Statements based on full-year 2006 data should be deleted. Finally, the Panel should explain what significance it accords to the questionnaire data where no U.S. producer responded that they were materially injured by subject imports, four said that they were not, and the other six either said they were not in a position to answer or took no position.[37] The Panel notes these facts, but fails to assess them in any way. The Panel should do so and explain what weight it is giving to this evidence and how it effects the Panel's assessment of causation.

6.45 **The United States** asserts that the Panel correctly disagreed with China's claim that there were only "minimal" increases in the volumes of Chinese imports before 2006.[38] In paragraph 7.307, the Panel noted that the record showed that there was a "very substantial increase in the volume of {Chinese} imports prior to 2006." As the Panel correctly stated, the subject imports from China increased from 14.6 million tires in 2004 to 20.8 million tires in 2005, indicating that Chinese imports grew by 42.7 per cent between 2004 and 2005.[39] Accordingly, as the Panel indicated, the significant increases in subject imports prior in 2005 provided the USITC with a sufficient basis for concluding that these increases were a significant contributing factor for the industry's decision to close certain production plants in 2006. The United States also contends that the Panel correctly relied on import data for 2006 in its analysis.[40] Because the plant closure announcements occurred at least six months into 2006, the Panel reasonably relied on the fact that Chinese imports continued to increase significantly over their 2005 levels in 2006, and that Chinese imports became the second-lowest priced source of tires in 2006.[41] Given that Chinese imports continued their aggressive surge into the market in 2006 and continued to be increasingly aggressive in their pricing practices in that same year, the Panel and the ITC both reasonably relied on these facts when concluding that Chinese imports were a significant factor in the industry's decision to close these production facilities.

6.46 The United States believes the Panel clearly explained what weight it gave to the fact that no producer specifically reported that it was materially injured by imports, and reasonably concluded that producers' statements were not dispositive of the question as to whether Chinese imports caused material injury to the industry. As the Panel reasonably noted, even though some domestic producers stated that they were not injured by subject imports and even though other producers took no position on the issue, these facts did not constitute conclusive evidence that domestic producers had not been affected by the subject imports, nor did it indicate that the producers did not choose to close certain production facilities due to subject import competition.

6.47 In light of China's request, we have included footnote 440 in our Report, concerning the 2005 subject import data. We see no need to make any of the additional changes requested by China.

(g) Paras. 7.353 – 7.354

6.48 **China** submits that the Panel offers a wholly inadequate assessment of the causal implications of the recession. In light of the Panel's conclusion that "we must assess whether the reasoning provided by the USITC in its determination seems adequate in light of plausible alternative

[36] Interim Report, paras. 7.307-7.308.
[37] Interim Report, para. 7.312.
[38] Interim Report, para. 7.307.
[39] Interim Report, para. 7.307.
[40] Interim Report, paras. 7.307 and 7.308.
[41] Interim Report, paras. 7.301 and 7.307-308.

explanations of the record evidence or data advanced by China in this proceeding,"[42] the Panel should have assessed the causal implications of the recession in-depth as it assuredly qualifies as a "plausible alternative explanation." Additionally, the Panel's decision to dismiss the causal implications of the recession because the injury to the domestic industry could not be attributed "in whole" to the recession is inadequate.[43] This too easily dismisses a causal factor that was significantly injuring the U.S. industry simply because it was not responsible for the entire injury. The Panel should delete this statement and engage in a more in-depth assessment of the causal effects of the recession. Particular factual findings regarding the extent of the effects of the recession should be made. The Panel quoted the USITC's finding that U.S. apparent consumption declined by 20.4 million tires in 2008.[44] Accordingly, the Panel should make a finding that this decline in demand was attributable to the effects of the recession in 2008 or, if not, the Panel should note what this decline in demand in 2008 was attributable to.

6.49 **The United States** asserts that the Panel's analysis of the recession was neither brief nor inadequate. In its analysis, the Panel addressed at length China's arguments that demand declines during the period were the primary cause of the industry's troubles over the period of investigation.[45] In the same analysis, the Panel addressed in detail China's argument that the recession in 2008 accounted for the bulk of the declines in the industry's condition in that year.[46] As the Panel correctly concluded in its factually-detailed consideration of China's claims, the record clearly showed that, in 2008, the volume of the Chinese imports increased substantially even as demand fell by 6.9 per cent and even as the sales volumes of U.S. and non-subject tires fell.[47] As the Panel also correctly concluded, this continued growth in Chinese imports in 2008 meant that the U.S. industry was forced to absorb virtually all of the declines in demand in 2008, thus establishing that the Chinese imports had a clear and significant adverse impact on the production, sales and market share levels of the industry in that year.[48] The Panel's analysis of this issue was reasoned, detailed and complete, and no change to the Panel's analysis is warranted.

6.50 The United States further asserts that China's argument that the Panel should not have dismissed the recession as a causal factor simply because the recession did not explain the injury to domestic injury "in whole" China misses the point. As the Panel and the USITC found, the record evidence showed clearly that increased volumes of subject imports were having an adverse impact on the domestic industry, and that this impact was independent of the effects of the recession on demand in 2008.[49] Accordingly, the Panel agreed that the USITC reasonably found subject imports to be a significant cause of material injury to the domestic industry, even in 2008, and that the declines in the industry's production, sales, market share and profitability levels in that year could not be attributed wholly or primarily to the recession in 2008, or to any other alleged causal factors, as China claimed. Again, the Panel's analysis was reasoned and thoughtful, and need not be revised.

6.51 The Panel sees no reason to alter the provisions or paragraphs as requested.

[42] Interim Report, para. 7.18.
[43] Interim Report, para. 7.354.
[44] Interim Report, para. 7.353.
[45] Interim Report, paras. 7.323 - 7.352.
[46] Interim Report, paras. 7.337 - 7.339, 7.342 - 7.343, and 7.351-7.352.
[47] Interim Report, para. 7.203.
[48] Interim Report, para. 7.354.
[49] Interim Report, paras. 7.337 - 7.339, 7.342 - 7.343, and 7.351-7.352.

B. REQUEST FOR REVIEW SUBMITTED BY THE UNITED STATES

**1. Standard of review**

(a) Para. 7.18

6.52 **The United States** asks that the word "seems" be replaced with the word "is" in the final sentence of this paragraph.

6.53 **China** believes the change requested by the United States is unnecessary.

6.54 We agree with China that the change is not strictly necessary.

**2. "As such" causation**

(a) Para. 7.136

6.55 **The United States** asks that a cite to Article XVI:4 of the WTO Agreement be included at the end of the first sentence of this paragraph.

6.56 **China** opposes the U.S. suggestion to cite Article XVI:4 of the WTO Agreement to support the proposition that the "WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law." China asserts that while it may be true that the WTO Agreement does not prescribe a particular manner of transposing WTO obligations into domestic law, Article XVI:4 does not say this.

6.57 We see no need to make the change requested by the United States. As noted by China, Article XVI:4 of the WTO Agreement does not provide that the WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law.

**3. Substantive findings generally**

(a) Paras. 7.197, 7.215, 7.216, 7.238, 7.260, 7.322, 7.359, 7.367, and 7.379

6.58 **The United States** suggests that the findings set forth in these paragraphs be linked back to the Panel's standard of review through the insertion of the following sentence: "Therefore, we find that the USITC's determination was reasoned and adequate in this respect, consistent with the standard wet out by the Panel in paragraph 7.18." The United States also proposes a reformulation of the Panel's findings in certain of these paragraphs.

6.59 **China** believes these changes are unnecessary. China further contends that the proposed U.S. language actually goes beyond the language of Para 7.18. Para 7.18 addresses only whether the ITC reasoning was "adequate" and does not otherwise making any statement about the whether the ITC determination was "reasoned."

6.60 With the exception of a minor change regarding paragraph 7.359, we agree with China that the changes proposed by the United States are unnecessary.

**4. Remedy**

(a) Para. 7.397

6.61 **The United States** suggests that the last sentence of this paragraph is unnecessary.

6.62 **China** opposes the U.S. suggestion to delete the last sentence of this paragraph. The Panel has correctly noted that there is "no guarantee" that a measure imposed to improve the injurious condition of the domestic industry caused by increased imports will "not be excessive." The U.S. attempt to delete this fair, objective statement is constitutes over-reaching.

6.63 We agree with China that there is no need to delete the last sentence of this paragraph.

(b) Para. 7.414

6.64 **The United States** proposes the insertion of a footnote at the end of the first sentence to refer the reader back to paragraph 7.20, where the Panel concluded that there is no obligation to explain.

6.65 **China** does not comment on this request.

6.66 In the absence of any objection by China, we have included the new footnote 555 requested by the United States.

(c) Para. 7.418, footnote 557

6.67 **The United States** asks that the Panel explain that it is not addressing the issue raised in this footnote as a matter of judicial economy.

6.68 **China** does not comment on this request.

6.69 The Panel has amended footnote 557 to highlight its intended purpose, which is to demonstrate that China's GATT 1994 claims are dependent on its claims under the Protocol.

**5. Conclusion**

(a) Para. 8.1

6.70 **The United States** suggests that, for greater clarity, the Panel should include a full conclusion on each of China's claims. The United States also asks the Panel to include a conclusion regarding the rejection of China's "as such" claim.

6.71 **China** does not comment on this request.

6.72 The Panel sees no reason to alter the concluding paragraph.

## VII. FINDINGS

### A. GENERAL ISSUES

7.1 We shall begin with some preliminary observations and then address general issues relating to our standard of review, the burden of proof, and the rules of treaty interpretation. We also consider the relationship between sub-paragraphs 1 and 4 of Paragraph 16 of the Protocol.

## 1. Preliminary observations

7.2 The Panel was aware that there are a number of features of this particular case that provide a background against which the case has to be considered and constitute a context for dealing with the matters raised.

7.3 First, this is the first case under the transitional product-specific safeguard mechanism in Paragraph 16 of the Protocol. It thus raises questions that have not yet been dealt with in WTO dispute settlement, including the question of the relationship of this particular safeguard measure to the global safeguards mechanisms under the WTO Agreements: GATT Article XIX and the WTO *Safeguards Agreement.* Thus, the case raises important questions of the interpretation of the transitional product-specific safeguard mechanism that will obviously be of interest to other WTO Members even though the mechanism expires in 2013.

7.4 Second, the safeguard measure imposed in this case under Paragraph 16 of the Protocol of Accession of China is country specific, but nevertheless such a measure has effects on non-subject imports of tyres into the United States with its own systemic implications.

7.5 Third, imposition of a safeguard measure in this case was based on a determination of the USITC that was not unanimous. Two commissioners dissented on the critical issue of causation. Such a circumstance warrants the panel in giving very careful consideration in particular to that aspect of the USITC determination.

7.6 Fourth, the investigation that led to the imposition of a safeguard measure in this case against the importation of tyres from China was initiated, unusually, as the result of a petition by a labour union in the United States and not by the domestic producers of tyres. This, of itself, alerted the Panel to the possibility that there was something different about this case, particularly where the domestic producers, the normal petitioners in such cases, had indicated that they would not make any adjustments notwithstanding that a safeguard remedy was put in place with adjustment purposes.

7.7 Fifth, the issue of "material injury" was not in question before the Panel and, indeed, the determination of the USITC on this point was unanimous. Thus, a key issue in this case was causation, a matter that was complicated by the fact that the period of investigation involved in part a period of massive global economic downturn or recession.

7.8 Sixth, an important allegation in this case relating to this key issue of causation was that the U.S. tyre manufacturing industry had voluntarily reduced its investment in the United States and had invested in manufacturing tyres in China instead. Thus, according to this view, the reduction in domestic manufacturing of tyres and the increase in imports from China were the consequences of deliberate economic decision-making by the U.S. tyre industry.

7.9 In such circumstances, the argument went, this case involved the invocation of a mechanism designed to protect a domestic industry that did not want that protection and by its own actions had precipitated the events that were now being invoked to justify the application of the transitional product-specific safeguard mechanism of China's Protocol of Accession. Arguably, it explained too why the investigation had been initiated by a labour union, a body that was concerned with job losses resulting from this transfer of manufacturing capacity to China, and not by the domestic producers themselves. Thus, the Panel was aware that this aspect of the case raised the question of the suitability or relevance of safeguard mechanisms in the context of "outsourcing" and "globalization", matters of considerable systemic interest to WTO Members.

7.10 Having stated this important contextual background, the Panel was also aware that the issues before it involved the interpretation of the provisions of the transitional product-specific safeguard

mechanism and that it was the task of the Panel to do that. It was not for the Panel to seek to recalibrate what the WTO Members had agreed to in the negotiations that led to the accession of China to the WTO in the light of what the Panel might perceive as changing economic circumstances that perhaps had not been considered when the Protocol was negotiated. That remains the prerogative of the WTO Members themselves. Nevertheless, the Panel felt that it was important to set this background out as it informed the understanding of the Panel of the arguments made before it in this case.

## 2. Standard of review

7.11 Article 11 of the DSU, and, in particular, its requirement that "… a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", sets forth the appropriate standard of review for WTO Agreements. Since the Protocol is silent as to the appropriate standard of review, Article 11 of the DSU will be applied by the Panel in examining the consistency of the U.S. *Tyres* measure with Paragraph 16 of the Protocol.

7.12 Although there is a disagreement between the parties regarding certain aspects of the nature of the "objective assessment" we must undertake in this case, there is much regarding our standard of review that the parties do agree on.

7.13 The United States submits that:

> in order for the Panel to make an "objective assessment" of the market disruption determination by the ITC, it must examine whether the ITC provided a reasoned explanation as to how the evidence before it (on the record) supported its conclusion that the requirements set out in paragraph 16.4 of the Protocol were met. The Panel is not acting as an initial trier of fact, and therefore must not conduct a *de novo* review. However, we do not suggest that the Panel should grant total deference to the competent authority. The Panel should review whether the analysis and explanations provided in the ITC Report reveal how the ITC considered the factors under paragraph 16.4 and whether the ITC provided a reasoned explanation as to how the facts supported the market disruption determination.[50]

7.14 China agreed with this part of the United States' understanding of our standard of review. In particular:

> China agrees the Panel must not conduct *de novo* review. China agrees the Panel must not grant total deference to the authorities. China agrees the "Panel should review whether the analysis and explanations provided in the ITC Report reveal how the ITC considered the factors under paragraph 16.4 and whether the ITC provided a reasoned explanation as to how the facts supported the market disruption determination" – the focus must be on the USITC Determination as it was written, and that rationale must constitute a "reasoned and adequate explanation."[51]

7.15 We agree with this part of the parties' assessment of our standard of review. It is well established in WTO case law regarding trade remedy cases that a Panel should neither conduct a de novo review, nor grant total deference to an investigating authority.[52] It is also well established that

[50] U.S. Reply to Question 18 from the Panel, para. 47, footnote omitted.
[51] China's Second Written Submission, para. 44.
[52] *See*, for example, Appellate Body Report, *US – Lamb*, para. 106.

the Panel's standard of review "must be understood in the light of the obligations of the particular covered agreement at issue".[53] Taking into account the obligations imposed by Paragraph 16,[54] we consider that our review of China's claims under Paragraph 16 of the Protocol should contain both a formal and a substantive element.[55] The formal aspect is whether the USITC evaluated "objective factors", as required by Paragraph 16.4. The substantive element is whether the USITC provided a reasoned and adequate explanation of its determination, in line with its obligation under Paragraph 16.5.

7.16 The main disagreement between the parties concerns the USITC's treatment of alternative explanations of the evidence and data before it. China relies on the Appellate Body Report in *US – Countervailing Duty Investigation on DRAMS* to argue that "the explanation provided by the investigating authority 'should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions'".[56] The United States denies that the USITC was required to address any alternative explanations in its determination. The United States claims that, in *US – Countervailing Duty Investigation on DRAMS*, "this level of detail [of requiring an assessment of alternative explanations] is derived from the requirements found in Articles 22.3 and 22.5 of the *SCM Agreement*, and particularly the requirement in Article 22.5 for the notice or report to contain "the reasons for acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers".[57] The United States notes that no such provision is contained in Paragraph 16 of the Protocol.

7.17 In making the abovementioned finding in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body referred in a footnote to para. 106 of its Report in *US – Lamb*, which reads in relevant part:

> A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[58]

7.18 We note that there is no obligation in Paragraph 16 of the Protocol requiring the USITC to address, in its determination, alternative explanations that could reasonably be drawn from the evidence or data before it.[59] Nor is there any provision equivalent to Article 22.5 of the *SCM Agreement*. Since a panel's standard of review is necessarily distinct from the substantive and procedural obligations of the investigating authority, our standard of review cannot impose any such

---

[53] *See*, for example, Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

[54] We note in particular that, under Paragraph 16.4 of the Protocol, an investigating authority is required to "consider objective factors" in determining if market disruption exists. Furthermore, under Paragraph 16.5, the importing Member "shall provide written notice of the decision to apply a measure, including the reasons for such measure...".

[55] Appellate Body Report, *US – Lamb*, paras. 103-104.

[56] China's Second Written Submission, para. 46, citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

[57] U.S. Reply to Question 18 from the Panel, para. 47 n. 52.

[58] Appellate Body Report, *US – Lamb*, para. 106 (emphasis in original).

[59] This issue concerns alternative explanations generally. It does not concern the issue of whether the USITC should have considered alternative causes of injury, or conducted a non-attribution analysis in respect of any such alternative causes of injury.

obligation on the USITC.[60] For this reason, and guided by the abovementioned finding of the Appellate Body in *US – Lamb*, we consider that, in order to review whether the reasoning of the USITC was reasoned and adequate, we must assess whether the reasoning provided by the USITC in its determination seems adequate in light of plausible alternative explanations of the record evidence or data advanced by China in this proceeding.

7.19 The other disagreement between the parties concerns our review of the U.S. remedy determination. China contends that our review of remedy should take account of the fact that the "United States must ... provide a 'reasoned explanation' for the remedy being imposed – both the level of the tariffs, and the decision to continue the tariffs for three years".[61] According to the United States, our review should take account of the fact that "the Protocol does not contain an obligation for a Member to consider particular factors or to demonstrate at the time of the imposition of the measure how the measure meets the requirement of Paragraphs 16.3 and 16.6".[62]

7.20 We recall that our standard of review "must be understood in the light of the obligations of the particular covered agreement at issue".[63] In this regard, we note that the last sentence of Paragraph 16.5 of the Protocol requires a Member to "provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration". This provision refers to the need to provide a statement of the "reasons for such measure". It does not refer to the need to provide a statement of the "reasons for the scope and duration of such measure". In our view, therefore, a Member need only provide written notice of the scope and duration of the measure. It need not provide written notice of the reasons for the scope and duration of that measure.

7.21 Our interpretation of the last sentence of Paragraph 16.5 is consistent with the Appellate Body's finding[64] in *US – Line Pipe* that Article 5.1 generally does not require a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary". The burden, therefore, is on China to establish that the *Tyres* measure is excessive. China cannot simply point to any failure on the part of the United States to explain, in a published determination, that the measure is not excessive. Instead, we consider that our review of the U.S. remedy should be based on the arguments and evidence put forward by the parties during the present WTO dispute settlement proceeding.[65]

### 3. Burden of proof

7.22 We recall the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a covered agreement by another Member must assert and prove its claim.[66] In this dispute, China, which has claimed that the United States acted inconsistently with Paragraph 16 of the Protocol, and Articles I:1 and II:1 of the GATT 1994, thus bears the burden of demonstrating that the United States acted inconsistently with those provisions. In addition, it is generally for each party asserting a fact to provide proof thereof.[67] We note in addition that a prima facie case is one which, in the absence of effective refutation by the

[60] However, if the USITC failed to consider plausible alternative explanations, there may be a greater risk that we, under our standard of review, would find that the USITC's reasoning does not seem adequate in light of those plausible alternative explanations.
[61] China's Second Written Submission, para. 45.
[62] U.S. Reply to Question 18 from the Panel, para. 48.
[63] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.
[64] Appellate Body Report, *US – Line Pipe*, para. 233.
[65] This reflects the approach adopted by the panel in *US – Steel Safeguards*, paras. 10.25–10.27.
[66] Appellate Body Report, *US – Wool Shirts and Blouses*, page 16.
[67] *Ibid*.

other party, requires a panel, as a matter of law, to rule in favour of the party presenting the prima facie case.[68]

## 4. Treaty interpretation

7.23 Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled that the principles codified in Articles 31 and 32 of the *Vienna Convention* are such customary rules. Equally, in WTO case law Article 33 is so applied.[69] These provisions read as follows:

*Article 31: General rule of interpretation*

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32: Supplementary means of interpretation*

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or

[68] Appellate Body Report, *EC-Hormones*, para. 104.
[69] *See*, for example, Panel Report, *Japan – DRAMS (Korea)*, para. 7.45.

(b) leads to a result which is manifestly absurd or unreasonable.

*Article 33: Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

7.24 We shall apply these principles in this case.

## 5. Relationship between Paragraph 16.1 and Paragraph 16.4 of the Protocol

7.25 In order to properly assess the conformity of the United States' measure with Paragraph 16 of the Protocol, we must establish the conditions under which the provisions would apply. This is particularly important regarding China's claims on increased imports and causation, in respect of which the parties have developed significantly diverse positions on the interaction between sub-paragraphs 1 and 4 of Paragraph 16.

7.26 Paragraph 16.1 of the Protocol provides:

In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

7.27 Paragraph 16.4 of the Protocol provides:

Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.

(a) Arguments of the parties

7.28 According to **China**, Paragraphs 16.1 and 16.4 are interrelated. China contends that Paragraph 16.1 functions as a *chapeau* for Paragraph 16, providing the basic conditions for any action under Paragraph 16.[70] China submits that Paragraph 16.1 also provides "important context" for understanding the obligations of Paragraph 16.4 (and *vice versa*), such that "[t]he two provisions must be read together".[71] In reading the two provisions together, China understands Paragraph 16.4 to add to the basic conditions set forth in Paragraph 16.1.

7.29 Thus, in respect of the issue of increased imports, China asserts that "the first requirement of [Paragraph] 16.1 sets a base level requirement of 'in such increased quantities'".[72] Referring to the case law of the Appellate Body regarding the interpretation of the same phrase in Article 2.1 of the *Safeguards Agreement*, China contends that imports will only be "in such increased quantities" if they are sudden enough, sharp enough, and significant enough, to cause injury. China continues, though, that "even if the increase in imports is sudden enough, sharp enough, or significant enough to satisfy the [Paragraph 16.1] requirement of 'in such increased quantities', they still must meet the additional [Paragraph 16.4] standard of 'increasing rapidly'".[73]

7.30 China adopts the same approach to the Paragraph 16 causation standard. Thus, China asserts that the word "cause" in Paragraph 16.1 constitutes the "base requirement".[74] China asserts that the Appellate Body has confirmed, in case law regarding the *Safeguards Agreement*, that a "'cause' requires 'a genuine and substantial relationship of cause and effect' between the imports and the alleged injury".[75] China contends that "Article 16.4 further strengthens this basic requirement, by modifying the term 'cause' with 'significant'".[76] China contends that sub-paragraphs 1 and 4 of Paragraph 16 therefore require that increased imports under the Protocol must have "a significant, important, genuine and substantial causal relationship with material injury being suffered by the U.S. domestic industry".[77]

7.31 The upshot of China's interpretative analysis is that the increased imports and causation standards of Paragraph 16 are more stringent than those of the *Safeguards Agreement*, since they incorporate both the disciplines of the *Safeguards Agreement* (as embodied in Paragraph 16.1), plus the additional requirements of Paragraph 16.4.

7.32 **The United States** submits that Paragraph 16.1 does not impose any obligations regarding the existence of market disruption, but merely sets forth the general conditions under which a Member is authorized to seek consultations with China. The United States asserts that, while Paragraph 16.1 provides context for the interpretation of Paragraph 16.4, it does not set out a general obligation with respect to the market disruption determination.[78] According to the United States, it is Paragraph 16.4 that sets the standards that a Member has to meet in order to make an affirmative market disruption determination.[79] The United States contends that, consistent with Paragraph 16.4, a Member must find that imports are (1) "increasing rapidly" so as to be (2) a "significant cause" of (3) material injury

[70] China's Second Written Submission, para. 176, and China's Reply to Question 35 from the Panel.
[71] China's Second Written Submission, para. 176.
[72] China's Reply to Question 15 from the Panel, para. 60 (emphasis in original).
[73] China's Reply to Question 15 from the Panel, para. 60.
[74] China's First Written Submission, para. 185.
[75] China's First Written Submission, para. 182.
[76] China's First Written Submission, para. 187.
[77] China's First Written Submission, para. 204.
[78] *See* Oral Statement by the U.S. at the Second Meeting, para. 19.
[79] *See* U.S. Reply to Question 19 from the Panel.

or threat thereof.[80] The United States contends that these are the standards against which its measure should be assessed. The United States contends that the transitional safeguard mechanism exists outside and apart from the global safeguard disciplines embodied in Article XIX of the GATT 1994, and the *Safeguards Agreement*.

(b) Evaluation by the Panel

7.33 In our view, Paragraph 16.1 is concerned with more than the mere right of Members to seek consultations. Paragraph 16.1 provides the very basis for action under the Paragraph 16 transitional product-specific safeguard mechanism, as Paragraph 16.1 consultations are the trigger for any subsequent action to address the "market disruption" in question. Indeed, it is only if such consultations fail that transitional product-specific measures may be imposed (under Paragraph 16.3).

7.34 In accordance with Paragraph 16.1, action under Paragraph 16 is triggered when Chinese imports are being imported "in such increased quantities or under such conditions"[81] "as to cause" "market disruption". But what do these terms mean substantively? How does a Member know when imports are in sufficiently "increased quantities" to justify action? What is the degree of harm that the domestic industry must suffer? And what is the degree of causal relationship required between those imports and that harm?

7.35 Similar questions regarding "increased quantities" and causation arose in the context of disputes concerning Article 2.1 of the *Safeguards Agreement*. In that context, the answers were provided by the Appellate Body, based on its interpretation of the relevant provisions of that Agreement. In the context of Paragraph 16, the answers are provided in Paragraph 16.4, which sets forth a definition of "market disruption" that encompasses the nature of the increase in imports, the nature of the harm to be suffered by the domestic industry, and the degree of causal nexus that must exist between those imports and that harm. In particular, Paragraph 16.4 provides that the increase in imports must be rapid, that the harm to the domestic industry must amount to material injury, and that the rapidly increasing imports must be a significant cause of that material injury. Thus, imports from China will be "in such increased quantities ... as to cause ... market disruption" when those imports are "increasing rapidly ... so as to be a significant cause of material injury."

7.36 Thus, Paragraphs 16.1 and 16.4 are interrelated. They should be read together, and each provision provides important context for interpreting the other. The interrelation between Paragraphs 16.1 and 16.4, the joint reading of these provisions, and the definitional nature of Paragraph 16.4, suggest that Paragraph 16.4 clarifies the substance of the trigger conditions provided for in Paragraph 16.1.[82]

7.37 Since Paragraph 16.4 clarifies the substance of the conditions for taking action under Paragraph 16, it is in light of the "increasing rapidly" and "significant cause" standards of Paragraph 16.4 that the conformity of the U.S. *Tyres* measure should be assessed.[83] As indicated

[80] Oral Statement by the U.S. at the Second Meeting, para. 21.

[81] In the light of the French and Spanish texts and in accordance with Article 33(4) of the *Vienna Convention*, the word "or" is to be taken to include "and".

[82] Indeed, the clarificatory role of Paragraph 16.4 has been acknowledged by China which, after itself noting the interrelationship between Paragraphs 16.1 and 16.4, asserted that:

> Article 16.4, in turn, defines the specific circumstances in which "market disruption" is deemed to exist, thus clarifying the applicable requirements – in particular, that imports be "increasing rapidly" and constitute a "significant cause" of material injury. (China's Reply to Question 35 from the Panel, para. 36.)

[83] We note that China itself has asserted that:

above, we shall interpret the phrases "increasing rapidly" and "significant cause" in the manner prescribed by Articles 31 and 32 of the *Vienna Convention*. To the extent that the provisions of Article XIX of the GATT 1994 or the *Safeguards Agreement*, as interpreted by the Appellate Body, are relevant they will be taken into account.

## B. WAS THE USITC ENTITLED TO FIND THAT IMPORTS WERE "INCREASING RAPIDLY" IN ACCORDANCE WITH PARAGRAPH 16 OF THE PROTOCOL?

### 1. Introduction

7.38 China claims that the United States failed to evaluate properly whether imports from China were "increasing rapidly" in accordance with Paragraph 16.4 of the Protocol. The thrust of China's argument is that a decline in the rate of increase in 2008, the most recent period in China's view, means that imports were no longer "increasing rapidly".

### 2. Arguments of the Parties

7.39 **China** argues that the term "increasing" means imports must be increasing in the *most* recent past. China claims that Paragraph 16.1 and Paragraph 16.4 both use the present continuous tense in detailing the increased imports standard under the Protocol.[84] China submits that Paragraph 16.1 is in the present continuous tense as the phrase "are being" modifies "imported". China contends that in Paragraph 16.4 the phrase "are increasing rapidly" is a construction in the present continuous tense.[85] China argues that, therefore, there is consistency in the tenses between the two paragraphs, and it is this present continuous tense that requires the investigating authority to focus on the *most* recent period of time.[86]

7.40 China provides two reasons for this. First, as a matter of grammar, the present continuous tense requires the activity to be happening either now, or in the near future or very recent past.[87] In China's view that distinguishes imports that are "increasing rapidly" from imports that have "increased rapidly". In this case, China argues that the *most* recent period of time is the most recently completed year and any other period for which data is available.[88] Second, China argues that this approach is consistent with the way the Appellate Body has interpreted the textual distinction between "increased" and "increasing" when considering Article 4.2 in the *Safeguards Agreement.*[89] China also believes that the use of the term "increasing" requires the analysis under Paragraph 16 of the Protocol to focus

---

When evaluating whether China-specific safeguards under Article 16 are WTO-consistent, a panel must determine whether the national authorities have properly found that imports are "increasing rapidly" and that they are a "significant cause" of any injury. (China's Reply to Question 9b from the Panel, para. 35.)

[84] China's Second Written Submission, para. 70.

[85] China's Reply to Question 12 from the Panel, para. 46 and footnote 37 noting that the grammatical point does not arise in the French and Spanish texts as the present tense captures the English equivalent of both the simple present tense and the present continuous tense.

[86] China's Second Written Submission, para. 70.

[87] China's Reply to Question 12 from the Panel, para. 46.

[88] China's Reply to Question 14 from the Panel, para. 53. China's Second Written Submission, para. 84.

[89] China's Reply Question 12 from the Panel, para. 47. Appellate Body Report, *US – Steel Safeguards*, para. 367. Oral Statement by China at the First Meeting, para. 22. China's Reply to Question 36 from the Panel, para. 40.

on an even *more* recent period of time compared to the *Safeguards Agreement* to determine whether imports are increasing.[90]

7.41 China notes that when describing an increase, "rapidly" indicates "a significant or steep increase"[91] or a recent surge.[92] China continues that the way to make the distinction between imports that are "increasing rapidly" compared to imports that are merely increasing is to consider the rate at which the increase is occurring.[93] China contends that a trend line over time that is "progressing quickly" must either have a steep slope (a "rapid" change over time, as opposed to a gradual change over time) or must have an accelerating slope (a "rapid" change over time, since the change is "progressing quickly" by progressing at an increasingly faster rate).[94] China argues that "[t]he ordinary meaning of 'rapidly' can best be understood in this context as imports increasing more 'rapidly' than they have been increasing previously".[95] In other words, China argues "increasing rapidly" does not contemplate the present increase being modest and the past increase being rapid.[96] Rather, imports must be accelerating or continuing at a high rate in light of the preceding period.[97]

7.42 China points to the drop in the rate of increase in 2006/2007 (53.7 per cent) compared to 2007/2008 (10.8 per cent) to argue that imports were no longer "increasing rapidly" in the most recent past. China responds to a question from the Panel to say that imports were "increasing rapidly" in 2007, but that "such a finding would be premised primarily on the dramatic changes in rate of increase, not simply an increase in absolute quantity".[98] China claims that the USITC failed to address the fact that the majority of the increase in volume of imports, approximately 86 per cent, occurred between 2004 and 2007.[99] China also claims that the U.S. blurred the last two years of the investigation, which obscures the fact that 46 per cent of the growth in absolute volume occurred from 2006 to 2007.[100] Between 2007 and 2008 the growth in absolute volume was only 14 per cent.[101]

7.43 China provides the following table to argue further that imports were no longer "increasing rapidly" in 2008:[102]

[90] Oral Statement by China at the First Meeting, para. 22. China's Second Written Submission, para. 71. China's First Written Submission, para. 101.

[91] China's First Written Submission, para. 79.

[92] China's First Written Submission, para. 85.

[93] China's Second Written Submission, para. 77. We note that China develops a 3 prong qualitative test to determine whether imports are "increasing rapidly" that requires (1) consideration of data in the most recent period; (2) the most weight to be given to the most recent trends; and (3) an analysis of the most recent year in more detail when the initial analysis shows imports are slowing.

[94] China's Second Written Submission, para. 77.

[95] China's Reply to Question 14 from the Panel, para. 54. China's Second Written Submission, para. 85.

[96] China's First Written Submission, para. 83.

[97] China's First Written Submission, para. 85. China considers that there may be other scenarios where imports can be "increasing rapidly". China's First Written Submission, para. 81.

[98] China's Reply to Question 13 from the Panel, para. 49.

[99] China's First Written Submission, para. 133, quoting the USITC report, page V-1.

[100] 14,498/31400*100 = 46%.

[101] China's Second Written Submission, para. 116.

[102] China's Second Written Submission, para. 114. China's First Oral Statement, para. 28.

| | Average Annual Increase over 2004-2007 Period | Annual Increase in 2007 Compared to 2006 | Annual Increase in 2008 Compared to 2007 |
|---|---|---|---|
| **Quantity of Tires (million tires)** | 9.0 M | 14.5 M | 4.5 M |
| **Rate of Absolute Increase (%)** | 42.1% | 53.7% | 10.8% |
| **Increase in Market Share (% pts)** | 3.1 % pt | 4.7 % pt | 2.7 % pt |

7.44 China challenges the 10.8 per cent increase in 2008 as not being in and of itself rapid. China argues that the Panel in *US – Steel Safeguards* found an increase of 11.9 per cent during the most recent full year of data not to be sufficient to constitute "increased imports".[103] China contends that a 10.8 per cent increase cannot, therefore, be sufficient to comply with the higher standard under the Protocol for imports to be "increasing rapidly".[104]

7.45 China provides the following table regarding relative data of subject imports:[105]

| Year | Per cent of Domestic Production (percentage) | Change in Share of Production (percentage points) | Per cent of Total Consumption (percentage) | Change in Share of Consumption (percentage points) |
|---|---|---|---|---|
| 2004 | 6.7 | -- | 4.7 | -- |
| 2005 | 10.0 | 3.3 | 6.8 | 2.1 |
| 2006 | 14.6 | 4.6 | 9.3 | 2.5 |
| 2007 | 23.0 | 8.4 | 14.0 | 4.7 |
| 2008 | 28.7 | 5.7 | 16.7 | 2.7 |

7.46 China argues that the USITC's treatment of relative import data is cursory and misleading as the USITC did not pay enough attention to the changes in 2008, but, rather, stressed changes over the full period. China argues that the trends in share of consumption (i.e. market share), suggest a stable trend given that the change in share of consumption was consistently in the 2-3 percentage points range, apart from 2007.[106]

7.47 China considers that relative data under the Protocol refers to market share, that is, imports as a percentage of total consumption rather than imports relative to domestic production.[107] China submits that while consideration of imports relative to domestic production makes sense for global safeguards due to Article 2.1 ("absolute or relative to domestic production") and Article 4.2(a) ("the share of the domestic market taken by increased imports, changes in the level of sales, production,

[103] China's Reply to Question 36 from the Panel, para. 43.

[104] We note that China makes similar claims regarding the comparable numbers in relative data. *See* China's Reply to Question 36 from the Panel, para. 43.

[105] China's First Written Submission, para. 158. USITC Report, Table II-2.

[106] China's First Written Submission, para. 132.

[107] China's Reply to Question 38 from the Panel, para. 48. China's Second Written Submission, para. 117.

productivity, capacity utilization, profits and losses and employment") of the *Safeguards Agreement*, under the Protocol there is no elaboration of the meaning to be given to "relative" data. China argues that the USITC relied on imports relative to domestic production when Paragraph 16 seems to place the focus on market share.[108] China argues that a focus on domestic production is misleading when non-subject imports were such an important factor in the market and the "domestic industry is engaging in a conscious strategy of shifting some of its production offshore".[109]

7.48 China also claims that the blurring of the last two years of the investigation obscures the fact that 39 per cent of the growth in market share occurred from 2006 to 2007. Between 2007 and 2008 the growth of market share was only 22 per cent.[110]

7.49 China argues that the U.S. relies too heavily on an end-point-to-end-point analysis given that the Appellate Body has found such an approach to be inadequate for assessing properly whether imports have "increased" under the *Safeguards Agreement.*[111] China claims that an end-point-to-end-point analysis is particularly inappropriate under Paragraph 16 of the Protocol.[112] China acknowledges that a longer period of time may be necessary to provide context for what is happening in the most recent period, but claims that an end-point-to-end-point analysis "misapplies the relevance of this longer period of time and … can obscure the more relevant analysis of what is happening over the more recent period".[113]

7.50 China recalls that in *Argentina – Footwear (EC)*, even though imports almost doubled over a five year period, due to a decline in imports at the end of the period neither the Panel nor the Appellate Body found "increased imports" in accordance with the *Safeguards Agreement*. China argues that the essential lesson from *Argentina – Footwear (EC)* is that any year, and particularly the recent period, must be put in context and not considered in isolation.[114] China submits that the U.S. argument in the case before us, stressing increases over the period of investigation, is similar to that argument rejected in *Argentina – Footwear (EC).*

7.51 Regarding trends in value, China argues that the USITC erroneously relied on trends in value when the "text of Paragraph 16 requires a focus on the 'quantity' of imports".[115]

7.52 China argues that the USITC never discussed the implications of the low base level at the beginning of the period.[116] China continues that when imports begin at a low base level it is "inevitable that the subsequent increases will seem large".[117] China argues that these increases were never placed in their proper context.[118]

7.53 China argues that the USITC should have included data for the first quarter of 2009 in its period of investigation, which would have been in keeping with USITC established practice. China

[108] China's Second Written Submission, para. 117.
[109] China's Reply to Question 38 from the Panel, para. 51.
[110] China's Second Written Submission, para. 116.
[111] Appellate Body Report, *US – Steel Safeguards*, paras. 354-355.
[112] China's Second Written Submission, para. 85. China's Reply to Question 36 from the Panel, para. 41.
[113] China's Second Written Submission, para. 105.
[114] China's Second Written Submission, para. 108.
[115] China's First Written Submission, para. 116.
[116] China's First Written Submission, para. 117.
[117] China's First Written Submission, para. 117.
[118] China's First Written Submission, para. 117.

contends that had the data from the first quarter of 2009 been included, it would have shown a sharp decline in subject imports from China.[119]

7.54 China argues that the USITC's refusal to collect or consider available interim data "stands in stark contrast to its well-established and consistent practice of collecting interim data in other cases".[120] China notes that the petition in this case was not filed until 20 April 2009. However, the USITC decided not to collect interim data even though it had "collected interim data in *every single* other Section 421 safeguard investigation in which an interim period was completed prior to the filing of the petition".[121] China considers the USITC refusal to collect interim data for the completed first quarter of 2009 is "wholly inconsistent" with the USITC's practice in other Section 421 cases.[122]

7.55 Noting the U.S. argument that the USITC does not have an established practice of collecting interim data as outlined by China, and that it decides whether to collect interim data on a case by case basis, China accuses the United States of being "overboard and quite dangerous" in its case by case approach. China believes the United States overstates the burden of collecting such data and that the desire to avoid the imposition of a slight reporting burden on domestic producers is not a sufficient explanation.[123] China claims that when the staff report was completed on 12 June 2009, import data was available for the first quarter of 2009 ("Q1 2009").[124]

7.56 China asserts that the United States collects interim data in antidumping and countervailing investigations whenever such data is available. China claims that in 2009 the USITC collected interim data in all such investigations as long as one quarter in 2009 had been completed prior to the petition being filed.[125] As one example, China notes that in *Oil Country Tubular Goods from China*, a case that began 11 days before the initiation of the *Tyres* investigation, the USITC collected interim data for Q1 2009.[126]

7.57 China argues that in the only Section 421 transitional safeguard investigation to be initiated prior to the completion of an interim period, *Uncovered Innerspring Units from China*, the USITC collected information for the entire previous year even though the investigation started just 6 days after the completion of the prior year.[127]

7.58 China dismisses the contention by the USITC that the first quarter 2009 data would have been of limited use given the lack of information on the relative share of imports from China and claims that the "record was incomplete only because the USITC chose to leave the record incomplete".[128] China argues that the USITC reason for not using Q1 2009 data (i.e. that it would add no probative value in the absence of relative data) "overlooks the fact that the absolute level of imports was still a

[119] China's First Written Submission, paras. 136-137. China's Second Written Submission, paras. 123-126.
[120] China's First Written Submission, para. 139.
[121] China's First Written Submission, para. 139.
[122] China's First Written Submission, para. 139. We note that China also argues the USITC should have issued supplemental questionnaires to collect the data. The United States questions the burden on the recipients and the likelihood of getting a relatively complete data series at a late stage in the investigation. *See* China's First Written Submission, paras. 142-144. United States' First Written Submission, paras. 139-140.
[123] China's Second Written Submission, para. 124.
[124] China's First Written Submission, para. 146.
[125] China's First Written Submission, para. 140.
[126] China's First Written Submission, para. 140.
[127] China's First Written Submission, para. 139.
[128] China's First Written Submission, paras. 147-148.

key issue to be considered ...".[129] China claims that the "inability to address one issue completely does not justify ignoring probative data on another issue".[130]

7.59 **The United States** argues that China seeks to have the Panel impose an overly restrictive view of how recent increases in imports should be in order to comply with the Protocol.[131] The United States continues that there is no support in the text of the Protocol for investigating authorities to consider only very recent increases in imports. The United States contends that there is no meaningful distinction between the language in the Protocol and the language in the *Safeguards Agreement* to indicate an investigating authority must focus its analysis on a *more* recent period of time under the Protocol compared to the *Safeguards Agreement*. The United States notes that the USITC has consistently explained that it must "focus on recent increases in imports" under the Protocol.[132]

7.60 The United States submits that the ordinary meaning of "rapid" means "progressing quickly, developed or completed within a short time".[133] The United States contends that, in light of this, when the Panel is examining the USITC's analysis regarding imports it should assess whether the USITC "reasonably concluded that the growth in Chinese imports had 'progressed quickly' over the period of investigation or had been 'developed or completed within a short period of time'".[134]

7.61 The United States notes that Paragraph 16 of the Protocol does not define the nature of the rapid increase that is sufficient to meet the requirements of Paragraph 16. The United States challenges China's view that imports must be "steep" or "surging", arguing that China is imposing a higher standard to find that imports are "increasing rapidly" than is warranted by the text.[135]

7.62 The United States argues that the Protocol does not preclude a competent authority from finding imports to be "increasing rapidly" over the period examined simply because the rate of increase of imports lessens at the end of the period. Nor does the Protocol "suggest that imports must be growing at their most rapid pace at the end of the period examined by a competent authority".[136] The United States contends that, instead, the Protocol only requires that the competent authority find that there was a rapid increase in imports on an absolute or relative basis, during the period, and that these imports were a significant cause of material injury or threat of material injury to the industry.[137]

7.63 The United States claims that China continues to make the factually mistaken assertion that imports from China were "declining in 2008", the end of the period of investigation.[138] The United States notes that the subject imports were at their highest levels in absolute terms in 2008.[139] The United States contends that the record shows "clearly and unequivocally" that there was a rapid and recent increase in the volumes of Chinese imports.[140]

---

[129] China's First Written Submission, para 148.
[130] China's First Written Submission, para. 148.
[131] United States' First Written Submission, para. 100.
[132] United States' First Written Submission, para. 89 and USITC Report page 11.
[133] United States' First Written Submission, para. 87. New Shorter Oxford English Dictionary (2007) at 2463.
[134] United States' First Written Submission, para. 87.
[135] United States' First Written Submission, para. 95.
[136] United States' First Written Submission, para. 91
[137] United States' First Written Submission, para. 91.
[138] Oral Statement by China at the First Meeting, para. 7.
[139] United States' First Written Submission, para. 122.
[140] United States' Second Written Submission, para. 20.

7.64 The United States criticises the focus by China on the rate of increase in volumes of Chinese imports rather than actual volumes or market shares of subject imports. The United States submits that the use of a change in the rate of increase is the only way China can provide support for its claim that there was a declining or lessening trend in imports in 2008.[141] The United States submits that even if the rate of growth in absolute terms had lessened in 2008 when compared to the extremely rapid rate of growth seen in 2007, the quantities of Chinese imports in 2008 continued to grow in a rapid manner.[142] The United States contends that it does not matter that subject imports may have increased at a lower rate in 2008 than they did in 2007.

7.65 The United States continues that in 2008 the absolute volume of imports was 10.8 per cent higher than 2007; 70 per cent higher than in 2006; 121 per cent higher than in 2005; and 215.5 per cent higher than in 2004.[143] The United States argues that it should be clear that in 2008 Chinese imports of subject tyres continued to increase in a rapid manner, just as they had throughout the period of investigation.[144]

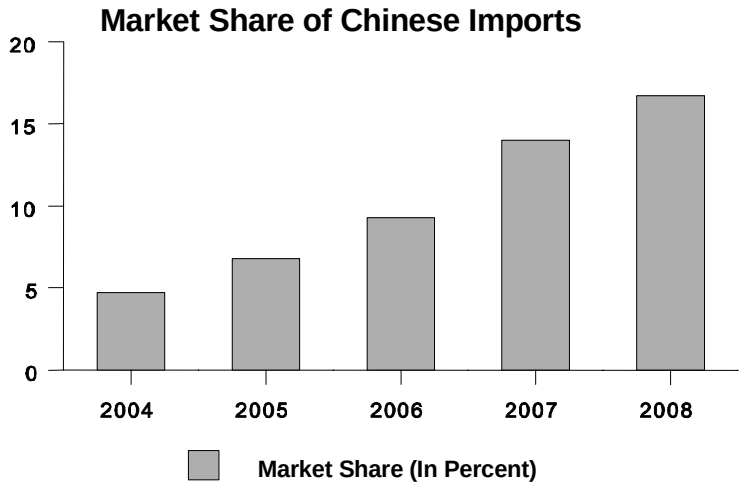
7.66 The United States argues that China's discussion of the *US – Steel Safeguards* case is misleading. The United States argues that the panel's decision in that case was based on a sharp decline in absolute and relative terms at the end of the period and trends in absolute imports that differ significantly from this case, i.e., "an alternation of increases and decreases from year to year"[145] rather than the upwards trend from year to year in the current case.

7.67 The United States notes that both the market share of the subject imports and the ratio of subject imports to U.S. production rose considerably throughout the period examined, with the two largest year to year increases, in both sets of data, occurring in 2007 and 2008.[146] The United States submits, therefore, that the USITC had a reasonable basis for finding that the increase in 2008 continued to be "large", "rapid" and "significant".[147]

7.68 The United States notes that in 2007 and 2008 there was a 62 per cent growth in the market share of subject imports.[148] Overall, the market share of subject imports increased by 12 percentage points between 2004 and 2008. The market share in 2008 was 2.7 percentage points higher than 2007; 7.4 percentage points higher than in 2006; 9.9 percentage points higher than in 2005; and 12.0 percentage points higher than in 2004.[149]

7.69 The United States provides the following graph to illustrate the increases in market share:[150]

[141] United States' Second Written Submission, para. 23.
[142] United States' Second Written Submission, para. 25.
[143] United States' Second Written Submission para. 20, and USITC Report pages 11-12 and Table C-1.
[144] United States' Second Written Submission, para. 20.
[145] U.S. comment on China's Reply to Question 36 from the Panel, paras. 20-22. Panel Report, *US – Steel Safeguards*, para. 10.206.
[146] United States' First Written Submission, para. 111.
[147] United States' First Written Submission, para. 120 - 122.
[148] United States' First Written Submission, para. 122.
[149] USITC Report, pages 11-12 and Table C-1.
[150] United States' First Written Submission, para. 21; USITC Report Table C-1.




7.70 The ratio of subject imports to U.S. production increased by 22 percentage points between 2004 and 2008[151] with the highest annual increase in 2007 and the second highest annual increase in 2008.[152]

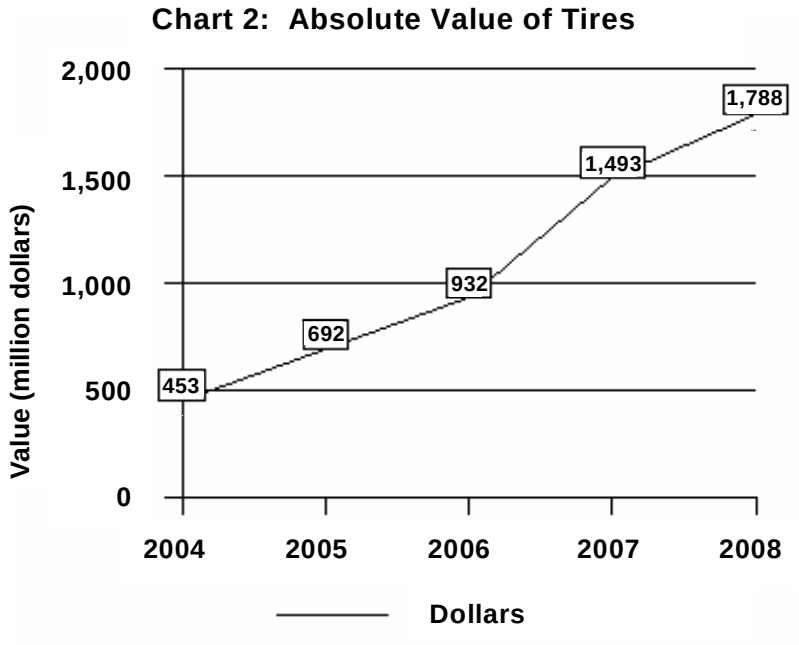
7.71 The United States argues that the USITC did not merely recite that there was a growth in imports between the first and last years of the period. Rather, the United States argues that the USITC specifically considered the growth in absolute and relative quantities for the subject imports during each year of the period of investigation, and in particular for 2007 and 2008 and concluded that the subject imports increased throughout the period and by significant amounts in each year.[153]

7.72 The United States notes that an investigating authority is not forbidden from examining trends in imports between the end points of an investigation and acknowledges that it should also be looking at trends over the entire period.[154] The United States recalls that the Appellate Body has explained that, in the context of the *Safeguards Agreement*, the "competent authorities should not consider such data [from the most recent past] in isolation from the data pertaining to the entire period of investigation".[155] The United States contends that the increase in imports in the *Argentina – Footwear (EC)* case, and specifically the drop in the final two years motivated the comments about an end-point-to-end-point analysis by the Appellate Body. The United States argues that the facts of the present case are very different and that the USITC correctly concluded that the increases in subject imports were "large, rapid and continuing" throughout the period, including the final years of the period examined by the USITC.[156]

7.73 The United States claims that the Protocol does not prohibit a competent authority from considering trends in the value of subject imports. The United States notes that the value of subject

[151] United States' First Written Submission, para. 111.
[152] United States' First Written Submission, para. 122.
[153] United States' First Written Submission, para. 114 quoting USITC Report page 12.
[154] United States' First Written Submission, para. 116, quoting Appellate Body Report, *Argentina – Footwear (EC)*, para.129 and Appellate Body Report, *US – Lamb* paras. 137-138.
[155] Appellate Body Report, *US – Lamb*, paras. 137-138.
[156] United States' First Written Submission, para. 118, quoting USITC Report at page 12.

imports increased by 294.5 per cent between 2004 and 2008 and provides the following graph to illustrate the changes in value over the period of investigation:[157]




7.74 The U.S. claims that imports of subject tyres from China at the beginning of the period were not small. In 2004 imports from China were five per cent of the market and the fourth largest import source.[158] The United States argues that whether or not subject imports were small at the beginning of the period, they had become a large presence in the market at the end of the period.[159]

7.75 The United States argues that the Protocol does not require the inclusion of the most recently concluded quarterly data. The U.S. contends that the USITC's choice of a five year period of investigation that ended less than four months before the beginning of the investigation satisfies the standard under the Protocol.

7.76 The United States explains that:

> ... the ITC has an established practice in investigations under Section 421 of collecting, at a minimum, five full years of data, plus for any interim period that can reasonably be collected, when conducting its investigations. The ITC decides on a case-by-case basis, whether to attempt to collect data for the 'interim period,' which is the most recently completed period of less than a full calendar year.[160] (footnotes omitted)

7.77 The United States continues that the USITC considers a number of factors in deciding whether to use interim data including: the likelihood of obtaining full information; the amount of time elapsed between the end of the most recent quarter and the issuance of questionnaires; and the number of parties.[161] The United States notes that the USITC is less likely to seek data for a particular

[157] United States' First Written Submission, paras. 108-109. USITC Report, pages 11-12 and 22.
[158] United States' First Written Submission, para. 129.
[159] United States' First Written Submission, para. 129.
[160] United States' First Written Submission, para. 132.
[161] United States' First Written Submission, para. 132.

quarter if a relatively small amount of time has elapsed between the end of the quarter and the beginning of the investigation, if participants in the market are unlikely to provide meaningful information, or if the number of participants is large so that the USITC is unlikely to obtain reasonably complete data in the time allocated.[162]

7.78 The United States argues that in the *Tyres* case, data was needed from 10 U.S. producers, 35 importers and 36 foreign producers. The USITC believed that "a relatively complete data series for that period would not have been available in time for use in this investigation".[163] The United States continues that China fails to mention that in the five Section 421 cases it argues interim data was used, the period of time that had elapsed between the end of the most recent quarter and the filing of the petition ranged from 33 to 67 days.[164] In the *Tyres* case just 20 days had elapsed between the end of the quarter and when the petition was filed and the staff began preparing questionnaires.[165]

7.79 The United States submits that the USITC takes a case by case approach regarding the availability and usefulness of interim data.[166] The United States argues that the antidumping and countervailing investigations referred to by China are not analogous to the *Tyres* case. For 10 of the 11 preliminary-phase investigations that occurred in 2009, the period of time that elapsed between the end of the quarter and the filing of the petitions ranged between 29 and 100 days, "considerably longer than the 20 days between the end of the quarter and the filing of the petition in the *Tires* case".[167] The United States continues that there have been occasions where a petition has been filed more than 20 days after the end of a quarter where the USITC has not collected interim data. The United States argues this demonstrates further that the decision to collect interim data "depends on the nature and complexities of the relevant investigation".[168]

7.80 The United States explains that in the case of *Uncovered Innerspring Units from China*, China does not recognise that the USITC reasonably concluded that asking parties to provide a set of data for one full year as opposed to data for a full year plus two interim periods was likely to place a significantly lower reporting burden on participants. The United States explains:

> In the Innersprings investigation, the ITC collected data for five full years, 1999, 2000, 2001, 2002, and 2003. *Uncovered Innerspring Units from China*, Inv. No. TA-421-5, USITC Pub. 3676 at I-12, III-7-8 (March 2004). If the ITC had chosen to collect data only through the third quarter of 2003, then it would have had to collect data for seven, rather than five reporting periods: 1998, 1999, 2000, 2001, and 2002, plus interim data for the first three quarters of 2003 and the first three quarters of 2002. This would obviously have increased the burden considerably on all respondents.[169]

7.81 The United States argues that absent data to assess whether imports were increasing on a relative basis, it would not have been possible for the USITC to assess whether imports were "increasing rapidly".[170] The United States continues that the USITC's ability "to determine whether imports were increasing on a relative basis was a necessary component of its 'increasing imports' analysis. Even if the available data showed that imports were declining on an absolute level during

[162] United States' First Written Submission, para. 132.
[163] USITC Report, page 12 footnote 55.
[164] United States' First Written Submission, para. 135.
[165] United States' First Written Submission, para. 133.
[166] United States' First Written Submission, para. 137.
[167] United States' First Written Submission, para. 137.
[168] United States' First Written Submission, para. 138.
[169] United States' First Written Submission, para 136, footnote 265. Emphasis in original.
[170] United States' First Written Submission, para. 141.

the first quarter of 2009, the USITC would still not have been able to conclude that imports were not increasing rapidly overall because it could not assess whether they were increasing rapidly on a relative basis".[171]

### 3. Evaluation by the Panel

7.82 The Panel begins by reviewing various data concerning the volume of subject and non-subject imports in absolute terms. We then consider China's arguments regarding the interpretation of the phrase "increasing rapidly". Thereafter, we consider issues regarding: the USITC's determination that imports were increasing rapidly in relative terms; China's argument that the USITC improperly relied on an end-point-to-end-point analysis of imports; China's argument that the USITC improperly relied on increases in value rather than increases in volume; China's argument that the USITC should have taken account of the fact that subject imports began from a low base; and China's argument that the USITC should have collected data for the first quarter of 2009.

*(i) Review of import data*

7.83 We summarise below the import data on the absolute increase in the volume of subject imports in each year of the period of investigation[172]; and the percentage increase in subject imports year on year between 2005 and 2008.[173]

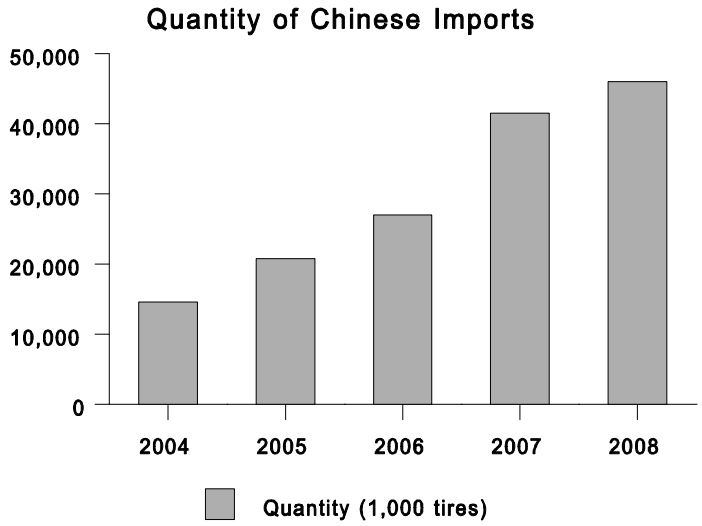
| Year | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| **Quantity of subject imports (1,000 tyres)** | **14,575** | **20,790** | **27,005** | **41,503** | **45,975** |

| Year | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| **Increase in subject imports (percentage points)** | **-** | **42.7** | **29.9** | **53.7** | **10.8** |

7.84 There were absolute increases in subject imports in each year of the period of investigation. This resulted in an overall increase of 31 million units, or 215.5 per cent, in subject imports from China by the end of the period.[174] The greatest increase occurred in the last two years of the period.[175] Regarding non-subject imports, the next largest increase in imports between 2004 and 2008 was from Indonesia, representing an increase of just 3.9 million units.[176] The absolute increases in volume of

[171] United States' First Written Submission, para. 141. USITC Report, page 12, footnote 55.
[172] Data referred to comes from the USITC Report, Table C-1.
[173] Data referred to comes from the USITC Report, Table C-1.
[174] USITC Report, pages 11-12, and Table II-1.
[175] We note that there was a 14.5 million unit increase in subject imports in 2007 compared to 2006, representing a 53.7 per cent increase; and a 4.5 million unit increase in 2008 compared to 2007, representing a 10.8 per cent increase. The increase in 2008 was in addition to the large increase in 2007.
[176] USITC Report, Table II-1.

subject imports from China over the period of investigation are clearly depicted in the following graph:[177]




7.85 On the basis of this data, the USITC concluded:

> In absolute terms, imports of subject tires from China increased throughout the period of investigation and were the highest, in terms of both quantity and value, in 2008, at the end of the period. The quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008." The value of subject imports rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008.
>
> ...we find that the subject imports increased, both absolutely and relatively throughout the period by significant amounts in each year and, as stated above, were at their highest levels at the end of the period in 2008. Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.[178]

7.86 At first glance, taking into account the absolute import data outlined above, we see no error in the USITC's conclusion that there was a rapid increase in subject imports from China in absolute terms.[179]

---

[177] United States' Second Written Submission, para. 20. USITC Report, pages.11-12 and Table C-1.

[178] USITC Report, pages 11-12. Footnotes omitted. We consider relative data and data based on value in paras. 7.94-7.99 and 7.104 below.

[179] China also argues, as part of a 3 prong test, that there should be an analysis of the most recent year in more detail when the initial analysis shows imports are slowing. In this case, China argues that quarterly data for the final two years of the period of investigation should have been analysed. *See* China's Second Written Submission, para. 87 and China's Reply to Question 14, para. 56. We do not agree that subject imports were slowing in 2008. Indeed, in 2008 subject imports were at their highest levels in absolute terms. We note that China provides quarterly data for 2007 and 2008 in para. 127 of its First Written Submission and at Exhibit China-26. This data reveals that the two highest absolute quarterly quantities were Q2 and Q3 2008, and apart

*(ii) The meaning of the phrase "increasing rapidly"*

7.87 Despite these absolute increases, China argues that imports were not "increasing rapidly" in accordance with the Protocol. According to China, the use of the present continuous tense in the phrases "are being imported" (Paragraph 16.1) and "are increasing" (Paragraph 16.4) requires the investigating authority to focus on the *most* recent past, in this case 2008.[180] China asserts that this requirement for the most recent past is reinforced by the use of the term "increasing" in Paragraph 16.4, rather than the term "increased".[181] China also submits that the increase in imports must be "rapid", which China understands as requiring a quick progression in the rate of increase in the volume of imports.[182] We note that China outlines two scenarios for the meaning of "rapidly" and acknowledges that other scenarios might be possible.[183] The first scenario is that imports must be increasing at a consistently very high rate. The second scenario is that imports must be increasing at a higher rate in each successive year.[184] China argues that, regardless of the scenario, the rate cannot be declining rapidly and that it is "fatal" that the rate of increase from 2007 to 2008 was "a fraction of any of the prior years."[185]

7.88 We note China's argument that the use of the present continuous tense in the phrases "are being imported" (Paragraph 16.1) and "increasing" (Paragraph 16.4) require a focus on the most recent past. However, we recall that the Appellate Body has found the grammatical construction of the phrase "is being imported" in Article 2.1 of the *Safeguards Agreement* to mean that "the increase in imports must have been sudden and recent".[186] The Appellate Body did not find that the increase must have occurred in the *most* recent past.[187]

---

from the final quarter, on a comparative basis subject imports were higher in 2008 than 2007. See U.S. First Written Submission para. 28. In our view, the legal standard for finding imports to be "increasing rapidly" does not hinge on the final quarter comparison between 2007 and 2008.

[180] We note that China considers the most recent past will include the most recently completed year and any more recent period for which data is available. *See* China's Reply to Question 14 from the Panel, para. 53. China's Second Written Submission, para. 84. We address China's arguments regarding the need to include the first quarter 2009 data in paras. 7.106 to 7.109. We note that the situation during the period of investigation is used as a proxy for the situation pertaining currently at the time of imposition. Panel Report, *Japan – DRAMS (Korea)*, para. 7.357. *See* also Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58.

[181] China's Second Written Submission, para. 71.

[182] We also note that China considers a "rapid" increase is an *additional* requirement to the requirements in the *Safeguards Agreement*, thus setting forth a standard even more demanding under the Protocol. *See* China's First Written Submission, para. 67. We do not agree that it is useful to compare the *Safeguards Agreement* and the Protocol in this way. The obligations under the Protocol must be interpreted according to the *Vienna Convention*.

[183] China's Second Written Submission, para 77. China's First Written Submission, para. 81.

[184] We note that China focuses on the second of these scenarios, as do we in our analysis. See, for example China's First Written Submission, paras. 115, 120-126, and 131-135; Oral Statement by China at the First Panel Meeting, paras. 26-31; China's Reply to Questions 13 and 14, paras. 49-55; China's Second Written Submission, paras. 110-117.

[185] China's Second Written Submission, para. 112.

[186] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130. We do not consider the term "sudden" applies here given Paragraph 16.4 of the Protocol includes the term "rapidly". Since Article 2.1 of the *Safeguards Agreement* does not refer to the term "increasing rapidly", case law interpreting what is happening to imports under Article 2.1 of the *Safeguards Agreement* is of limited contextual relevance.

[187] We note that the period of investigation needs to be recent in order to be relevant, but still long enough to ensure a proper analysis of what is happening to imports over the period, with a focus on the latter part of the investigation. Appellate Body Report, *US – Steel Safeguards*, para. 374.

7.89 According to the panel in *US – Line Pipe*:

> The word 'recent' – which was used by the Appellate Body in interpreting the phrase 'is being imported' – is defined as 'not long past; that happened, appeared, began to exist or existed lately'.[188] In other words, the word 'recent' implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation.[189]

7.90 The findings of the Appellate Body in *Argentina – Footwear (EC)* and the Panel in *US – Line Pipe* are applicable here. We consider that the phrase in Paragraph 16.1 of the Protocol, "are being imported" is essentially the same as the phrase "is being imported" in Article 2.1 of the *Safeguards Agreement*. As such, we consider that the Appellate Body's interpretation of the temporal implications of the phrase "is being imported" provides useful guidance in this case. We are also guided by the finding of the panel in *US – Line Pipe* that, although "the word 'recent' implies some form of retrospective analysis... [i]t does not imply an analysis of the conditions immediately preceding the authority's decision". These findings suggest that there is nothing in the use of the present continuous tense in Paragraphs 16.1 and 16.4 of the Protocol that would require an investigating authority to focus on the movements in imports during the *most* recent past, or during the period immediately preceding the authority's decision.

7.91 We recall China's focus on the fact that Paragraph 16.4 uses the term "increasing", in the present continuous tense, rather than the past tense "increased". China argues that the difference between imports that have "increased rapidly" and imports that are "increasing rapidly" means that an investigating authority must find that imports are still "increasing" rapidly during the most recent period. We agree there is a temporal difference between imports that have increased rapidly and those that are increasing rapidly. However, the text of Paragraph 16.1 does not say "increased rapidly". The text says "are being imported … in such increased quantities" and, as acknowledged by China, this phrase uses the same grammatical tense as the phrase "increasing rapidly" in Paragraph 16.4. Reading the terms "increased" and "increasing" in their proper context, we do not consider that the use of the term "increasing" in Paragraph 16.4 requires a focus on a more recent period than the term "increased" in Paragraph 16.1.[190]

7.92 We note that the ordinary meaning of rapid means "progressing quickly; developed or completed within a short time".[191] The adverb "rapidly" is defined as "… with great speed, swiftly".[192] There is no reference to the rate of increase in the dictionary meaning of "rapidly", nor any suggestion that imports can only increase rapidly if there is an increase in the rate of increase in those imports. Accordingly, in order for imports to be "increasing rapidly", they need only be increasing "with great speed", or "swiftly". There is no need for any swift progression in the *rate* of increase in those imports. Nor does a decline in the rate of increase necessarily preclude a finding that imports are "increasing rapidly". Under the Protocol the rapid increase need only be on an absolute or relative basis.

---

[188] *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).

[189] Panel Report, *US – Line Pipe*, para. 7.204.

[190] China also relies on its understanding of the object and purpose of Paragraph 16 of the Protocol to support its call for a narrow interpretation of the phrase "increasing rapidly". We address China's arguments regarding the object and purpose of Paragraph 16 of the Protocol at paras. 7.147-7.149.

[191] Shorter Oxford English Dictionary, Vol.2, page 2463. Both China and the United States acknowledge this dictionary definition. *See* China's First Written Submission, para. 79. United States' First Written Submission, para. 87.

[192] Shorter Oxford English Dictionary, Vol. 2, page 2465.

7.93 Furthermore, even if the USITC had been required to focus on imports during the last year of the period, the fact that the 10.8 per cent increase in 2008 was lower than the increase in the preceding year does not mean that imports were not "increasing rapidly" in 2008. An increase of 10.8 per cent in 2008 by no means precludes a finding that imports are "increasing rapidly", especially when that increase is assessed in context.[193] Nor is it a "modest" increase.[194] In this regard, we recall that the 10.8 per cent increase in absolute volumes between 2007 and 2008 was *in addition* to an increase of 53.7 per cent between 2006 and 2007, which was *in addition* to an increase of 29.9 per cent between 2005 and 2006, which was *in addition* to an increase of 42.7 per cent between 2004 and 2005. In our view, the 10.8 per cent increase in absolute volumes from 2007 to 2008 reinforces the USITC's conclusion that imports were "increasing rapidly" during the period, and continued to be "increasing rapidly" at the end of the period.

*(iii) Relative increase in imports*

7.94 We note that there is no definition in the Protocol for imports that are "increasing rapidly... relatively". Therefore, in our view, any reasonable form of a relative assessment is acceptable. As such, the interpretation of this factor is not necessarily limited to a consideration of the market share of Chinese imports, i.e., imports from China as a percentage of total consumption. We see no reason why imports relative to domestic production cannot also be considered. We note that in this case the USITC considered *both* imports relative to market share *and* imports relative to domestic production.[195] Specifically, the USITC found that:

> Both the ratio of subject imports to U.S. production and the ratio of subject imports to U.S. apparent consumption rose throughout the period examined, and both ratios were at their highest levels of the period in 2008. The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with the two largest year-to-year increases occurring at the end of the period in 2007 and 2008. The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008.[196]

7.95 We summarise below the data regarding the market share of China's imports compared to the market share of non-subject imports:[197]

| U.S. imports from: | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| **China (%)** | 4.7 | 6.8 | 9.3 | 14.0 | 16.7 |
| **All other sources (%)** | 31.9 | 33.6 | 34.5 | 33.4 | 33.7 |

7.96 There was an increase in the market share of subject imports from China in every year, leading to a 12 percentage point increase over the period of investigation. In comparison, the market share of non-subject imports was more or less stable.[198]

[193] And we note that in making its finding the USITC considered the "increase and rate of increase in subject imports". USITC Report, page 11.
[194] China's First Written Submission, para. 125.
[195] USITC Report, page 12.
[196] USITC Report, page 12. *See* also Table II-2 and Table V-1.
[197] USITC Report, Table C-1.

7.97 We summarise below the data for subject imports as a percentage of domestic production.

| Year | 2004 | 2005 | 2006 | 2007 | 2008 |
|---|---|---|---|---|---|
| **Subject imports as % of domestic production** | 6.7 | 10.0 | 14.6 | 23.0 | 28.7 |

7.98 We note that there were increases in subject imports relative to domestic production year after year, as demonstrated in the above table.[199] There was a 22 percentage point increase in subject imports relative to domestic production over the period of investigation. Thus, regardless of a focus on imports relative to market share or relative to domestic production there were increases from year to year and significant increases over the period of investigation.

7.99 China argues that "stable" changes in market share reveal that imports are not increasing rapidly on a relative basis (See table in para. 7.45, above: the change in the market share between 2004 and 2005 was 2.1 percentage points; between 2005 and 2006 was 2.5 percentage points; between 2006 and 2007 was 4.7 percentage points; and between 2007 and 2008 was 2.7 percentage points). While we consider comparing rates of increase from year to year might be useful, we have already explained its limitations. The *change* in the market share seems to us a step further away again from the text of the Protocol where the obligation is to find rapid increases "either absolutely or relatively".

7.100 In any event we have, up to this point, determined that the USITC gave a reasonable and adequate explanation for concluding that the absolute data indicates that imports are "increasing rapidly". That is sufficient under the Protocol and it is not necessary to consider the situation in relation to relative data. However, for the sake of completeness we have done so, and find that given rapidly increasing subject imports from China relative to domestic production and relative to market share, imports are "increasing rapidly" in relative terms.

*(iv) End-point-to-end-point analysis*

7.101 The Panel next considers China's arguments regarding the utility of an end-point-to-end-point analysis by recalling what the Appellate Body said in *Argentina – Footwear (EC)*:

> We agree with the Panel that Articles 2.1 and 4.2(a) of the *Agreement on Safeguards* require a demonstration not merely of *any* increase in imports, but, instead, of imports 'in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury.' In addition, we agree with the panel that the specific provisions of Article 4.2(a) require that 'the *rate* and *amount* of the increase in imports...in absolute and relative terms'(emphasis added) must be evaluated. Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a). As a result, we agree with the Panel's conclusion that 'Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in

[198] Non-subject imports are discussed in more detail in the discussion on other causes of injury at paras. 7.364 to 7.367.

[199] China argues that the domestic production factor is unreliable given that the "domestic industry is engaging in a conscious strategy of shifting some of its production offshore …". China's Reply to Question 38 from the Panel, para. 51. We address the business strategy issue in paras. 7.285-7.322.

> 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used.[200]

7.102 As we understand it the Appellate Body is not saying that an end-point-to-end-point analysis is prohibited in all circumstances. But, rather, that the investigating authority in *Argentina – Footwear (EC)* did not assess the trends in imports during the period of investigation adequately, and did not take into account the particular sensitivity of the analysis to the end points selected given intervening trends. That is, the investigating authority in that case did not adequately consider the declines in absolute and relative imports in the final two years of the investigation.[201] Such was the significance of the decreases in that case that a one-year change in the base year "transformed the increase relied upon by Argentina into a decline".[202] We note that in the case before us the facts are very different. The USITC did not rely exclusively on an end-point-to-end-point analysis, but rather engaged in various temporal comparisons.[203] Furthermore, there was not even a predominant reliance on an end-point-to-end-point analysis, as the USITC relied on the fact that there was an absolute and relative increase in subject imports in every year of the investigation.[204]

7.103 China claims that an end-point-to-end-point-analysis "can obscure the more relevant analysis of what is happening over the more recent period".[205] We note that the Appellate Body in *US – Steel Safeguards* was concerned that a "simple end-point-to-end-point analysis could easily be manipulated" in cases where there is no "clear and uninterrupted upward trend in import volumes".[206] In this case, however, there was "a clear and uninterrupted upward trend in import volumes". As such, the results could not be manipulated by the selection of end points.[207]

*(v) Value / volume*

7.104 The Panel next considers China's argument that the USITC relied on increases in value rather than increases in volumes. The Panel begins by noting that even though the text of the Protocol refers to quantities, it does not prohibit an analysis that looks at the value of imports. We note that in this case the USITC assessed both the quantity and value of imports.[208] The value of subject imports rose by 294.5 per cent between 2004 and 2008; 52.6 per cent between 2004 and 2005; 34.7 per cent between 2005 and 2006; by 60.2 per cent between 2006 and 2007, and by 19.8 per cent between 2007 and 2008.[209] If an assessment of the quantity of imports tells a starkly different story to that of value due to factors influencing value being something other than volumes of imports, then a more searching analysis might discount an assessment based on value. However, China has not presented any arguments to suggest that the increase in value in this case could be explained by factors other than an increase in subject imports.[210]

---

[200] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (Footnotes omitted).
[201] Panel Report, *Argentina – Footwear (EC)*, paras. 8.153 – 8.164.
[202] Panel Report, *Argentina – Footwear (EC)*, para. 8.164.
[203] *See* para. 7.85.
[204] *See* paras. 7.83-7.86 and 7.94-7.100 on absolute and relative data.
[205] China's Second Written Submission, para. 105.
[206] Appellate Body, *US – Steel Safeguards*, para 354.
[207] We note that China also argues that the USITC needed to focus on the most recent period and look at increases in 2008 relative to the entire period. China considers the failure by the USITC to focus on 2008 in this way was "in "large part [due] to its over reliance on an 'end-point-to-end-point' analysis". We have considered the relevance of the *most* recent period in paras. 7.87-7.93.
[208] USITC Report, pages 11-12.
[209] *See* USITC Report, Table C-1.
[210] We note that Table II-I in the USITC Report provides information regarding the per unit price of subject imports. It shows that the increase in price over the period (from 31.10 per unit in 2004 to 38.90 per unit

*(vi) Low base*

7.105 China also argues that there was a "low" base at the beginning of the investigation period and this was never put into context by the USITC. In our view subject imports were not "low" at the beginning of the period. Having five per cent of the market at a value of 450 million dollars, and being the fourth largest import source are far from humble beginnings. Furthermore, gaining 12 percentage points in market share at a value of 1.7 billion dollars, and becoming the largest import source over the period of investigation means subject imports were a large and significant presence in the market at the end of the period.[211]

*(vii) Interim data for the first quarter of 2009*

7.106 Finally, the Panel addresses China's argument that data from the first quarter of 2009 should have been included in the period of investigation. The Panel begins its analysis by recalling footnote 55 on page 12 of the USITC Report which explains why the USITC did not collect or analyse Q1 2009 data.

> ... The data the Commission compiled and relied upon in this investigation, however, did not include first quarter 2009 data because a relatively complete data series for that period would not have been available in time for use in this investigation. The first quarter 2009 import data also are of no probative value in determining whether subject imports are increasing rapidly in relative terms in the absence of a data series that includes first quarter 2009 data on U.S. production and U.S. apparent consumption. Thus consideration of first quarter 2009 import data alone would not change our finding that imports of the subject imports from China are increasing rapidly, both absolutely and relatively."[212]

7.107 Regarding the selection of an investigation period, we recall that WTO jurisprudence in relation to the *Safeguards Agreement* says that where there are no specific rules as to the length of the period of investigation, the period selected must be sufficiently long to allow conclusions to be drawn regarding increased imports, and the period must allow an investigating authority to focus on recent imports.[213] We consider that the same logic applies in the context of the Protocol. In our view, given that there are no precise guidelines in the Protocol, the selection of a five year period of investigation that ended less than four months before the beginning of the investigation provides recent data and satisfies the standard under the Protocol.

7.108 We note that the Parties do not agree on what the USITC standard practice is regarding interim data. China argues that the USITC has a "well-established and consistent practice of collecting interim data in other cases".[214] The United States says that the USITC has an established practice in investigations under Section 421 "of collecting, at a minimum, five full years of data, plus any interim period that can reasonably be collected"[215] but that the USITC decides on a case-by-case basis whether to attempt to collect data for the interim period.[216] For the purposes of our analysis we

---

in 2008, or a 25 per cent increase) was substantially less that the overall increase in value (294.5 per cent between 2004 and 2008).

[211] USITC Report, Table C-1.

[212] USITC Report, page 12, footnote 55.

[213] Panel Report, *US – Line Pipe*, para. 7.201.

[214] China's First Written Submission, para. 139.

[215] United States' First Written Submission, para. 132.

[216] United States' First Written Submission, para. 132. Regarding the United States argument drawing on *US – Lamb* to support its view of a recent period of time, we note that the comments by the Appellate Body in that case were in relation to the evaluation of the state of the domestic industry when making a threat

do not consider it relevant whether the USITC deviated from its standard practice, only whether the choice of an investigation period was reasonable and adequate, and we have concluded that it was.[217]

7.109 We note that the USITC was concerned at not having relative data for the first quarter of 2009 and considered that even if it had collected absolute data for the first quarter of 2009, it would have served no probative value as it could not have completed the analysis regarding rapidly increasing imports without relative data. We note also that in the other Section 421 investigations both absolute and relative data were included.[218] Given the requirement to consider imports that are "increasing rapidly, either absolutely or relatively" it seems only practical that all data be available for any period selected as part of the investigation period in order to be able to determine whether imports are "increasing rapidly". In any event, we do not consider the USITC was obliged to collect and incorporate absolute and relative data for the first quarter of 2009 into its period of investigation.

### 4. Conclusion

7.110 For all of the above reasons, we conclude that the USITC did not fail to evaluate properly whether imports from China met the specific threshold under Paragraph 16.4 of the Protocol of "increasing rapidly".

## C. IS THE U.S. IMPLEMENTING STATUTE'S CAUSATION STANDARD INCONSISTENT AS SUCH WITH PARAGRAPH 16.1 AND PARAGRAPH 16.4 OF THE PROTOCOL?

7.111 China claims that Section 421 is "as such" inconsistent with Paragraph 16 of the Protocol (irrespective of the way in which the USITC applied that standard in the *Tyres* investigation), because it fails to fully implement the "significant cause" standard set forth in Paragraph 16.4 of the Protocol. China asserts that the U.S. implementing statute properly cites the appropriate causation standard as "significant cause", but then improperly defines "significant cause" as:

> a cause which *contributes significantly* to the material injury of the domestic industry, but *need not be equal to or greater than any other cause*.[219]

7.112 China's claim focuses on two elements of the definition set forth in the statute. First, China asserts that the statute lowers the Paragraph 16.4 causation standard by redefining "significant cause" as "contributes significantly". Second, China contends that the statute further lowers the causation standard by allowing imports to be a less important factor than any other single cause, no matter how minor that other cause might be.

7.113 The United States contends that the causation standard of the U.S. implementing statute is fully consistent with the provisions of the Protocol.

---

determination. The comments were not in relation to increased imports. Therefore we do not consider it relevant context for the purposes of this case. In any event we have already given our views on the temporal element to be considered under the Protocol in interpreting "increasing rapidly" - i.e. that it is the recent period of time that needs to be considered, while also considering trends over the period of investigation with particular attention on what is happening to imports in the latter part of the period.

[217] We note that, in the Section 421 investigations mentioned by China, the amount of time that had elapsed between the end of the most recent quarter and the filing of the petition ranged from 33 to 67 days, compared to the 20 days in this case. We consider this difference notable. We also note that responses to questionnaires were due on 7 May 2009, and it is arguably not reasonable to expect exporters, importers and producers to supply first quarter absolute and relative data by 7 May.

[218] China's Reply to Question 37 from the Panel, paras. 44-47.

[219] 19 U.S.C. § 2451(c)(1). (emphasis supplied)

7.114 Before turning to the substance of the parties' arguments, we first examine a threshold issue regarding the application of the mandatory/discretionary distinction.

### 1. Threshold issue regarding the application of the mandatory/discretionary distinction

7.115 We note the U.S. argument that, consistent with a long-standing distinction in GATT and WTO case law between mandatory and discretionary legislation, China must demonstrate that Section 421 mandates, or requires, the USITC to apply a causation standard that is inconsistent with the Protocol. The United States submits that there is nothing in the U.S. statute that mandates action that is inconsistent with the United States' obligations under the Protocol.

7.116 China contends that "the Appellate Body has explained that panels are *not* obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory".[220] China further contends that the general status of the mandatory/discretionary distinction is unsettled, and accordingly the Appellate Body has urged "caution against the application of this distinction in a mechanistic fashion".[221] China submits that, in any event, Section 421 does require the USITC to apply a fundamentally flawed definition. China asserts that the United States has not argued, and indeed cannot argue, that the USITC was free to disregard the statutory definition at its discretion.[222] China asserts that whenever the USITC makes the legal finding that imports are "a significant cause" of material injury, this finding is necessarily defined to be something different from (and lower in standard than) a finding of "significant cause" in accordance with the correct standard under the Protocol.

7.117 While we acknowledge that the Appellate Body has cautioned against the application of this distinction "in a mechanistic fashion", the Appellate Body has not expressly ruled out the applicability of the mandatory/discretionary distinction in the context of assessing the WTO-consistency of a legislative measure. Rather, the Appellate Body has itself implicitly applied the distinction. Thus, in *US – Carbon Steel*, the Appellate Body upheld the panel's ruling on the basis that "the European Communities did not satisfy its burden of proving either that United States law *mandates* USDOC to act inconsistently with Article 21.3 of the *SCM Agreement*, or that such law restricts in a material way USDOC's *discretion* to make a determination consistent with Article 21.3 in a sunset review".[223] The Appellate Body also did not rule out the application of the mandatory/discretionary distinction when the occasion to do so presented itself in *US – Zeroing (EC) (Article 21.5 – EC)* Instead, the Appellate Body repeated an earlier finding that "the import of the 'mandatory/discretionary distinction' may vary from case to case".[224]

7.118 In practice, the import of the mandatory/discretionary distinction is most pronounced in cases where, although a Member's law appears to be WTO-inconsistent on its face, there is sufficient discretion to allow national authorities to apply the law in a WTO-consistent manner. In such cases, the discretion reserved to national authorities "saves" the statute. For the reasons set forth below, we do not consider that Section 421 appears inconsistent on its face. In this case, therefore, the potential import of the mandatory/discretionary distinction is limited. That being said, we consider that we should approach China's "as such" claim against Section 421 by evaluating whether or not

[220] Panel Report, *US – Customs Bond Directive*, para. 7.209 (emphasis in original).
[221] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.
[222] The United States has admitted the definition is binding on the USITC. U.S. Reply to Question 20 from the Panel, para. 58.
[223] Appellate Body Report, *US – Carbon Steel*, para. 162 (emphasis supplied).
[224] Appellate Body Report, *US – Zeroing (EC) (Article 21.5-EC)*, para. 214, citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

Section 421 requires the United States to establish causation in a manner inconsistent with Paragraph 16 of the Protocol.[225]

### 2. Whether the statute lowers the Paragraph 16.4 causation standard by redefining "significant cause" as "contributes significantly"

(a) Arguments of the parties

7.119 **China** asserts that the U.S. "contributes significantly" definition is at odds with the ordinary meaning of the Paragraph 16.4 "significant cause" standard, interpreted in context and in light of the object and purpose of the Protocol.

7.120 In respect of the ordinary meaning of the terms, China contends that the statute improperly equates the word "cause" with "contribute", whereas these two words in fact have very different meanings. China asserts that the ordinary meaning of "cause" is "that which produces an effect or consequence"[226] or "something that brings about an effect or a result".[227] China contends that, by contrast, the ordinary meaning of "contribute" is "to play a part in the achievement of a result"[228], or "to play a significant part in bringing about an end or result"[229], which is a weaker notion than that of "cause". China contends that a cause "produces" or "brings about" the consequence, and does not merely "contribute to" or "play a part" in its occurrence.

7.121 China refers to the French and Spanish versions of the Protocol in support of its argument. China asserts that the French version uses the verb "causer", which means "to be at the origin of something, to have something as effect".[230] China asserts that the verb "contribuer" is defined so as to have a lower determinative value, meaning to merely "help with", or "have a part, more or less important, in the production of a result".[231] China makes similar arguments in respect of the translation and meaning of the Spanish terms "causar", "causa" and "contribuir".[232] According to China, both the French and Spanish versions of the text reveal the much less-determinative character of "to contribute" when compared with "to cause".

7.122 China asserts that the addition of the word "significant" strengthens this causal link requirement, since the Shorter Oxford English Dictionary defines "significant" as "important, notable, consequential".[233] China submits that the causal connection must be important, notable, or consequential, such that a simple causal connection is not sufficient. China contends that the ordinary meaning of "significant cause" therefore requires a particularly strong, manifest and important causal connection. China contends that the U.S. statute fails to reflect this standard, since a factor can make an "important contribution" at a far lower level of casual relationship than when it rises to the level of an "important cause".

---

[225] In doing so, we are guided in particular by the approach of the panel in *Korea – Commercial Vessels*, paras. 7.60–7.67.

[226] Shorter Oxford English Dictionary, Vol. 1, at 365 (2007 ed.).

[227] Webster's Ninth New Collegiate Dictionary, at 217 (1986 ed.).

[228] Shorter Oxford English Dictionary, Vol. 1, at 509 (2007 ed.).

[229] Webster's Ninth New Collegiate Dictionary, at 285.

[230] Trésor de la Langue Francaise, dictionary published by the CNRS (National Center for Scientific Research), available at: http://atilf.atilf.fr/tlf.htm.

[231] Trésor de la Langue Francaise, dictionary published by the CNRS (National Center for Scientific Research), available at: http://atilf.atilf.fr/tlf.htm.

[232] China's First Written Submission, para. 200.

[233] Shorter Oxford English Dictionary, Vol. 2, at 2833 (2007 ed.).

7.123 China relies on the context of the phrase "significant cause", and the object and purpose of the Protocol, to argue that "significant cause" should be interpreted more narrowly than the "causal link" causation standard set forth in Article 4.2(b) of the *Safeguards Agreement.*

7.124 Regarding context, China first notes that paragraph 246(c) of the Working Party Report provides:

> 246. …Members of the Working Party confirmed that in implementing the provisions on market disruption, WTO Members would comply with those provisions and the following: ….
>
> > (c) In determining whether market disruption existed, including the causal link between imports that were increasing rapidly, either absolutely or relatively, and any material injury or threat of material injury to the domestic industry, the competent authority would consider objective factors …

7.125 China contends that the term "cause" in Paragraph 16 of the Protocol and the phrase "causal link" in the Working Party Report are used synonymously. China then directs the Panel to the WTO case law regarding the interpretation of the phrase "causal link" in Article 4.2(b) of the Safeguards Agreement. In particular, China notes that the Appellate Body has found that the phrase "causal link" (as used in Article 4.2(b) of the *Safeguards Agreement*) requires a showing that there is a "*genuine and substantial relationship* of cause and effect between imports and threat of injury".[234]

7.126 China asserts that Paragraph 16.4 of the Protocol then goes further, as the word "significant" is used to strengthen the basic requirement to establish a "genuine and substantial relationship of cause and effect between imports and threat of injury". According to China, it is no longer enough for the relationship to be "genuine and substantial"; the relationship must be both "genuine and substantial" and also must be "significant". China asserts that, whereas the Protocol imposes a more stringent causation standard than the *Safeguards Agreement*, the U.S. statutory definition of "contributes significantly" actually lowers that threshold.

7.127 A further contextual element relied on by China concerns the meaning of the term "market disruption". China asserts that the word "disruption" means "break apart, throw into disorder, shatter; separate forcibly; esp. interrupt the normal continuity of (an activity etc); throw into disorder".[235] China also refers to the French and Spanish versions of the Protocol (which refer respectively to "désorganisation du marché" and "desorganización del Mercado").[236] China contends that the causal relationship that justifies the imposition of a product-specific safeguard measure must not only be significant, but also have the very serious consequence of throwing the market into disorder, breaking it apart, or shattering it.

7.128 As for object and purpose, China asserts that the Protocol as a whole should be viewed as an instrument which facilitates the expansion of trade. According to China, Paragraph 16 of the Protocol is an exceptional, country-specific measure designed to address unforeseen surges in imports from China – an "escape valve" to be used only in emergency situations as an extraordinary remedy. China contends that Paragraph 16 should therefore be given a narrow construction, to differentiate the higher

---

[234] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 132 (emphasis added).

[235] Shorter Oxford English Dictionary, Vol. 1, at 714 (2007 ed.).

[236] China's First Written Submission, para. 189.

causation standard of Paragraph 16 from the lower causation standard applied in the *Safeguards Agreement.*

7.129 The **United States** contends that China's argument regarding the distinction between "cause" and "contribute" is premised on the mistaken notion that the Protocol requires that imports from China be the sole cause of material injury to an industry. The United States asserts that China's argument is inconsistent with the text of the Protocol, as the Protocol provides that "market disruption shall exist" if Chinese imports constitute "*a* significant cause of material injury" to the industry. By providing that Chinese imports may constitute "a significant cause" of injury, the Protocol explicitly contemplates that there may be multiple significant causes of material injury or threat to an industry, a point which China ignores.

7.130 The United States asserts that China's argument is also inconsistent with the ordinary meaning of the word "cause". The United States contends that, while the Shorter Oxford English Dictionary defines the word "cause" as meaning a factor that "produces an effect or consequence" or "that brings about an effect or result"[237], there is no question that the word "cause" can be used to describe a situation where more than one factor brings about or produces a particular effect or result. According to the United States, one can correctly state that the "hearing room's heating system *and* the sun's rays on the windows of the hearing room caused the hearing room to be very hot during the morning session". The United States asserts that, given that it is entirely correct to use "cause" in this manner, it is also clear that "cause" can be used with respect to situations where multiple factors contribute to "bringing about" or "producing" an effect or result.

7.131 The United States further contends that China's argument is inconsistent with the Appellate Body's explanation of the terms "cause" and "causal link" in the *Safeguards Agreement* context. According to the United States, the Appellate Body examined the "causal link" requirement contained in Article 4.2(b) of the *Safeguards Agreement* in *US – Wheat Gluten*, and explained:

> The word "causal" means "relating to a cause or causes," while the word "cause," in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, "brought about," "produced,", or "induced" the existence of the second element. The word "link" indicates simply that increased imports have played a part in, *or contributed to*, bringing about serious injury so that there is a causal "connection" or "nexus" between these two elements. Taking these words together, the term "causal link" denotes, in our view, a relationship of cause and effect such that increased imports *contribute to "bringing about, "producing," or "inducing*" the serious injury.[238]

7.132 The United States contends that since China has conceded that the words "cause" and "causal link" are effectively the same for the purposes of the analysis set forth in the Protocol[239], this reasoning would suggest that the ITC can reasonably assess whether increased imports are a significant "cause" of injury to the industry by assessing whether they significantly "contribute" to the industry's injury.

---

[237] The United States refers in this regard to the dictionary definition set forth at para. 198 of China's First Written Submission.

[238] Appellate Body Report, *US – Wheat Gluten*, para. 67, emphasis supplied.

[239] The United States refers in this regard to China's First Written Submission, para. 180 ("the term 'cause' in the text of Article 16 of the Protocol and the phrase 'causal link' as used in the discussion of Article 16 of the Working Party Report are used synonymously").

7.133 The United States asserts that China is wrong to argue that by modifying "cause" with "significant", the Protocol simply took the causation standard of the *Safeguards Agreement* and made it more "severe". The United States contends that, under the *Vienna Convention*, each term must be interpreted in the context of its particular agreement. The United States asserts that such analysis demonstrates two different requirements: a "genuine and substantial relationship of cause and effect" under the *Safeguards Agreement* and an "important, notable, or consequential" cause under Paragraph 16 of the Protocol. The United States submits that China's effort to argue that one is more "severe" than the other is a pointless exercise, as it provides no guidance as to the meaning of either, or as to whether the causation standard under Section 241 is consistent with Paragraph 16 of the Protocol.

7.134 Regarding China's reliance on definitions of the words "market" and "disruption", the United States submits that there is no need for the Panel to consult a dictionary to define the term "market disruption" because the Protocol itself defines the term. The United States relies on Article 31.4 of the *Vienna Convention*, whereby "[a] special meaning shall be given to a term if it is established that the parties so intended". The United States contends that, in accordance with that principle, the Protocol's explicit definition of the term makes recourse to other sources unnecessary.

7.135 The United States disputes China's argument that a more "demanding" standard for causation should be applied under Paragraph 16 of the Protocol because the transitional product-specific safeguard mechanism is an "exceptional, country-specific measure designed to address unforeseen surges in imports from China".[240] The United States contends that China is mistaken in claiming that the transitional remedy under Paragraph 16 was intended to be used only in exceptional circumstances involving unforeseen surges in Chinese imports. According to the United States, the extraordinary nature of global safeguards is squarely rooted in the texts and immediate contexts of Article XIX of the GATT 1994 and the text of the *Safeguards Agreement*, which refer to the concepts of "emergency action" and "unforeseen and unexpected" developments. The United States contends that China's theory is based on the mistaken assumption that the basic principles that are applicable to an action taken under the *Safeguards Agreement* are also applicable to the transitional mechanism specified in the Protocol. The United States asserts that, unlike the provisions of Article XIX of the GATT 1994 and the provisions of the *Safeguards Agreement*, nothing in the Protocol indicates that the Protocol's transitional measure was intended to be an "emergency action"[241] or that the rapid increase in imports from China must be the result of "unforeseen developments".[242] The United States submits that, because similar terms and language were not included in Paragraph 16 of the Protocol, it is inappropriate to conclude, as China does, that the Appellate Body's statements about the "extraordinary" nature of a global safeguard apply to the transitional mechanism set forth in the Protocol.

(b) Evaluation by the Panel

7.136 The WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law. Accordingly, there is nothing to prevent a Member from including in its domestic law definitions of terms used in the WTO Agreement. Although a Member's decision to define WTO terms runs the risk that the resultant definition may not be WTO-consistent, WTO-inconsistency must not be presumed. Accordingly, the onus is on China to establish that the Section 421 definition of "significant cause" as "contributes significantly" is inconsistent with the causation standard set forth in Paragraph 16.4 of the Protocol.

[240] China's First Written Submission, paras. 191-193.
[241] GATT 1994, Article XIX:1(a); *Safeguards Agreement*, Article 11.1(a).
[242] GATT 1994, Article XIX:1(a).

7.137 China seeks to meet its burden by invoking dictionary definitions that allegedly show that the term "contribute" is less stringent than "cause". In particular, China submits that the ordinary meaning of "cause" is "that which produces an effect or consequence"[243] or "something that brings about an effect or a result"[244], whereas the ordinary meaning of "contribute" is merely "to play a part in the achievement of a result"[245], or "to play a significant part in bringing about an end or result"[246], which is a weaker notion than that of "cause". Thus, China contends that a cause "produces" or "brings about" the consequence, and does not merely "contribute to" or "play a part" in its occurrence.[247]

7.138 Looking exclusively at these dictionary definitions, one might legitimately conclude that a "contribution" has a lesser causal effect than a "cause". In particular, implicit in the definitional differences invoked by China is the notion that the term "contribute" allows for multiple factors to each "play a part in" bringing about a result, whereas "cause" means that the triggering event is in and of itself capable of bringing about, or producing, that result. In other words, a "cause" is capable of producing or bringing about a result on its own, whereas a "contribution" would only ever play a part in the occurrence of that result, along with other contributing factors.

7.139 We recall, though, that the terms of the Protocol must be interpreted in context. Of particular contextual importance in this regard is the fact that, according to Paragraph 16.4 of the Protocol, rapidly increasing imports need only be "a" significant cause of market disruption. In other words, the imports need not be the *sole* cause of the market disruption.[248] We note that the definitions cited by China do not appear to leave room for multiple causes. In particular, China invokes The Shorter Oxford English Dictionary definition of the noun "cause" as "*that which* produces an effect or consequence", and the verb "cause" as "to be *the* cause of, effect, bring about".[249] These definitions emphasise the singularity of the causal factor. The same emphasis on the singularity of cause is found in the French and Spanish definitions advanced by China. China notes that the French verb "causer" means "to cause", and is further defined as "to be at *the origin* of something, to have something as an effect". Regarding the Spanish version of Paragraph 16.4, China asserts that, in Spanish, the verb "causar" means "to cause", and is further defined as "when referring to a cause: produce its effect" as well as "[t]o be *the* cause, the reason and motive of the occurrence of something".[250] China further asserts that, "[n]otably, "causa" is defined as "cause"[251] as well as that "which is considered as fundamental to or *the origin* of something". Thus, both the French and Spanish definitions invoked by China suggest that an event has a single cause. In addition, both the French and Spanish definitions refer to the notion of "origin". Since an event may only have one origin, the singular nature of the causal factor inherent in the definitions proposed by China is again emphasised.

7.140 In the context of Paragraph 16.4, which refers to "*a* significant cause", we consider that Members must be entitled to interpret the term "cause" in a way that allows for the possibility that the

---

[243] Shorter Oxford English Dictionary, Vol. 1, at 365 (2007 ed.).
[244] Webster's Ninth New Collegiate Dictionary, at 217 (1986 ed.).
[245] Shorter Oxford English Dictionary, Vol. 1, at 509 (2007 ed.).
[246] Webster's Ninth New Collegiate Dictionary, at 285.
[247] The United States does not contest the dictionary definitions submitted by China.
[248] In its Reply to Question 19 (para. 61) from the Panel, China acknowledges that "the rapidly increasing imports need not 'produce' or 'bring about' the injury in and of themselves," but submits that "the causal role of subject imports ... requires something significantly more than mere contribution". This suggests that, for China, a contribution could necessarily only ever be a "mere" contribution. As explained below (*See* paras. 7.158 to 7.159), the Section 421 causation standard provides for more than a "mere" contribution.
[249] Shorter Oxford English Dictionary, Vol. 1, at 365-66 (2007 ed.).
[250] Diccionario de la Lengua Espanola, dictionary published by the Real Academia Espanola, available at: http://www.rae.es/rae.html.
[251] The Oxford Spanish Dictionary at 149 (2003 ed.).

causal factor is one of several causal factors that together produce or bring market disruption.[252] Where a Member does so, it is no longer appropriate to refer to each causal factor as "produc[ing] a result" (since this implies that each cause has produced the result on its own, which is not the case). Each causal factor might more accurately be said to play a part in producing that result. Since the ordinary meaning of "contribute" is to "play a part" in the achievement of a result"[253], it seems reasonable that Members might refer to multiple causes each "contributing" to the result.

7.141 Furthermore, we note that the parties in this case use the terms "cause" and "causal link" synonymously.[254] In the particular context of the Protocol, we agree with this approach. While Paragraphs 16.1 and 16.4 use the term "cause", paragraph 246(c) of the Working Party Report refers to the concept of "causal link":

> In determining whether market disruption existed, including the *causal link* between imports which were increasing rapidly, either absolutely or relatively, and any material injury or threat of material injury to the domestic industry, the competent authorities would consider objective factors, including (1) the volume of imports of the product which was the subject of the investigation; (2) the effect of imports of such product on prices in the importing WTO Member's market for the like or directly competitive products; (3) the effect of imports of such product on the domestic industry producing like or directly competitive products. (emphasis supplied)

7.142 According to paragraph 246(c), therefore, the finding of "cause" necessitated by Paragraph 16.4 might properly be referred to as a finding of "causal link". Thus, a finding that rapidly increasing imports are a (significant) cause of material injury is equivalent to a finding that there is a (significant) causal link between the imports and the injury. Regarding the meaning of the term "causal link" (in the first sentence of Article 4.2(b) of the *Safeguards Agreement*), the Appellate Body found in *US – Wheat Gluten* that:

> The word "link " indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal "connection" or "nexus" between these two elements." Taking these words together, the term "the causal link" denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about", "producing" or "inducing" the serious injury.[255]

7.143 The Appellate Body further explained that the "contribution must be sufficiently clear as to establish the existence of 'the causal link' required".[256] In other words, the Appellate Body finds that the existence of a causal link might be established on the basis of a (sufficiently clear) contribution. Since in the context of the Protocol the terms "cause" and "causal link" may properly be used synonymously, this guidance from the Appellate Body provides support – in the context of a provision that envisages a multiplicity of causal factors – for interpreting "cause" as "contribute to bring about".

---

[252] Although a Member might choose to interpret the term "cause" to mean *sole* cause, Paragraph 16 of the Protocol does not require them to do so.

[253] China's First Written Submission, para. 198.

[254] China's First Written Submission, para. 180, and United States' First Written Submission, para. 172.

[255] Appellate Body Report, *US – Wheat Gluten*, para. 67.

[256] Appellate Body Report, *US – Wheat Gluten*, para. 67.

7.144 In response to Question 5 from the Panel, China seeks to play down the relevance of the abovementioned finding by the Appellate Body (which concerned the first sentence of Article 4.2(b) of the *Safeguards Agreement*) by arguing that the ordinary meaning of the term "link" does not include the notion of "contribute to":

> China strongly doubts that the Appellate Body was focused here on the particular meaning of the word "contribute" and how this might relate to other possible formulations in relation to causation. Nor, in all likelihood, was the Appellate Body attempting to set in stone a definition of the term "link" for all future cases. More likely, the Appellate Body was concerned with setting out a reasoned explanation in the context of the particular circumstances of *US - Wheat Gluten*, as well as providing some useful guidance for the future.
>
> China notes the ordinary meaning of the word "link," as a noun, is "a connecting part" or "a means of connection." "Link" as a verb means "to connect or join (two things or one thing to another) with or as with a link." The notion of "contribute to" is simply not part of the ordinary meaning of "link."[257]

7.145 We are not persuaded by China's reading of the abovementioned finding by the Appellate Body in *US – Wheat Gluten*, or its suggestion that the Appellate Body could not have indicated that the term "link" might denote "contribution", for we are in no doubt that the Appellate Body was using the term "contribute" to denote the "connection" or "nexus" of the imports to the cause of the injury. This is abundantly clear from the Appellate Body's finding that "[t]he word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury". In other words, it is through the (causal) link that imports contribute to causing, i.e., bringing about, the injury.

7.146 Thus, in the context of a provision that envisages that there might be more than one "significant cause" of market disruption, it is not inconsistent with Paragraph 16.4 to interpret the ordinary meaning of the term "cause" as "contribute".

7.147 Before concluding, we recall that the term "cause" should also be interpreted in the light of the object and purpose of the treaty. In this regard, China submits that Paragraph 16 of the Protocol is an exceptional, country-specific measure designed to address unforeseen surges in imports from China – an "escape valve" to be used only in emergency situations as an extraordinary remedy.[258] China contends that Paragraph 16 should therefore be given a narrow construction, to differentiate the higher causation standard of Paragraph 16 from the lower causation standard applied in the *Safeguards Agreement.*

7.148 We note that the Appellate Body in *US – Shrimp* stated that:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be

[257] China's Second Written Submission, paras. 149–150, footnote omitted.

[258] We note the U.S. argument that because "the Protocol is an integral part of the WTO Agreement, as such, it does not have its own 'object and purpose', in the sense of Article 31(1) of the *Vienna Convention*". (U.S. First Written Submission, para. 66). We disagree. Even though the Agreement on Agriculture and *SCM Agreement* are both "integral parts" of the WTO Agreement (WTO Agreement, Article II:2), the Appellate Body has on various occasions referred to the object and purpose of these specific Agreements (*See*, for example, Appellate Body Report on *Canada – Autos*, paras. 138 and 142, and Appellate Body Report on *US – Upland Cotton*, paras. 613 and 623. We note that, in the latter case, even the United States referred to the object and purpose of the Agreement on Agriculture, as distinct from the WTO Agreement (*See* para. 68)).

> sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[259]

7.149 With regard to the claim that Paragraph 16 is an exceptional measure to be used only in emergency situations, the Panel notes that whether it is to be regarded as an emergency action or not the words of Article 16 still have to be interpreted in accordance with Articles 31 and 32 of the *Vienna Convention*.

7.150 To determine whether the Section 421 causation standard is inconsistent with the United States' WTO obligations, we must establish what that causation standard actually means. It is well established that, when ascertaining the meaning of domestic legislation, a panel might refer to evidence of the consistent application of that law.[260] In its defence, the United States has produced evidence to the effect that the "contributes significantly" definition is equivalent to the Protocol's "significant cause" standard because of consistent USITC practice requiring the demonstration of a "direct and significant causal link" between the rapidly increasing imports and the market disruption. In particular, the United States refers to the following extract from the USITC Report in the *Tyres* case:

> The third statutory criterion for finding market disruption is whether the rapidly increasing imports are a significant cause of material injury or threat of material injury. The term "significant cause" is defined in section 421(c)(2) of the Trade Act of 1974 to mean "a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause." The legislative history of section 406 describes the significant cause standard as follows:
>
> > Under this standard, the imports subject to investigation need not be the leading or most important cause of injury or more important than (or even equal to) any other cause, so long as a direct and significant causal link exists. Thus, if the ITC finds that there are several causes of the material injury, it should seek to determine whether the imports subject to investigation are a significant contributing cause of the injury or are such a subordinate, subsidiary or unimportant cause as to eliminate a direct and significant causal relationship.[261]

7.151 In addition, the United States refers to two additional Section 421 investigations: *Pedestal Actuators From China* and *Certain Ductile Iron Waterworks Fittings From China*. In both cases, the USITC made the same reference to the legislative history of Section 406. In our view, these three cases are sufficient to show that the USITC consistently interprets the "contributes significantly" standard of Section 421 as requiring a "direct and significant causal link", which is essentially equivalent to a showing of "significant cause".[262]

7.152 Although the fact that the USITC consistently interprets the "contributes significantly" standard of Section 421 as requiring a "direct and significant causal link" is not necessarily

---

[259] Appellate Body Report, *US – Shrimp*, para. 114.

[260] *See*, for example, Appellate Body Report, *US – Carbon Steel*, para. 157.

[261] USITC Report, page 18.

[262] China has not contested that a showing of "direct and significant causal link" would meet the Paragraph 16.4 "significant cause" standard. Indeed, China argued in para. 40 of its oral statement at the first meeting that "this dispute would be very different" with respect to its "as such" claim if "the statute required a 'direct and significant causal link', as does the USITC determination".

determinative of the issue at hand, it does support a finding that the Section 421 "contributes significantly" standard is no less stringent than the Paragraph 16.4 "significant cause" standard.

7.153 China argues that the above extracts from the USITC determinations relate to the legislative history of Section 406, rather than Section 421. The USITC references the legislative history of Section 406 because that contains the same statutory definition of "significant cause" (i.e., "contributes significantly") as provided for in Section 421. The evidence presented by the United States relates to the consistent application of the "contributes significantly" standard in Section 421 determinations, not in Section 406 determinations. In these circumstances, we consider it appropriate to take into account the legislative history of the Section 406 "contributes significantly" standard.

### 3. Whether the statute further lowers the Paragraph 16.4 causation standard by allowing imports to be a less important factor than any other single cause, no matter how minor that other cause might be

7.154 We recall that Section 421 allows a determination that increased imports constitute a "significant cause" of material injury even though their causal effect is not "equal to or greater than" that of any other cause.

(a) Arguments of the parties

7.155 **China** claims that, in circumstances where there are also other causes of injury to the domestic industry, the "significance" of the increased imports as a causal factor should be assessed relative to those other causes, rather than in a vacuum. According to China, the core meanings of "significant" – important, notable, consequential[263] – all include the notion of significance relative to other matters, in this case other causes. Thus, China claims that Paragraph 16.4 of the Protocol prevents increased imports from being treated as a "significant cause" if the causal effect of the increased imports is relatively less important than the causal effect of some other factor, or if the increased imports play a relatively small role in the market. China submits that the U.S. statutory definition is inconsistent with Paragraph 16.4 of the Protocol because it fails to provide for any such relative assessment between the causal effect of subject imports and other causes of market disruption. China claims that, by allowing imports that are a less important factor than any other single cause, no matter how minor that other cause might be, to still qualify as a "significant cause", the U.S. statutory definition further lowers the causation standard set forth in Paragraph 16.4. For this reason, China refers to the fact that the Section 421 "contributes significantly" standard requires no more than a "mere"[264] contribution.

7.156 The **United States** denies that Paragraph 16.4 of the Protocol requires the weighing of causal factors, or precludes a finding that increased imports are a "significant cause" of material injury simply because the causal effect of such increased imports may be less than some other factor(s). The United States asserts that Paragraph 16.4 refers to "a significant cause", indicating that increased imports might be one of several "significant causes" of injury to the domestic industry.

7.157 The United States further submits that the USITC stated in the underlying determination that it may not find that imports from China are a "significant cause" of material injury if those imports are such an "unimportant," subordinate," or "subsidiary" cause of injury that there is no "direct and

[263] *See* Panel Report, *US – Upland Cotton*, para. 7.1325 ("The ordinary meaning of the term 'significant is 'important; notable … consequential. The term 'significant' therefore connotes something that can be characterized as important, notable or consequential").

[264] *See*, for example, China's Second Written Submission, para. 137.

significant causal link" between the imports and material injury or threat.[265] Instead, as the USITC has consistently stated, the USITC must find a "direct and significant causal link" between imports from China and material injury or threat.[266] The United States asserts that such an interpretation precludes the possibility that increased imports might be treated as a "significant cause" when they do not, in fact, have the requisite degree of causal effect.

(b) Evaluation by the Panel

7.158 We first consider China's argument that the core meanings of "significant" – important, notable, consequential[267] – all include the notion of significance relative to other matters (in this case other causes).[268] While we agree with China (and the United States[269]) that the ordinary meaning of the word "significant" is "important", "notable", "consequential"[270], we disagree with China's argument that these meanings must include the notion of significance relative to other causal factors. We note that China has provided no evidence or explanation in support of this argument. In our view, rapidly increasing imports might properly constitute a significant cause of market disruption even though their causal role is not as significant as other factors.

7.159 Regarding China's argument that Section 421 impermissibly allows an investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be considered as "a significant cause," we consider that this possibility is excluded by the plain text of Section 421. The statutory definition at issue in this claim provides that rapidly increasing imports must "contribute significantly" to the market disruption. Since the relevant contribution must be "significant", i.e., important, or notable, we see no basis for concluding that only a "minimal", or "mere", contribution might suffice.[271] Furthermore, we have already explained that, in the context of Paragraph 16.4 of the Protocol, the term "cause" may be interpreted to mean "contributes". Thus, if rapidly increasing imports "contribute significantly" to the market disruption, they will necessarily be a "significant cause" of that market disruption for the purpose of Paragraph 16.4 of the Protocol.

---

[265] USITC Report, page 18.

[266] The United States refers, by way of an example, to page 18 of the USITC Report.

[267] *See* Panel Report, *US – Upland Cotton*, para. 7.1325 ("The ordinary meaning of the term 'significant is 'important; notable … consequential. The term 'significant' therefore connotes something that can be characterized as important, notable or consequential").

[268] China challenges the statement in Section 421 that imports "need not be equal to or greater than any other cause". Inherent in this challenge seems to be the notion that imports might only satisfy the "significant cause" standard if their impact is equal to or greater than any other cause. This is reflected in para. 155 of China's Second Written Submission, where China asserts that "[i]t is hard to see how a minor cause – one indeed that is less important than any other cause – can be properly considered to be 'significant'." This statement is also made in para. 38 of the Oral Statement of China at the First Meeting. In our view, this argument is at odds with the plain language of Paragraph 16.4, which requires only that rapidly increasing imports be "a" significant cause of market disruption. If the drafters of Paragraph 16.4 had intended that rapidly increasing imports should be "the most" significant cause of market disruption, they would have drafted Paragraph 16.4 accordingly.

[269] *See*, for example, the United States' First Written Submission, para. 179.

[270] The New Shorter Oxford English Dictionary, (1993).

[271] We note China's argument that Paragraph 16.4 focuses on the nature of the cause, such that "the obligation to find imports from China to be a 'significant cause' requires more than a mere contribution", whereas Paragraph 16.1 and Article 2.1 of the *Safeguards Agreement* focus on the (causal) link, rather than the nature of the cause itself (China's Reply to Question 16, paras. 61 and 63). While we do not necessarily agree with China's interpretation of Article 2.1 of the *Safeguards Agreement* and Paragraph 16.1 of the Protocol, we do agree that "significant cause" requires more than a mere contribution.

### 4. Conclusion

7.160 For all of the above reasons, we do not consider that the Section 421 "contributes significantly" standard requires the United States to establish causation in a manner inconsistent with Paragraph 16 of the Protocol.

## D. WHETHER THE USITC PROPERLY FOUND THAT RAPIDLY INCREASING IMPORTS WERE A SIGNIFICANT CAUSE OF MATERIAL INJURY

7.161 China claims that the USITC failed to properly demonstrate that subject imports were a "significant cause" of market disruption, contrary to Paragraphs 16.1 and 16.4 of the Protocol. China's claim is based on three principal arguments: the USITC failed to show that the conditions of competition between subject imports and the domestic product support a finding of causation; the USITC failed to establish any temporal correlation between rapidly increasing subject imports and material injury to the domestic industry; and the USITC failed to address alternative causes of material injury to the domestic industry, in the sense that the USITC failed to ensure that injury caused by other factors was not improperly attributed to subject imports.

7.162 Before turning to the substance of the USITC's causation analysis, though, we first address disagreements between the parties regarding the nature of the causation analysis actually required by Paragraph 16 of the Protocol.

### 1. The nature of the analysis required by Paragraph 16 of the Protocol

(a) Conditions of competition / correlation

7.163 The parties disagree as to whether the USITC was required to analyse the conditions of competition and correlation. China says it was. The United States says it was not.

*(i) Arguments of the parties*

7.164 **China** submits that WTO case law has established that the conditions of competition must always be analysed under the *Safeguards Agreement*, since Article 2.1 of the *Safeguards Agreement* refers to a product being imported in increased quantities and "under such conditions" as to cause serious injury. China argues that Paragraph 16.1 of the Protocol contains the same language ("under such conditions") as Article 2.1 of the *Safeguards Agreement*. China contends that while a conditions of competition assessment is required for global safeguards, it is especially indispensable under the more exacting causation standard of the Protocol. China submits that this is particularly the case where the relevant market encompasses a broad range of products and market segments, as in the U.S. tyre market.

7.165 China claims that an analysis of correlation is also required under Paragraph 16 of the Protocol. China asserts that WTO case law highlights the central role played by correlation in the context of establishing causation under the *Safeguards Agreement*. China refers in particular to the finding of the panel in *Argentina – Footwear (EC)* (affirmed by the Appellate Body) that:

> In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot prove causation, its absence

> would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present.[272]

7.166 China submits that such case law is relevant to the Protocol, and that the correlation analysis is even more demanding under the Protocol than under the *Safeguards Agreement*, given the allegedly more onerous "significant cause" causation standard provided for in the Protocol.

7.167 **The United States** denies, as a legal matter, that an investigating authority is required to analyse the conditions of competition under Paragraph 16 of the Protocol. The United States notes in this regard that Article 2.1 of the *Safeguards Agreement* provides that a Member may impose a global safeguard only if it has determined that a product "is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry". (Emphasis added). The United States asserts, by way of comparison, that the language of Paragraph 16.1 of the Protocol states that a need for a transitional measure may arise in cases where products from China are being imported "in such increased quantities or under such conditions as to cause or threaten to cause market disruption". (Emphasis added). The United States submits that, unlike the language of the *Safeguards Agreement* which specifically requires an analysis of increased quantities *and* the conditions under which imports are causing serious injury, the Protocol indicates that increased quantities alone or conditions alone may cause market disruption. The United States further submits that the Protocol's definition of market disruption in Paragraph 16.4 does *not* require the investigating authority to examine conditions of competition to determine if market disruption exists, but directs it only to consider import volumes, their price effects, and the effect of imports on the domestic industry.

7.168 The United States further asserts that the Protocol does not indicate that the competent authority should assess whether there is a coincidence of trends between increasing imports and the declines in the condition of the industry analysis, or suggest that an authority must provide a "compelling analysis of why causation is still present" if such a coincidence does not exist, as alleged by China. According to the United States, therefore, China has no basis for asserting that the USITC was required to perform a "coincidence of trends" analysis in its determination, or that it must provide "a compelling analysis of why causation is still present" if that coincidence does not exist.

*(ii) Evaluation by the Panel*

7.169 The first sentence of Paragraph 16.4[273] requires the importing Member to determine whether imports cause market disruption, i.e., whether imports (that are increasing rapidly) are a "significant cause" of material injury, or threat thereof, to the domestic industry. The first sentence of Paragraph 16.4 does not require that causation be established on the basis of any particular methodology. In addition, the second sentence of Paragraph 16.4 requires that "objective factors " be considered in determining the existence of market disruption, including causation:

> In determining if market disruption exists, the affected Member shall consider objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products.

7.170 Thus, Paragraph 16.4 does not require the importing Member to apply any particular methodology for establishing market disruption, including causation. The second sentence of

[272] Panel Report, *Argentina – Footwear (EC)*, para. 8.238; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 144-145.

[273] *See* paras. 7.33 to 7.37.

Paragraph 16.4 simply requires the consideration of objective factors. This suggests that an investigating authority is free to choose any methodology to establish causation, provided it addresses the objective factors set forth in Paragraph 16.4, and provided in particular it is sufficient to establish that rapidly increasing imports are a "significant cause" of material injury. We believe that an analysis of the conditions of competition[274] and correlation will often be relevant, and may on the facts of a given case prove essential, to a consideration of "significant cause". Indeed, it might be very difficult to establish "significant cause" without performing these types of analyses.[275] Our task is to perform an objective assessment of the USITC's overall determination of "significant cause," in light of the arguments of the parties. The USITC did rely on analyses of the conditions of competition and correlation in determining that rapidly increasing subject imports were a "significant cause" of material injury. Accordingly, to the extent the arguments of the parties require, we shall examine those analyses as part of our assessment of the USITC's overall determination of "significant cause".

(b) Non-attribution

7.171 The parties disagree as to the extent to which an importing Member is required to assess the injurious effects (on the domestic industry) of factors other than increased imports, and ensure that injury caused by such other factors is not improperly attributed to increased imports. Such assessment is generally referred to as "non-attribution".

*(i) Arguments of the parties*

7.172 **China** attributes the injury suffered by the U.S. domestic industry to a number of alternative factors, including changes in demand and the domestic industry's business strategy. China contends that the USITC ignored or failed to assess fully these other causes of injury, or to establish that the injury caused by such other factors was not improperly attributed to the subject imports. China submits that it is impossible to make the requisite determination of causation without considering the role played by causes of injury other than subject imports. China asserts that it would be inconsistent with the object and purpose of Paragraph 16 for a Member to apply a safeguard measure based on injury caused by factors other than imports from China. China acknowledges that there is no explicit "non-attribution" requirement in Paragraph 16, but submits that this requirement is in fact embedded in the ordinary meaning of the phrase "causal link", which the USITC was required to examine by virtue of paragraph 246(c) of the Working Party Report (and which is found in the first sentence of Article 4.2(b) of the *Safeguards Agreement*). Reading Paragraph 16 of the Protocol in light of paragraph 246(c) of the Working Party Report, China refers to a finding by the Appellate Body in *US – Lamb* which, it alleges, explains how a "causal link" should be established under the *Safeguards Agreement*. China understands the Appellate Body to have found that, to establish a "causal link" for

[274] We recall that, in the light of the French and Spanish texts and in accordance with Article 33(4) of the *Vienna Convention*, the word "or" in the first sentence of Paragraph 16.1 is to be taken to include "and" (*See* note 81 above).

[275] In its Reply to Question 25 from the Panel, the United States has indicated that "it is possible for a competent authority to evaluate the 'effect of imports on prices for like or directly competitive articles' and the 'effect of imports on the domestic industry producing like or directly competitive products,' as the terms are used in paragraph 16.4, without performing a 'coincidence of trends' analysis and/or performing a detailed assessment of all possible conditions of competition in the market. For example, a competent authority could reasonably choose to assess the effects of imports on prices and the industry by performing an economic modelling exercise, such as a static equilibrium or a linear regression modelling analysis". We are not persuaded by this argument, since a static equilibrium analysis generally involves an advanced analysis of the conditions of competition, and a linear regression modelling analysis generally involves an advanced analysis of correlation over an extended period of time (i.e., "regression" back in time). In our view, therefore, the United States' Reply to Question 25 does not really explain how causation might be established without some form of conditions of competition and/or correlation analysis.

the purpose of Article 4.2(b) of the *Safeguards Agreement*, an investigating authority had to establish a "genuine and substantial relationship of cause and effect" between the increased imports and the serious injury suffered by the domestic industry. China further understands the Appellate Body to have found that, in order to establish the "genuine and substantial relationship of cause and effect", an investigating authority must "distinguish[] and separate[]" the injurious effects caused by all the different causal factors. China therefore submits that an investigating authority cannot conclude that a "causal link" exists without first assessing whether other factors are actually responsible, or better explain the data. However, China does not claim that, under Paragraph 16, the authority must perform the same non-attribution analysis for other factors in the market that it would in a global safeguard proceeding.[276]

7.173 **The United States** contends that China's argument regarding the need to consider other causes, and ensure that their injurious effects are not attributed to rapidly increasing imports, is legally mistaken because it is premised on analytical standards developed by the Appellate Body under the *Safeguards Agreement*, which have no basis in the text of the Protocol. The United States submits that China's argument disregards the actual text of the Protocol, and the context and scope of the Appellate Body's findings under the *Safeguards Agreement*. The United States asserts that, since the negotiators of the Protocol were presumably aware that the *Safeguards Agreement* and the *AD Agreement* contained "non-attribution" language but chose not to include any "non-attribution" requirement in the causation provisions of the Protocol, the Panel should assume that such an analysis was not intended to be required. The United States submits that it is well-established that, under the principle of *inclusio unius est exclusio alterius*, when a treaty includes a term or requirement in one part but excludes that term or requirement from another part, the absence of that term or requirement indicates that the drafters intentionally chose not to include that term or requirement in the provision from which it is absent. That being said, the United States does accept that some form of non-attribution analysis is required – albeit not the non-attribution imposed by the Appellate Body in the context of Article 4.2(b) of the *Safeguards Agreement*. According to the United States, "a competent authority may use any reasonable methodology to consider such other factors when assessing whether market disruption exists.[277] The United States submits that a competent authority's need to address the effects of other possibly injurious factors will depend on the facts and circumstances of the particular case. The United States posits three possibilities in this regard: in some cases, another factor might arguably be so significant a cause of injury to the industry that the competent authority will need to perform a detailed and reasoned explanation of the effects of that factor, to ascertain whether that factor severs the apparent causal link between imports and material injury; in other cases, the factor may be contributing to injury in a considerably less significant fashion. In those circumstances, the competent authority could reasonably reference the factor and indicate in a reasonable fashion why the factor does not explain the injury caused to the pertinent industry; and, in still other cases, the authority could simply find that there was no evidence establishing that a particular factor caused injury to the industry, or that the parties have not presented sufficient evidence to establish that the factor causes any injury at all. In such cases, the authority would have little or nothing to investigate and no need to analyze the effects of the factor.

*(ii) Evaluation by the Panel*

7.174 While at the outset of this proceeding, it appeared that the parties disagreed fundamentally on whether an investigating authority was required by Paragraph 16 to perform a non-attribution

[276] China's Second Written Submission, para. 309, footnote omitted.
[277] U.S. First Written Submission, para. 299. *See* also U.S. Reply to Question 29 from the Panel.

analysis, by the end it was clear that the parties agreed that some form of non-attribution analysis may be required in certain circumstances.[278]

7.175 As to the nature of the non-attribution analysis that may be required under Paragraph 16 of the Protocol, we begin by considering the following finding of the Appellate Body in *US – Lamb*, which China relied on in its arguments:

> In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports.[279]

7.176 Although the reasoning in *US – Lamb* was based on the requirement of non-attribution in Article 4.2(b) of the *Safeguards Agreement* and thus is not directly applicable here, this does not mean that the obligation to demonstrate that rapidly increasing imports are a significant cause of material injury should not entail some form of analysis of the injurious effects of other factors. An analogy can be drawn with the approach in *US – Upland Cotton*, where notwithstanding the absence of non-attribution language in Articles 5 and 6.3 of the *SCM Agreement*, both the panel and Appellate Body found that (some form of) non-attribution is inherent in establishing the causal link between the subsidy and price suppression. Both took that view that if non-attribution does not occur, one cannot establish with certainty that price suppression was the effect of the subsidy (as opposed to some other injurious factor).

7.177 Thus, we consider that the causal link between rapidly increasing imports and material injury must be assessed "within the context of other possible causal factors".[280] In particular, a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors. We shall evaluate the USITC's assessment of alternative causes in this light.

7.178 We now turn to the substance of China's claims against the USITC's finding of significant cause, beginning with China's claims against the USITC's assessment of the conditions of competition between subject imports and domestic tyres.

## 2. The conditions of competition between subject imports and domestic tyres

7.179 **China** claims that the USITC's causation analysis was based on a misinterpretation and distortion of the conditions of competition, such that the USITC failed to understand the attenuated nature of competition between subject imports from China and domestic tyres.[281] China claims that

---

[278] *See*, for example, para. 309 of China's Second Written Submission, and para. 299 of the United States' First Written Submission. China also asserts that non-attribution under the Protocol does not require a precise quantification of the injury caused by the various injurious factors (*See* China's Reply to Question 17(b) from the Panel, para. 71).

[279] Appellate Body Report, *US – Lamb*, para. 179 (emphasis in original).

[280] Panel Report, *US – Upland Cotton*, para. 7.1344.

[281] In its First Written Submission, China refers to declining demand and the industry business strategy in the context of its claim regarding the USITC's treatment of the conditions of competition. However, China only develops its arguments regarding these factors when claiming that the USITC ignored or failed to assess fully other causes of injury (in the context of its non-attribution claim) (*See* paras. 219 and 220 of China's First Written Submission, which contain cross-references to more detailed arguments set forth in Section V.C.4(a)

the USITC improperly dismissed the fact (a) that subject imports and domestic tyres focus on different market segments in the replacement tyre market, and (b) that U.S. producers have a greater involvement in the OEM sector. China also claims that the USITC (c) improperly concluded from questionnaire responses that subject imports and domestic tyres were substitutable.

7.180 **The United States** denies that there were any flaws in the USITC's analysis of the conditions of competition, or that the USITC erred in finding that competition between domestic tyres and subject imports was not attenuated.

7.181 We begin by considering China's argument that the USITC dismissed the fact that domestic tyres and subject imports focused on different segments of the replacement market.

(a) Different segments in the replacement market

*(i) Arguments of the parties*

7.182 **China** argues that the USITC failed adequately to account for the fact that, within the replacement market, Chinese and domestic tyres focus on different market segments. China contends that the largest share of U.S. producer shipments was to the higher-end tier 1, and that the largest share of imports from China was to the lower-end tier 3. China refers to the USITC determination to argue that only 18.6 per cent of U.S. producer shipments fell into tier 3. China also relies on the finding by a dissenting commissioner that "U.S. production is focused on the higher-value, premium branded products and the OEM market, segments in which the subject imports are not competing in any meaningful manner".[282] According to China, the most logical inference from the record data is that any competition between Chinese and domestic tyres in the replacement market is attenuated.

7.183 China acknowledges that U.S. producers have not completely exited the tier 2 and tier 3 categories, and that domestic tyres and subject imports are therefore present in these same categories.[283] Nevertheless, China contends that the USITC fails to provide a reasoned or adequate explanation why the "vestigial" competition within tiers 2 and 3 rises to the level of "significant competition", or permits the further inference that imports from China rise to the level of a "significant cause" of any injury experienced by the U.S. producers. According to China, subject imports are absent from tier 1, which represents approximately 70 per cent of the replacement market.

7.184 **The United States** submits that the USITC addressed this issue at length in its determination, but found that, although the U.S. replacement market could generally be segmented into three categories, market participants did not agree on which tyres fell into which categories.[284] The United States asserts that market participants responded to the USITC's supplemental questionnaires on this issue with a wide range of estimates of the share of U.S. producer's and subject Chinese tyre shipments falling into each category, further evidencing the fact that there was no bright line or

---

and (b) of China's First Written Submission). Furthermore, in its Second Written Submission, China only refers to demand and industry business strategy as "other causes" of injury (Section IV.C.3(b)). We therefore do not consider it necessary to review these issues in the context of the present claim. At para. 234 of its First Written Submission, China also referred to certain "other factors" allegedly affecting the conditions of competition which the USITC allegedly overlooked. However, China has made no specific arguments as to how such "other factors" actually affected the conditions of competition, nor otherwise explained why the USITC should have considered such factors in its assessment of the conditions of competition. There is therefore no basis for us to uphold China's claim regarding these "other factors."

[282] USITC Report, page 52 (dissenting Commissioners).
[283] USITC Report, page 64 (dissenting Commissioners).
[284] USITC Report, page 27.

industry-wide accepted dividing line between the three categories.[285] In addition, the United States contends that the information on the record did not support China's argument that there was little competition between subject tyres and U.S. tyres in these categories, as the record showed that both subject tyres and U.S. produced tyres competed in all three segments of the market in 2008, albeit to varying degrees. The USITC found that subject imports and the domestic product were both present in category one, and that both had a significant presence in categories two and three.[286] The United States asserts that, in 2008, 18.6 per cent of U.S. producers' U.S. shipments fell into category three, the category in which subject tyres were most heavily concentrated, and the record showed that there was also a significant presence of both subject imports and domestically produced tyres in category two.[287] The United States contends that, given that the record showed that there was significant competition between subject imports and U.S. tyres in the market sectors in which subject imports were supposedly most heavily concentrated, the USITC reasonably rejected the claim that competition between subject and U.S. tyres was attenuated. The United States asserts that it is important to recall that the domestic industry shipped 18.6 per cent of its shipments into the category three sector in 2008, the last year of the period, after the domestic industry had already undertaken substantial reductions and plant closures to reduce its production of low-end tyres (a decision that the United States claims was made in reaction to the significant and increasing volume of subject imports).[288]

*(ii) Evaluation by the Panel*

7.185 China's argument regarding attenuated competition in the replacement market is based on the existence of three distinct tiers, or market segments, and the fact that domestically produced tyres and subject imports were focused on different market segments. According to China, domestic tyres were confined principally to tier 1, whereas subject imports were confined principally to tiers 2 and 3. China asserts that the limited presence of domestic tyres in tiers 2 and 3 meant that there was only "vestigial" competition between subject imports and domestic tyres in those segments.

7.186 We note that the USITC did not deny the existence of different market segments. Instead, the USITC issued a supplemental questionnaire to explore this issue, and to examine the possibility of attenuated competition between U.S. industry and subject imports.[289] On the basis of the supplemental questionnaire responses, the USITC "agree[d] with respondents that the record supports the view that the U.S. replacement market generally can be segmented into three categories", but noted that "there was less agreement [among firms submitting questionnaire responses] as to which tires were included in the two lower-priced categories".[290]

7.187 China acknowledges that there is no bright dividing line between the three different segments, but argues that "[t]he fact that the distinction may not be absolute does not mean that the distinction does not exist at all, or that the distinction does not produce highly attenuated competition".[291] China further argues that "[a]lthough responses indicated some differences in opinion concerning the dividing line between tiers 2 and 3, there was not much doubt about the dividing line between tier 1,

[285] USITC Report, page 27.
[286] USITC Report, page 27.
[287] USITC Report, page 27.
[288] USITC Report, pages 24-25.
[289] USITC Report, page 27.
[290] USITC Report, page 27.
[291] China Second Written Submission, para. 201.

on the one hand, and tiers 2 and 3, on the other".[292] According to China, "[t]he record as a whole demonstrates a strong distinction between tier 1 tires and tier2/tier 3 tires."[293]

7.188 Regarding the differentiation between segments in the replacement market, we note the finding by dissenting commissioners that:

> There is consensus among the parties that the subject tire market is segmented between the OEM and replacement markets, and, to some degree, that there are categories or tiers within the replacement market. However, *there is no consensus on how to define what types of tires are classified in each tier, or what brands are classified in each tier within the replacement market.* In addition to examining industry publications placed on the record, the Commission issued supplemental questionnaires to gather additional information about competition among tiers. The record indicated that in general, tier 1 comprises premium or flagship brands; tier 2 comprises mid-level, secondary/associate, or smaller producer brands; and tier 3 comprises entry-level or non-recognizable branded tires. The majority of questionnaire responses classify private brands as tier 3 tires but are *mixed as to where to place associate brands, with some responses placing them in tier 2 and others placing them in tier 3.* In addition, market participants do not agree on what specific brands are classified in each tier. Other responses classify tires based on price.[294]

7.189 This finding indicates that there was no consensus as to the dividing lines between the three market segments in the replacement market (particularly in respect of the differentiation between tiers 2 and 3).[295] The lack of consensus regarding the dividing lines between the market segments is further confirmed by the fact that there were:

> wide variations in the estimates for the share of the total U.S. market accounted for by each tier. Producers and importers reported that tier 1 ranged from 21 per cent to 78 percent of the total U.S. tire market; tier 2 ranged from 7 percent to 52 percent of the market; and tier 3 ranged from 10 percent to 50 percent of the market.[296]

7.190 In other words, there was no established market perception of where the boundaries between tiers 1, 2 and 3 should lie. Indeed, five of the 26 respondent importers reported that the replacement market could not be segmented[297], and one major U.S. producer reported "there was no consensus in the marketplace on how to divide the U.S. market".[298]

7.191 We recall China's arguments that domestically produced tyres were confined principally to tier 1, whereas subject imports were confined principally to tiers 2 and 3, and that there is "a strong distinction between tier 1 tires and tier 2/tier 3 tires". In this regard, we note the statement in the finding by the dissenting commissioners that:

---

[292] China Second Written Submission, para. 200.
[293] China Second Written Submission, para. 201.
[294] USITC Report, page 51 (dissenting commissioners), emphasis supplied.
[295] In its comments on the U.S. Reply to Question 46 from the Panel, China asserts that "the overwhelming number of companies responding to the questionnaire ... were able to segment the market into three tiers" (China's comments on U.S. Reply to Question 46 from the Panel, para. 21). The point is not whether respondents could segment the replacement market. The point is whether the distinction between those segments was so well established that it should necessarily have been taken into account by the USITC.
[296] USITC Report, page 52 (dissenting commissioners).
[297] USITC Report, page V-5.
[298] USITC Report, page V-6.

> While not arguing that there is a clear dividing line among each of the tiers, *respondents*, in general, contend that competition is attenuated between *domestically produced tires which are primarily in tier 1 and 2* tires for the OEM and replacement markets, and *subject imports which are primarily in tier 3* tires for the replacement market.[299]

7.192 This statement, which refers to respondents arguing that domestically produced tyres are present in both tiers 1 and 2, is at odds with China's argument that there is "a strong distinction between tier 1 tires and tier 2/tier 3 tires", and that domestic tyres compete primarily in tier 1, whereas subject imports compete primarily in tiers 2 and 3. China's argument is also at odds with the specific statement by one Chinese producer during the underlying investigation that:

> while there is certainly a real distinction between Tier 1 and Tier 2 tires, *it is often useful to group Tier 1 and Tier 2 tires together* in the category of 'higher-end" tires, since both of these segments are ones in which brand equity is an important element. Tier 3 tires, by comparison, are 'economy' or 'low-end' tires. Brand equity plays essentially no role in the marketing of these tires.[300]

7.193 Thus, while this one Chinese producer notes that there is a real distinction between tiers 1 and 2, that distinction is apparently not so profound that tier 1 and tier 2 tyres should not be grouped together for the purpose of identifying tyres that compete on the basis of brand equity.

7.194 Given the uncertainty regarding the basis for distinguishing between tiers 1, 2 and 3 of the replacement market, respondents' views that domestically produced tyres were primarily in tiers 1 *and 2*, and one respondent's view that it is in any event "useful to group Tier 1 and Tier 2 tires together" for certain purposes, we are not persuaded by China's argument that the USITC was required to have found that there is "a strong distinction between tier 1 tires and tier2/tier 3 tires".

7.195 Furthermore, even if tiers 2 and 3 could be clinically isolated from tier 1, record evidence demonstrates that there remained significant competition between domestic tyres and subject imports in tiers 2 and 3. In 2008[301], U.S. producers and subject imports accounted for 16 and 27.3 per cent respectively of tier 2 shipments, and 18.6 and 42.4 per cent respectively of tier 3 shipments.[302] In our view, such U.S. industry presence in tiers 2 and 3 suggests significantly more than the merely "vestigial" competition alleged by China.[303] The fact that this data relates to 2008, after the U.S. industry closed plant producing lower-value (i.e., tier 2 and 3) tyres, suggests that the competition between the U.S. industry and subject imports would have been even greater earlier in the period of investigation.

7.196 We note China's argument that subject imports were absent from tier 1, which it estimated to represent 70 per cent of the replacement market. The United States contests China's estimate, on the basis of a press article providing an overview of the tyre market in 2008. The United States asserts

---

[299] USITC Report, page 52 (dissenting commissioners), emphasis supplied.

[300] Post-Hearing Brief of GITI, page 6, (emphasis supplied).

[301] This data is taken from interested parties' responses to a supplemental questionnaire from the USITC. That supplemental questionnaire only requested data for 2008.

[302] These figures are based on each individual producer's and importer's own estimates of the percentage of its own shipments that were shipped in each tier in 2008. The USITC did not itself make a determination that certain volumes of shipments by individual producers and importers in 2008 should be classified as tier 1, 2 or 3 tyres. Certain producers and importers did not report segment-specific data, as they claimed that the market could not be divided into distinct segments.

[303] In absolute numbers, there were more U.S. industry sales in tiers 2 and 3 in 2008 than subject imports. *See* U.S. Reply to Question 46 from the Panel, para. 24.

that tier 1 occupies considerably less than the 70 per cent share of the replacement market claimed by China. We do not consider it necessary to enter into the details of the parties' arguments regarding this issue, as China's estimate of the relative importance of tier 1 was made before the United States provided the abovementioned supplemental questionnaire data in response to Question 46 from the Panel. On the basis of that data, we note that tier 1[304] accounted for 51.2 per cent of shipments in the replacement market. Thus, while subject imports from China may only have had a limited presence in tier 1[305], subject imports had a far greater presence in the remainder of the replacement market where, as explained above, domestic tyres were also prevalent.

7.197 In the circumstances, we conclude that while there was a general understanding that the tyre replacement market was divided into 3 tiers, we find no fault with the USITC's conclusion that there was no distinct dividing line between these tiers. Also, while we recognize that there was some variation in levels of competition between subject imports and domestic products as between tier 1 and tiers 2 and 3, we find no fault with the USITC's conclusion that subject imports and domestic products were not focused in different tiers and do not accept that the USITC should have found that there was only "vestigial" competition between them in tiers 2 and 3.

(b) U.S. producers' focus on the OEM market

*(i) Arguments of the parties*

7.198 **China** claims that the USITC failed to accord significance to the U.S. producers' greater involvement in the OEM market. China contends that the USITC incorrectly found that there was competition between domestic tyres and subject imports in the OEM market, even though between 17.7 and 23.3 per cent of U.S. producers' shipments were in the OEM market, whereas only 0.8 to 7.3 per cent of subject imports went to the OEM market. China further contends that subject imports only accounted for 0.2 to 4.9 per cent of all OEM shipments, such that any competition between subject imports and domestic tyres in the domestic OEM market was negligible.

7.199 **The United States** submits that the USITC recognized that the vast majority of both imports of tyres from China and domestically produced tyres were sold in the replacement market[306], but also recognized that both Chinese and U.S. producers sold and competed in the OEM market as well.[307] The United States asserts that the USITC record showed that U.S. producer's shipments to the OEM market declined steadily during this period to a period low of 24.2 million tyres in 2008, representing 17.7 per cent of U.S. shipments in that year[308], whereas import shipments from China increased irregularly from 121,000 tyres in 2004 to a period high 2.3 million tyres in 2008, representing five per cent of imports from China in that year, and 4.9 per cent of the OEM market.[309] The United States therefore asserts that, in every year of the period, there were considerable amounts of U.S. tyres and an increasingly significant amount of subject imports in the OEM market, thereby demonstrating that there was competition between imports from China and domestically produced tyres in the OEM market.

---

[304] We rely in this regard on the data reported by those producers and importers that did divide the market into three segments.

[305] The supplemental questionnaire data indicates that subject imports accounted for less than one per cent of those tier 1 shipments.

[306] USITC Report, page 21. The United States asserts that the USITC noted that the replacement market is by far the more important market for both types of producers, but stated that it was relatively more important to Chinese producers since a higher percentage of their shipments went to that market.

[307] USITC Report, page 27.

[308] USITC Report, Tables V-2 and V-3.

[309] USITC Report, Tables V-2 and V-3.

7.200 Regarding China's argument that competition between domestic and Chinese tyres in the OEM market was "negligible", because Chinese tyres amounted to approximately five per cent of shipments to that market in 2008[310], the United States contends that this assertion has no basis in the text of the Protocol, or the facts on the record. The United States submits that there is no legal basis under the Protocol for the USITC to ignore the impact of increasing volumes of subject imports in the OEM market simply because these imports accounted for only five per cent of shipments in the market. The United States further submits that the facts on the record showed that while U.S. producers' U.S. shipments into the OEM market declined in every year of the period examined, shipments of imports from China increased in every year. The United States asserts that, even from 2007 to 2008, when both domestically produced tyres and non-subject import tyres declined in that sector, subject imports from China continued to grow, reaching their period high in 2008. Furthermore, the United States disagrees that Chinese imports were virtually absent from the OEM market. The United States asserts that, while this statement may have been true at the start of the period in 2004 when Chinese imports of 121,000 tires accounted for less than one-tenth of one per cent of the market, it was certainly not true in 2008, when OEM subject import volumes rose to their period high of 2.3 million tyres and accounted for approximately 5 per cent of the OEM market.

*(ii) Evaluation by the Panel*

7.201 While it is true that the OEM sector was more important for U.S. producers than for subject imports, the proportion of U.S. producer shipments to that sector was *decreasing*, whereas the proportion of subject imports to the OEM sector was *increasing*. According to Table V-3 of the USITC Determination, the proportion of U.S. producer shipments to the OEM sector decreased from 23.3 per cent in 2004 to 17.7 per cent in 2008. Over the same period, the proportion of OEM subject imports increased from 0.8 per cent to 5 per cent.

7.202 In absolute terms, the quantity of U.S. producer OEM shipments decreased from 45,351,000 in 2004 to 24,211,000 in 2008, while the quantity of OEM subject imports increased from 121,000 in 2004 to 2,281,000 in 2008. Thus, as the absolute volume of U.S. producer OEM shipments decreased by 46.6 per cent, the absolute volume of OEM subject imports increased by 1,785 per cent. The OEM market share of subject imports increased from 0.2 to 4.9 per cent over the period of investigation, while the OEM market share of U.S. producer shipments fell from 69.6 to 51.6 per cent.

7.203 Furthermore, we recall the USITC's finding that, overall, subject imports in 2008 increased substantially while apparent consumption fell by 6.9 per cent, and non-subject imports and U.S. producer shipments declined.[311] This trend was even more pronounced in the OEM market. As apparent consumption in the OEM market fell by 16.4 per cent from 2007 to 2008, the volume of OEM subject imports increased by 12.4 per cent (while the volume of OEM non-subject imports declined by 11.3 per cent, and U.S. producer OEM shipments declined by 22 per cent).[312]

7.204 Thus, during the period of investigation both subject imports and domestically-produced tyres were present in the OEM sector. Over the period as a whole, the degree of the resultant competition between subject imports and domestically-produced tyres in the OEM sector was increasing, as the relative importance of domestically-produced tyres decreased, and that of subject imports increased.[313]

[310] China's First Written Submission, para. 226.
[311] USITC Report, page 26.
[312] Apparent consumption data calculated on the basis of USITC Report, Table V-3.
[313] We note China's argument (China's Second Written Submission, para. 195) that the United States improperly relied on ex post rationalization in arguing that, because "U.S. producers' U.S. shipments into the OEM market declined in every year of the period examined, [while] shipments of imports from China increased in every year", "it was therefore reasonable for the USITC to find a growing degree of competition between subject imports and domestically produced tyres in the OEM market". (U.S. First Written Submission,

Consistent with the trend for OEM and replacement market shipments overall, the competitive importance of subject imports in the OEM market became particularly pronounced at the end of the period of investigation, when despite a fall in apparent consumption of 16.4 per cent, subject imports were able to increase by 12.6 per cent, while non-subject imports and U.S. producer shipments fell by 11.3 and 22 per cent respectively.

7.205 In light of the above considerations, although we accept that there was some variation in the levels of competition within the OEM market, we do not consider that the USITC was required to dismiss competition from subject imports in the OEM sector as "negligible".[314]

(c) Reliance on Questionnaire responses to establish the substitutability of imports and domestic tyres

*(i) Arguments of the parties*

7.206 **China** contends that the USITC improperly found that subject imports and domestic tyres were substitutable. China asserts that the USITC's finding is improperly premised on "vague"[315] responses to a questionnaire that simply asked producers, importers and purchasers "if subject tires produced in the United States and in other countries are used interchangeably", giving the option of "always", "frequently", "sometimes", and "never".[316] China asserts that the questionnaire failed to differentiate between product type, category or characteristics, even though there is market segmentation between the OEM and replacement markets, and even though there are three separate tiers within the replacement market, and widely varying tyre sizes and characteristics. China submits that the questionnaire responses relied on by the USITC constitute the type of subjective and overbroad questionnaire data that the panel in *Argentina – Footwear (EC)* warned against.

7.207 **The United States** submits that there was nothing "vague" about the questionnaire responses relied on by the USITC, and that the large majority of producers, importers, and purchasers agreed that tyres from China and tyres produced in the United States were "always" or "frequently" used interchangeably.[317] The United States asserts that these questionnaire responses were also consistent with other evidence on the record relating to substitutability as, for example, the record showed that

---

para. 227). However, we see no reason why the United States may not rely on the fact (established in the USITC's record) that OEM imports from China were growing while U.S. OEM shipments were falling to rebut China's argument regarding the allegedly negligible competitive impact of subject imports in the OEM sector. Furthermore, we note the USITC's finding that "[t]he share shipped to the OEM market by U.S. producers declined each year during the period examined, while the share of subject imports from China shipped to the OEM market increased irregularly and was at its highest in 2006 at 7.3 percent" (USITC Report, page 21).

[314] China First Written Submission, para. 226. Regarding China's argument that non-subject OEM imports were nine times the quantity of subject OEM imports (China's Second Written Submission, para. 193), in our view this relates more to the possibility of non-subject imports being an "other cause" of injury, than to the issue of whether or not there is attenuated competition between subject imports and domestic tyres. This issue is addressed at paras. 7.364 to 7.367.

[315] China's First Written Submission, para. 223.

[316] USITC Report, page V-16, Table V-6, n. 1.

[317] USITC Report, page 23. The United States asserts that six out of seven U.S. producers, 21 out of 25 importers, and 18 out of 22 purchasers reported that tyres from China and tyres produced in the United States are "always" or "frequently" used interchangeably. USITC Report, Table V-6. The United States asserts that any market participant that responded that tyres from China and tyres from the United States are "sometimes" or "never" used interchangeably" was given the opportunity to provide an explanation for this answer in the questionnaire.

tyres from China and tyres from the United States compete in all segments of the market.[318] The United States contends that the interchangeability of subject imports and domestically produced tyres was further confirmed by the fact that the USITC was able to conduct pricing comparisons of large quantities of shipments by U.S. producers and importers of subject tyres for six specific pricing products, each with specific dimensions, load indexes, and speed ratings, in the large majority of quarters over the period.[319] The United States submits that, according to this evidence, the large majority of responding market participants, whether they are producers, importers, or purchasers, indicated that market segmentation was not a bar to, or limit on the interchangeability of the subject and U.S. tyres.

7.208 Regarding China's reliance on the Appellate Body's report in *Argentina – Footwear (EC)*, the United States contends that the facts of the underlying investigation are very different. The United States submits that, in *Argentina – Footwear (EC)*, the panel noted that the investigating authority performed no analysis of the conditions of competition in the market, but simply summarized the conflicting views of domestic producers and importers. The panel noted that the investigating authority conducted no price comparisons of imported and domestic footwear to support its references to "cheap imports", despite the fact that its causation finding was based primarily on price considerations. The panel stated that the authority did not even analyze the effects of imported prices on the domestic industry, but indicated instead that it compared broad statistical indicators, resulting in conclusory statements. Moreover, the panel noted that the investigating authority itself acknowledged that its references to "cheap imports" had mostly to do with a problem of customs valuation and that the composition of imports had actually shifted to higher-valued goods. According to the United States, it was in the context of these glaring deficiencies that the panel stated that this "is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2". The United States asserts that the USITC performed a much more rigorous analysis than in that case.

*(ii) Evaluation by the Panel*

7.209 We understand China to claim that the questionnaire responses were insufficient to establish the interchangeability of subject imports and domestic tyres, as the questionnaire failed to differentiate between "product category, characteristics, or market segment."[320] As a general matter, we note that China's arguments concern the original questionnaire sent out by the USITC at the beginning of the investigation. In light of the responses to that original questionnaire, the USITC issued a supplemental questionnaire to gather additional information about the existence of segments or product categories in the market. In our view, there is nothing inherently wrong with an investigating authority first issuing a generally-worded questionnaire regarding the competitive relationship between domestic tyres and subject imports, and then following that original questionnaire up with a more detailed supplemental questionnaire addressing particular issues raised in the responses to the original questionnaire.

7.210 Regarding the issue of whether the original questionnaire should have been phrased more specifically in terms of market segmentation, we recall our findings above regarding the absence of any clear differentiation between the market segments. We recall that this was confirmed by the dissenting commissioners, who found that:

[318] USITC Report, page 27. The United States contends that the USITC noted that there was general agreement as to the existence of three categories of tyres in the replacement market, but that there was less agreement as to which tyres were included in the two lower-priced categories.

[319] USITC Report, Tables V-9-V-14.

[320] China's First Written Submission, para. 222.

> *there is no consensus on how to define what types of tires are classified in each tier, or what brands are classified in each tier within the replacement market.*[321]

7.211 In the absence of any industry consensus on the distinction between tiers 1, 2 and 3, we do not consider that the USITC was required to have included, in its original questionnaire, more specific questions regarding interchangeability on the basis of distinctions between tiers 1, 2 and 3 of the replacement market.

7.212 China also raises the possibility of distinguishing domestic tyres from subject imports on the basis of other factors, such as "product category" or "characteristics"[322], or "tire sizes".[323] However, it is not clear to the Panel how the USITC could have drawn such distinctions, particularly since it appears that there was no industry consensus on which the USITC might have acted. Furthermore, record evidence suggests that size and performance would not have been a suitable basis for distinguishing domestic tyres from subject imports, as one Chinese respondent witness stated that tier 3 tyres "cover the same broad spectrum of size and performance as are offered in the first two segments".[324]

7.213 Nor do we consider that the findings of the Panel in *Argentina – Footwear (EC)* provide any guidance on whether the USITC improperly relied on "subjective" questionnaire responses. The *Argentina – Footwear (EC)* panel found that "the question of price [wa]s of particular importance to the analysis" of the conditions of competition in that case, as price was "the only 'condition of competition' between imports and domestic products on which Argentina's causation finding was based". The panel therefore "focus[ed] [its] assessment of this analysis primarily on whether there is support in the record for Argentina's conclusions about import prices and their effect on the domestic industry". In making its assessment, the panel found:

> *no evidence* in the record to support the statements that the imports were cheaper than the domestic goods. In particular, there is *no evidence* that any price comparisons of imported and domestic footwear were made in the investigation, including on the basis of average unit values of all imports and all domestic products.[325]

7.214 The circumstances of the USITC *Tyres* investigation are very different from those in *Argentina – Footwear (EC)*. In particular, this is not a case where the investigating authority had "no evidence" regarding the conditions of competition other than the original questionnaire responses. Nor is this a case where the original questionnaire replies did not address the specific condition of competition at hand (i.e., the competition between subject imports and domestic producers).

7.215 For the above reasons, we find no error in the USITC's reliance on the original questionnaire responses.

(d) Conclusion

7.216 For all of the above reasons, we find no error in the USITC's assessment of the conditions of competition.

---

[321] USITC Report, page 51 (dissenting commissioners), emphasis supplied.
[322] *See* China's First Written Submission, para. 222.
[323] *See* China's First Written Submission, para. 223.
[324] USITC Hearing transcript at 246.
[325] Panel Report, *Argentina – Footwear (EC)*, para. 8.259, emphasis supplied.

### 3. Correlation between the increase in imports and the decline in injury factors

(a) Arguments of the parties

7.217 **China** submits that the USITC failed to properly establish correlation between the rapidly increasing subject imports and the material injury suffered by the domestic industry. China claims that, by finding that imports increased over the five-year period of investigation while injury factors declined over that period, the USITC merely engaged in an end-point-to-end-point analysis, of the sort rejected by the panel in *Argentina – Footwear (EC)*. According to China, the consistent teaching of WTO jurisprudence is that the coincidence must be apparent with respect to movements in imports and injury factors. As the panel in *Argentina – Footwear (EC)* observed, in a causation analysis "it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination".[326] China contends that it is not enough that imports increase in every year of the period and that injury factors decline in every year of the period. According to China, the degree of the respective annual increases must correspond generally with the degree of the respective declines in injury factors. China contends that the orders of magnitude are key, in the sense that the varying degrees in annual import increases should be reflected in varying degrees of annual declining injury indicators. China submits that the USITC never addressed these orders of magnitude.

7.218 China claims that the failure in the USITC's analysis is particularly apparent with respect to the more recent period (i.e., changes in 2006-2007 and 2007-2008). China contends that the USITC statement that "the largest declines in these indicators have occurred since 2006 when subject imports exhibited the greatest and fastest increases"[327] is misleading on several levels. China asserts that the USITC failed to point out that imports from China grew at their fastest rate in 2006-2007, but grew at their slowest rate (10.8 per cent) in the period from 2007-2008. Worse still, the USITC failed to address the fact that the various injury factors typically showed a substantial improvement in 2006-2007, when imports from China were at their highest level in the period, and experienced their greatest declines of the period in 2008, when Chinese imports grew at the slowest rate in the period. In other cases, the injury factors (e.g., price, R&D expenditures, and capital improvements) show positive trends throughout the period. According to China, the record regarding the more recent period poses two concrete tests for the U.S. theory of causation. Given the U.S. argument that imports from China were fungible, that the product is price sensitive, and that different market segments do not matter, China suggests that one would expect the large increase in imports over the 2006 to 2007 period to have the largest adverse impact on injury indicators. China also suggests that one would also expect that the small increase in imports over the 2007 to 2008 period would have the smallest adverse impact on injury indicators. China submits, though, that the facts in the record belie the U.S. theory.

7.219 Regarding the 2006-2007 period, China suggests that the U.S. correlation theory would demonstrate that the large increase in imports from China over the 2006-2007 period to have the largest adverse impact on injury indicators. China contends that this theory is not supported by the facts, though, since over the 2006-2007 period, many key indicators were in fact positive. China asserts that prices – both for specific pricing products and for average unit values overall – were up sharply, as was net sale value. China asserts that operating profits were also up sharply. China further asserts that productivity, capacity utilization, capital expenditures and R&D spending were all up. According to China, therefore, six of the ten factors showed strong improvements, and a seventh factor – net sales – showed improvement on a sales value basis. China asserts that these seven out of

[326] Panel Report, *Argentina – Footwear (EC)*, para. 8.237.

[327] *See* USITC Report, page 24 ("All of these indicators were at their lowest levels of the period in 2008, when subject imports were at their highest ...").

ten factors improved, even in the face of the largest increase in imports from China over the entire period. China acknowledges that the volume metrics – production, net sales volume, market share, and employment – declined over the 2006-2007 period, but claims that these declines must be placed in context. In particular, China claims that the declines in the 2006-2007 period are more modest than the declines in the "prior two comparison periods". China therefore claims that these factors, also, were actually "much better" in 2007. China concludes that, of the ten indicators, at most only two arguably suggest some possible coincidence – market share, and employment. According to China, this pattern strongly suggests the absence of any overall coincidence, as it is hard to see an overall coincidence when eight of ten factors actually show results that are in fact improving.

7.220 Regarding the 2007-2008 period, China recalls that the U.S. theory of correlation should show the small increase in imports from China over the 2007-2008 period having the smallest adverse impact on injury indicators. China contends, though, that in fact the opposite is true, as six indicators (production, net sales volume, profit, productivity, capacity utilization and employment) were all down.

7.221 China submits, therefore, that over the 2006-2007 and 2007-2008 periods, the vast majority of the changes in injury indicators are inconsistent with the U.S. theory, and the few changes that at least might support the U.S. theory in fact provide very weak support.

7.222 **The United States** submits that China's arguments against the USITC's analysis must fail because they are premised on the concept that even a minor variation in the trends establishes that there is not a "coincidence of trends" between increasing imports and material injury. The United States disagrees that the USITC should have considered whether the "degree of the respective annual increases [in Chinese imports] correspond generally with the degree of the respective declines in injury factors".[328] The United States submits that China's argument is flawed as an analytical matter because it assumes that Chinese imports must cause all, or most, of the injury being suffered by an industry in any particular year of the period being examined. According to the United States, it is only in such a situation that there would be a close "correspondence" between the degree of the annual increase in Chinese import volumes and any declines in the indicia of the industry's condition. In cases where other factors are causing material injury to an industry at the same time as Chinese imports, the United States contends that there might not necessarily be the same "degree" of correspondence between changes in the volume trends of Chinese imports and changes in the industry's condition.

7.223 The United States asserts that, with respect to the *Safeguards Agreement*, WTO panels have explained that the "overall coincidence [in trends] is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered".[329] The United States notes in this regard that the panel in *US – Wheat Gluten* found:

> [I]n light of the overall coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of individual injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.[330]

7.224 The United States submits that the USITC properly concluded that there was a clear overall "coincidence" in trends between the rapidly increasing imports and their effects on the domestic

[328] Oral Statement by China at the Second Panel Meeting, para. 64.
[329] Panel Report, *US – Steel Safeguards*, para. 10.302.
[330] Panel Report, *US – Wheat Gluten*, para. 8.101.

industry.[331] The United States asserts that, during a period in which Chinese import volumes increased rapidly in every year of the period, the record showed that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;[332]

- The domestic industry's production declined in every year of the period, resulting in an overall decline of 26.6 per cent;

- The domestic industry's capacity declined in every year of the period, for an overall decline of 17.8 per cent;

- The domestic industry's U.S. shipments declined in every year of the period, for an overall decline of 29.7 per cent;[333]

- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 per cent;[334] and

- The domestic industry's employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2 per cent, the number of hours worked falling by 17.0 per cent, and wages paid falling by 12.5 per cent over the period.[335]

7.225 The United States submits that all of these factors were at their lowest levels in 2008, while Chinese tyre imports were at their highest levels in 2008 (in terms of volume of imports and market share). The United States also asserts that the USITC found that the U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008.[336] Thus, the United States notes that:

- Productivity fell by 11.5 per cent over the period.

- Capacity utilization fell by 10.3 percentage points over the period.

- Operating margins fell by 4.8 percentage points over the period.

- Operating income fell from $256.2 million in 2004 to a loss of 262.8 million in 2008.

7.226 The United States contends that there was therefore clear evidence of a coincidence between imports and declines in the industry's condition over the period of investigation.[337]

[331] USITC Report, page 29.
[332] USITC Report, pages 25-26.
[333] USITC Report, pages 15-18 and 24.
[334] USITC Report, pages 23-24.
[335] USITC Report, pages 17 and 24.
[336] USITC Report, Table C-1.
[337] Oral Statement by the U.S. at the Second Panel Meeting, para. 59.

(b) Evaluation by the Panel

7.227 We shall first address China's general arguments regarding correlation. We shall then address China's specific arguments regarding the USITC's finding that subject imports caused a cost-price squeeze.

*(i) Correlation generally*

7.228 We recall that Paragraph 16 does not require a showing of correlation between material injury and rapidly increasing imports.[338] Instead, correlation is a tool that an investigating authority might use to demonstrate causation (either alone, or in conjunction with other analytical tools). There is a basic disagreement between the parties regarding the type of correlation that might be sufficient to establish causation under Paragraph 16 of the Protocol. In brief, the United States considers that there need only be an overall coincidence between imports and injury factors, in the sense that the upward movements in imports should occur at the same time as the downward movements in injury factors. China submits that mere temporal coincidence does not suffice. China contends that more is required, in the sense that the degree of the increases in imports should correspond with the degree of the declines in injury factors. According to China, simply assessing whether an upward movement in imports over the period coincides with a downward movement in injury factors amounts to no more than an end-point-to-end-point analysis, of the sort condemned by the Appellate Body in *Argentina – Footwear (EC)*.

7.229 We are not persuaded that causation might only be based on a finding of correlation if the varying degrees of increase in imports over the period of investigation are reflected in the varying degrees, or rates, of declines in injury indicators. Correlation between the varying degrees of increase in imports and decrease in injury indicators suggests a certain degree of precision. However, correlation between imports and injury factors is not an exact science, especially as there may be other causes of injury at work. As a result, it would be unrealistic to expect, or require, a somewhat precise correlation between the degree of change in imports and the degree of change in the injury factors. While a more precise degree of correlation between the upward movements in imports and the downward movements in injury factors might result in a more robust finding of causation, and might indeed suffice on its own to demonstrate causation, a finding of "significant cause" is not excluded simply because an investigating authority relies on an overall coincidence between the upward movement in imports and the downward movement in injury factors, especially if that finding of overall coincidence is combined – as it was in the present case - with other analyses indicative of causation.

7.230 In *Argentina – Footwear (EC)* the panel stated that it would assess Argentina's causation analysis:

> on the basis of (i) *whether an upward trend in imports coincides with downward trends in the injury factors*, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation.[339]

7.231 These findings were upheld by the Appellate Body[340], and were followed by the panel in *US – Steel Safeguards*. The latter panel found that:

[338] *See* paras. 7.169 to 7.170 above.
[339] Panel Report, *Argentina – Footwear (EC)*, para. 8.229, emphasis supplied.
[340] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

> the word "coincidence" in the current context refers to the *temporal* relationship between the movements in imports and the movements in injury factors. In other words, upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist. [341]

7.232 There is no suggestion in these statements by the *Argentina – Footwear (EC)* and *US – Steel Safeguards* panels that the orders of magnitude are key, or that changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors. Rather, the panels simply found that imports should increase at the same time as the injury factors decline.

7.233 The *US – Steel Safeguards* panel also found that it is the "overall coincidence ... that matters, and not whether coincidence or lack thereof can be shown in relation to a few select factors which the authority has considered".[342]

7.234 In light of the above considerations regarding the degree of precision required for an assessment of correlation, we consider that the USITC was entitled to support its determination of "significant cause" with a finding of overall coincidence between an upward trend in subject imports from China and downward trends in the relevant injury factors.[343] We recall our finding that the USITC properly established that imports were "increasing rapidly" during the period of investigation, and that imports continued to increase in every year of the period. In terms of injury factors, we note that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;[344]

- The domestic industry's production declined in every year of the period, resulting in an overall decline of 26.6 per cent;

- The domestic industry's capacity declined in every year of the period, for an overall decline of 17.8 per cent;

- The domestic industry's U.S. shipments declined in every year of the period, for an overall decline of 29.7 per cent;[345]

- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 per cent;[346] and

- The domestic industry's employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2 per cent, the number of hours worked falling by 17.0 per cent, and wages paid falling by 12.5 per cent over the period.[347]

---

[341] Panel Report, *US – Steel Safeguards*, para. 10.299.
[342] Panel Report, *US – Steel Safeguards*, para. 10.302.
[343] China has advanced detailed arguments regarding the alleged lack of correlation between increased imports and injury. Since these arguments are based on its more precise approach to correlation, which we have rejected, we do not need to consider all of China's arguments in detail. We do, though, consider China's arguments regarding the USITC's finding of a "cost-price squeeze" (*see* paras. 7.239 to 7.260 below).
[344] USITC Report, pages 25-26.
[345] USITC Report, pages 15-18 and 24.
[346] USITC Report, pages 23-24.
[347] USITC Report, pages 17 and 24.

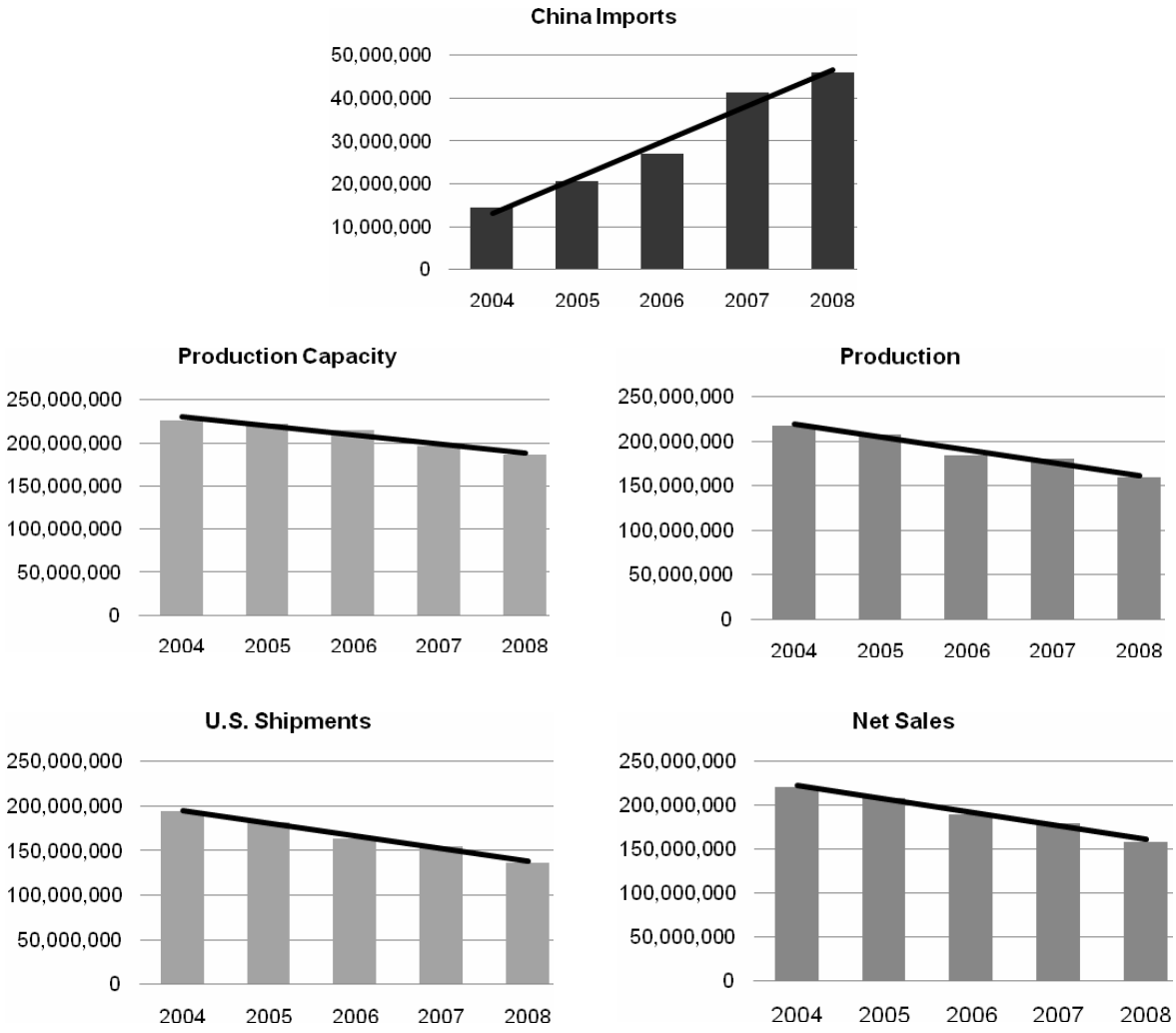
7.235 Furthermore, the U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008, when subject imports were at their highest.[348] In particular:

- Productivity fell by 11.5 per cent over the period;
- Capacity utilization fell by 10.3 percentage points over the period;
- Operating margins fell by 4.8 percentage points over the period, with declines in three out of four years of that period; and
- Operating income fell from $256.2 million in 2004 to a loss of 262.8 million in 2008.

7.236 We consider that this data was sufficient for the USITC to properly find that there was an overall coincidence between the upward movement in subject imports and the downward movement in domestic industry injury factors. In our view, such overall coincidence is amply demonstrated by the following figures submitted by the United States:

[348] USITC Report, Table C-1.

**Subject tires: Comparison of China imports to U.S. industry indicators, in units, 2004-08**




*Source:* USITC Report, Table C-1.

7.237 China contests the relevance of these figures on the basis that it relates only to volume-based indicators. According to China, volume-based indicators are influenced by the decline in demand and the domestic industry's business strategy of ceding the low-end of the replacement market. We are not persuaded. First, we find below[349] that no prima facie case has been established that there was error in the USITC's conclusion that the industry did not voluntarily adjust its business strategy (i.e., cede the low-end of the replacement market) independent of the rapidly increasing imports from China. Second, we also find below that the USITC properly considered the effect of changes in demand on the domestic industry. In particular, it is apparent that declines in demand do not account for the totality of the injury suffered by the domestic industry.[350] In these circumstances, it was appropriate for the USITC to take declines in volume-metrics into account for the purpose of analysing correlation. Finally, we recall that the U.S. industry also suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out

[349] *See* paras. 7.285 to 7.322 below.
[350] *See* paras. 7.323 to 7.359 below.

of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008.

7.238 For these reasons, we do not accept that the USITC failed to properly establish correlation in the present case. The USITC's finding of overall coincidence was sufficient to support, along with other considerations, its conclusion that subject imports from China were a "significant cause" of material injury to the U.S. tyre industry.

*(ii) Cost–price squeeze*

7.239 As part of its arguments regarding an alleged lack of temporal correlation between increasing subject imports and declining injury factors, China claims that there is no correlation between increased imports and falling prices, as prices actually increased over the period.[351] The United States submits that China's observation is irrelevant, as the USITC did not find that subject imports had caused price depression. Instead, the USITC found price suppression, as underselling by subject imports caused domestic producers to experience a "cost-price squeeze"[352], preventing them from raising their prices sufficiently to offset increasing costs. China submits that the USITC's "cost-price squeeze" theory is predicated on a chain of false assumptions and improper inferences concerning (a) the cost of goods sold ("COGS") to sales ratio, (b) alleged underselling by subject imports, and (c) the role of non-subject imports. China addresses each of these elements in turn.

COGS/sales ratio

7.240 **China** contends that the USITC found that there was a "cost-price squeeze" over the period because the COGS/sales ratio rose by 5.4 percentage points from 2004 to 2008, when the volume of imports from China was at its highest. China rejects this finding, alleging that movements in the COGS/sales ratio do not correlate with rapidly increasing imports from China. China notes in particular that the COGS/sales ratio *fell* by 5.3 percentage points in 2007, which was the very year when imports from China rose by their highest margin. China asserts that, if rapidly increasing imports from China were creating a "cost-price squeeze", one would certainly expect to see that effect in 2007.

7.241 China asserts that the lack of correlation between the COGS/sales ratio and rapidly increasing imports is further evidenced by 2008 data. In 2008, the COGS/sales ratio rose by 5.8 percentage points, whereas the rate of increase in imports from China fell from the previous year. China contends that any "cost-price squeeze" in 2008, if it existed, would have been attributable to the near collapse of the U.S. auto industry and the onset of the worst recession since the 1930s.

7.242 China submits that the USITC theory is also at odds with the relatively greater price increases that U.S. producers were able to achieve during the period. Thus, China notes that the average unit value of U.S.-produced tyres rose 44 percentage points over the period, whereas the average price of non-subject imports rose by only 36.8 percentage points, and imports from China by 25.1 percentage points. China contends that the consistent average unit value increases over the period, and the magnitude of the increases U.S. producers were able to achieve (admittedly over all market tyre segments, including high-value tier 1), do not support the USITC "price squeeze" hypothesis. China

[351] We note that Paragraph 16.4 of the Protocol provides separately for analyses of "the effect of imports on prices" and "the effect of such imports on the domestic industry". Accordingly, it is not apparent to us that the question of price should necessarily be reviewed in the context of temporal correlation. However, since the United States has not objected to China's approach to this issue, we consider China's arguments on price under this section of our Report.

[352] USITC Report, page 24.

notes in this regard that, for pricing product no. 1, the average U.S. price increased by $12.57, whereas the average subject import price increased by only $1.96.

7.243 **The United States** asserts that China acknowledges that the ratio of costs to goods sold increased in every year of the period but one (2007).[353] The United States submits that the fact that the ratio of cost of goods sold to sales declined in 2007, when subject imports increased at the greatest rate, is not enough to show that overall coincidence is not present, as in every other year of the period the ratio of cost of goods sold to sales increased, thus corresponding with increases in the volumes of subject imports in every year. The United States contends that increases in U.S. industry average unit values should be viewed in light of increases in U.S. costs.

7.244 The **Panel** notes that China's claim that there was no correlation between the increase in subject imports and the increase in the COGS/sales ratio is based on its argument that there must be a precise correlation between the relevant trends, and that the USITC's analysis was merely a "simplistic end-point-to-end-point juxtaposition of data"[354] that does not withstand scrutiny. As explained above, we consider that the United States properly found an overall coincidence between rapidly increasing imports and the deterioration in the condition of the domestic industry. The fact that annual movements in every single injury factor did not precisely track annual movements in subject imports does not invalidate the USITC's finding of overall coincidence.

7.245 Regarding China's argument that U.S. producers were able to increase their prices by far more than subject imports, we recall that the USITC made a finding of price suppression. Accordingly, the price of U.S. products must be viewed in light of the costs of the U.S. industry. While China argues[355] that the average U.S. industry price for product no. 1 increased by $12.57 over the period, this price increase must be viewed in light of the $21.24 increase in U.S. industry costs over the same period. Similarly, although the average unit value of U.S.-produced tyres increased by 44 percentage points over the period, the average unit cost of goods sold increased by 52.4 percentage points.[356]

Underselling

7.246 **China** contends that the USITC misleadingly relied on questionnaire responses to assert that there was "pervasive underselling" by imports from China. China acknowledges that questionnaire data showed that imports from China were cheaper than U.S.-produced tyres in 119 of 120 instances in which the USITC compared pricing of Chinese and U.S. tyres, but refers to the observation by the dissent that these comparisons appear to have lumped together tyres with different speed ratings, load indices, and levels of performance, possibly aggregating tyres at different price points. China submits that the margin of underselling calculated and relied on by the USITC is therefore unreliable.

7.247 Furthermore, China contends that any price differences between domestic tyres and subject imports merely reflected the fact that U.S. producers were predominantly and increasingly positioned in the higher-end, premium tyre market, and accounted for more than half of all OEM sales in the U.S., whereas between 95 per cent and 99 per cent of imports from China were in the replacement market, focused on lower-end production. China submits that these differences will inevitably skew the data, and inflate any alleged "margin of underselling". China contends that the data was further skewed by the fact that no OEM sales by subject imports were included in the price comparisons, whereas 3 of the six U.S. producers reported data for the more-expensive OEM sales. China submits

[353] China's First Written Submission, para. 257.
[354] China's Second Written Submission, para. 232.
[355] China's Second Written Submission, para. 239.
[356] USITC Report, Table C-1.

that the USITC should have engaged in a more rigorous analysis of price competition between domestic tyres and subject imports, given the heterogeneous product market in question.

7.248 Furthermore, China criticises the USITC's reliance on questionnaire responses from three U.S. producers to the effect that they had to reduce prices or roll back announced price increases to avoid losing sales to competitors selling tyres from China. China laments the absence of specifics as to when, how frequently, or in what context this dynamic allegedly occurred, or how significant it was to operations over the period. Moreover, China notes (as the dissent observed) that not a single producer could report a specific example of lost revenues or lost sales, and that the USITC did not ask for or receive data from producers suggesting that Chinese import competition barred them from passing through cost increases in the form of needed price rises (as the "cost-price squeeze" theory would require).

7.249 In addition, China refers to the USITC's finding that the margin of underselling was the greatest in 2007, when the imports from China increased by the largest amount. China notes that 2007 was also the year in which the domestic industry saw record profitability. According to China, this disconnect between high margins of underselling and the financial condition of the domestic industry calls into serious doubt the logic of the USITC.

7.250 **The United States** notes that Paragraph 16.4 of the Protocol states that an investigating authority shall consider, among other things, "the effect of imports on prices for like or directly competitive articles" to determine if market disruption exists. The United States submits that the USITC conducted a detailed and thorough evaluation of pricing in the tyres market, and explained how the persistent and significant underselling by subject imports contributed to the deteriorating condition of the domestic industry.

7.251 The United States explains that the USITC collected quarterly data over the period examined for six specific products, each of which was defined by specific dimensions, load indexes, and speed ratings of each to ensure compatibility.[357] The United States asserts that these pricing products accounted for a significant amount of domestic producer's U.S. shipments and subject import shipments[358], and that the resultant comparisons showed underselling by the subject imports in 119 out of 120 comparisons, with the average margins of underselling at their highest in 2007 and 2008, coinciding with the largest volumes of subject imports.[359] The United States asserts that the USITC found that the consistent underselling by the large and rapidly increasing volume of subject tyres displaced domestic shipments by U.S. producers, and eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period examined. The United States asserts that the USITC also noted that continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs and thus suppressed prices.[360]

7.252 The United States rejects China's argument that the price comparison data collected by the USITC is "unreliable" because it does not define the price comparison products in a specific enough manner.[361] The United States submits that the USITC defined its price comparison products in a

[357] USITC Report, V-23-24. In response to China's argument that different speed ratings cause the USITC data to be unreliable, the United States notes that one of the respondent's own witnesses testified in this case that product 3 (which is the only passenger vehicle price product to have three speed ratings) "is a commodity tyre size and that there is little difference in the S, T, and H speed ratings in that particular size. *Id.* at V-35 citing Hearing Transcript, page 304 (Berra).

[358] USITC Report, page 23, n. 128.

[359] USITC Report, Tables V-9-V-14 and Table C-1.

[360] USITC Report, page 24.

[361] China's First Written Submission, para. 260.

highly specific manner that allowed it to perform an apples-to-apples comparison of prices of subject and domestic tyres. The United States further asserts that, given that the large majority of market participants reported that tyres from China and domestically produced were "always" or "frequently" interchangeable, it was entirely reasonable for the USITC to rely on this pricing data as a basis for assessing whether the subject imports were underselling the U.S. tyres.

7.253 Regarding China's argument that the USITC's price comparison data are unreliable because U.S. producers' ship a much higher percentage of their tyres into the more expensive OEM market, the United States asserts that the USITC's price comparison data only compared prices for subject and U.S. tyres on sales into the replacement market.[362] The United States argues that, since no shipments to the OEM market were included in these price comparisons, the fact that more U.S. tyres were sold into the OEM sector than subject tyres does not affect the validity of the USITC's actual price comparisons in any way.

7.254 The **Panel** notes that the USITC found underselling in 119 out of 120 price comparisons undertaken on the basis of data provided by U.S. producers and importers. The USITC also found that the margins of underselling for all six products increased during the period of investigation, and that the increase in the margins for five of the six products were at their highest levels of the period in 2007 and 2008. The USITC also found that the average margin of underselling for all six products coincided with increasing volumes of subject imports, and that the greatest increase in the average margin of underselling was in 2007, the year in which the volume of rapidly increasing imports rose by the greatest amount.[363]

7.255 China challenges the USITC's findings on various grounds. First, China alleges that the USITC's price comparisons were not sufficiently precise, in the sense that they lumped together tyres with different speed ratings, load indices, and levels of performance, possibly aggregating tyres at different price points. We note, though, that the relevant price comparisons were undertaken in respect of six different products, each of which was defined by reference to particular size, load index, and speed rating criteria. For example, the USITC defined Product 1 by tyre size (P225/60R16), load index (97-98), and speed rating S or T.[364] Product 2 was tyre size P235/75R15, load index 105-108, and speed rating S or T. China has not provided any explanation as to why products defined on the basis of such particular criteria would not provide a proper basis for comparing prices.

7.256 China also argues that the USITC's findings regarding underselling were distorted by the fact that the U.S. producers accounted for more than half of sales in the OEM market, whereas subject imports were focused primarily on the replacement market. We note, however, that, according to Tables V-9 to V-16 of the USITC Report, the USITC collected price data for each of the six products for both the OEM and replacement markets. Furthermore, the USITC's findings regarding the increase in the average margin of underselling were based on Tables V-9 to V-14, which concerned sales to the replacement market only. Accordingly, we consider that there was no risk that prices for the OEM market were compared with prices for the replacement market.[365]

7.257 China also argues that the USITC's findings regarding underselling were distorted by the fact that U.S. producers and subject imports targeted different segments of the replacement market, such

[362] USITC Report Tables V-9-V-14. According to the United States, these tables specify that the price comparisons are for shipments to the replacement market only. The United States asserts that shipments to the OEM market are in a separate table, V-15.

[363] USITC Report, page 23.

[364] USITC Report, V-23.

[365] In any event, the USITC found that, in 69 out of 78 quarters, the prices of U.S.-produced tyres sold to the OEM market were actually lower than the prices of comparable U.S.-produced tyres sold to the replacement market (USITC Report, page V-35).

that the price of segment 3 subject imports should not be compared with the price of segment 1 U.S. products. We recall our earlier findings regarding market segmentation, and our rejection of China's claim of attenuated competition. In light of these findings, we do not consider that any differentiation between segments in the replacement market, was so clearly defined, or pronounced, that it should have been incorporated into the pricing analysis undertaken by the USITC. We also recall that, in 2008, the U.S. industry made a large proportion of its sales in tiers 2 and 3, where sales of subject imports were concentrated.[366] As explained above[367], China's claim that the domestic industry and subject imports targeted different segments of the replacement market is, therefore, unfounded.

7.258 Furthermore, China submits that there was no correlation between underselling and profitability, as the largest margin of underselling coincided with record profitability in 2007. We are not persuaded by this argument, as the USITC did properly establish that "increases in the average margin of underselling coincided with increasing volumes of subject imports".[368] The USITC further established that "significant and continuous underselling throughout the period ... by the large and rapidly increasing volume of subject Chinese tires eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period examined".[369] In other words, the USITC found that underselling by subject imports generally had a highly detrimental impact on the domestic industry. In our view, the fact that the USITC might not have specifically addressed the relationship between underselling and one single additional injury indicator – profitability – does not detract from the USITC's findings regarding the effects of "increasing" underselling by subject imports more generally. Nor, as explained above[370], does the fact that profitability might have increased in 2007 undermine the USITC's finding of overall coincidence between rapidly increasing imports and injury to the domestic industry (particularly as operating margins fell by 4.8 percentage points over the period, with declines in three out of four years of the period).

7.259 Finally, we note China's argument that any price suppression would more likely have been caused by non-subject imports, which "dwarfed" subject imports and which also undersold domestic tyres. We address the role of non-subject imports below[371], in the context of our consideration of China's arguments regarding other causes of injury.

7.260 For the above reasons, we find no objection to the USITC's finding of a cost–price squeeze.

(c) Conclusion

7.261 In the light of the above considerations, we find that the USITC's reliance on an overall coincidence between an upward movement in imports and a downward movement in injury factors to support its finding of "significant cause" and to be in accordance with the requirements of Paragraph 16.4 of the Protocol.

**4. The non-attribution of injury caused by other factors to increasing imports**

7.262 **China** attributes the injury suffered by the U.S. domestic industry to a number of factors other than subject imports from China, namely: the domestic industry's business strategy; changes in demand; non-subject imports, and various other factors. China submits that, as a result of these other

[366] *See* para. 7.195 above.
[367] *See* paras. 7.185 to 7.197 above.
[368] USITC Report, page 23.
[369] USITC Report, page 24.
[370] *See* paras. 7.234 to 7.236 above.
[371] *See* paras. 7.364 to 7.367 below.

causes of injury, the domestic producers would have experienced the same injury even without imports from China. China contends that the USITC ignored or failed to assess fully these other causes of injury, or to establish that the injury caused by such other factors was not improperly attributed to the subject imports. China asserts that the USITC merely listed some of the arguments made by respondents regarding alternative causes in a single paragraph and then stated, without explanation, that it "considered" them.[372] China submits that the USITC then dismissed these other causes as legally irrelevant, stating that Section 421 "does not require a weighing of causes, but only that we find that rapidly increasing imports, in and of themselves, are a significant cause of material injury ...".[373] China also claims that, in addition to examining the impact on the domestic industry of each of these alternative factors individually, the USITC should also have examined the cumulative effect of these other causal factors.

7.263 **The United States** contends that the USITC properly addressed all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury.

7.264 We shall examine each of the alleged alternative causes identified by China in turn, beginning with the change in the domestic industry's business strategy. In examining the parties' arguments, we recall our view that a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors.[374]

(a) The domestic industry's business strategy

*(i) Arguments of the parties*

7.265 **China** contends that the USITC relied on four factors to reject the argument that domestic producers had voluntarily ceded the low end of the market: (1) imports from China were increasing before plant closures in 2006 and 2008; (2) significant purchases of tyre-manufacturing equipment in China occurred over the past ten years; (3) U.S. producers were not the largest importers of Chinese tyres during the period; and (4) a 2006 article noted that imports from China were expected to increase.[375] China challenges the USITC's assessment of each of these factors.

Plant closures

7.266 China claims that the USITC improperly attributed plant closings to imports from China, when the record in fact demonstrates that domestic producers were engaged in a long-term strategy that led them to voluntarily close high-cost U.S. plants and plants that focused on small-sized or low-value tyres, and shift production in the United States towards the higher-end segments of the market.

7.267 China claims that the USITC ignored the fact that, rather than suffering injury as a result of subject imports, the U.S. industry chose to restructure itself voluntarily, consistent with its global sourcing strategy. China argues that the U.S. producers are "global companies with global sourcing strategies"[376], and that their "[o]perations in China have enhanced the[ir] profitability".[377] China alleges that the domestic industry voluntarily ceded the low end of the market because it was

[372] USITC Report, page 29.
[373] USITC Report, page 29.
[374] *See* para. 7.177 above.
[375] USITC Report, pages 26-27.
[376] China's First Written Submission, para. 345.
[377] China's First Written Submission, para. 348.

profitable to do so. In particular, China argues that "the imports from China (and other low-cost jurisdictions) are a *positive* factor"[378] for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires".[379]

7.268 China argues that U.S. producers testified repeatedly that they had voluntarily shifted domestic production away from lower-end tyres to the premium, higher-value branded segment. China contends that the USITC improperly rejected the testimony of the U.S. producers concerning their own business strategy, declaring erroneously that the restructuring of the U.S. industry was not "voluntary", and that the resultant plant closures were instead caused by imports from China.[380]

7.269 According to China, there is no record evidence to suggest that imports from China caused any of the plant closures. Regarding two plant closures by Continental, China asserts that hearing testimony indicated that these closures occurred because these two plants were the highest-cost facilities in the entire company:

> The Mayfield, Kentucky and Charlotte, North Carolina plants were closed in 2004 and 2006 respectively. Based on my personal knowledge of the situation as a nine-year employee of Continental, I can tell the Commission that Chinese imports had nothing to so with these closings. As far back as 1997 I was involved in monthly staff meetings that discussed the cost levels in all Continental plants worldwide, including the U.S.
>
> The Mayfield plant was consistently the highest cost plant in the global Continental system. The Charlotte plant was also one of the highest cost plants in the system. Continental was facing many issues during this period. But Chinese import competition was not among them.[381]

7.270 China further contends that, in press releases, Continental attributed the closure of the Mayfield site to declining business conditions and escalating energy and raw materials costs, and the closure of its Charlotte facility to "global competition putting pressure on us as our manufacturing costs are cheaper overseas", the "skyrocketing costs of energy, raw materials, and health care", and the plant's inability to successfully restructure its labor agreement with USW.[382] China submits that no mention was made of Chinese import competition.

7.271 China notes that Bridgestone closed its Oklahoma City facility in 2006 because it produced smaller tyres at the lower-value end of the market.[383] China asserts that, in a press release, Bridgestone said that "this plant produces tires in the low-end segment of the market where demand is shrinking and fierce competition from low-cost producing countries is increasing".[384] China asserts that the press release also stated that "the market is quickly running away from the products we produce in Oklahoma City".[385] China submits that, again, no mention was made of Chinese import competition.

---

[378] China's First Written Submission, para. 349.
[379] China's First Written Submission, para. 349.
[380] USITC Report, page 26.
[381] USITC Hearing Transcript, page 234.
[382] USITC Report, page I-15 and n. 51 (quoting press releases); Continental, "CTNA to reduce production at Charlotte plant", 9 January 2006; Continental, "CTNA announces indefinite suspension of tire production at Charlotte plant", 10 March 2006.
[383] USITC Report, page 64, n. 123 (dissenting Commissioners).
[384] "Bridgestone Firestone to close Oklahoma City Tire Plant", 13 July 2006.
[385] "Bridgestone Firestone to close Oklahoma City Tire Plant", 13 July 2006.

7.272 Regarding Goodyear's 2006 announcement of the closure of its Tyler plant, China asserts that Goodyear's press release explained this closure as consistent with its June 2006 announcement that it would exit certain segments of the private label tyre market.[386] China asserts that the press release also noted that "[t]he Tyler plant principally produces small diameter passenger tires, a segment that has been under considerable pressure from low cost imports".[387] According to China, this generic reference to "low-cost imports" could apply to any import source, including the many non-subject imports that are cheaper than domestic tyres. China contends that the October 2006 press release never mentions imports from China.

7.273 China also refers to three closures announced for 2009. China contends that these three announced closures were all primarily due to the economic crisis that began in 2008 and the overall decline in demand for tyres.[388] China submits that there is no evidence that imports from China are to blame for these closures.

7.274 China further contends that the USITC improperly found that imports from China were increasing before plant closures in 2006 and 2008, whereas the decisions to close these plants were made before imports rose significantly in 2007.

7.275 **The United States** contends that the record showed that imports were already increasing before the announced plant closings, and that U.S. producers issued contemporaneous statements at the time of these plant closings confirming that low-priced competition from imports, including subject imports from China, was an important part of their decisions.[389]

Purchases of tyre-manufacturing equipment by Chinese producers

7.276 **China** notes that the USITC relied on:

> articles in trade publications referred to a surge in the purchase of Western tire production equipment by Chinese tire manufacturers during the last ten years, indicating that Chinese producers were expanding their capacity to produce and export tires.[390]

7.277 China contends that the mere fact that Chinese companies purchased western tyre manufacturing equipment says nothing about whether the U.S. producers voluntarily adopted their business strategy, or were "forced" to curtail lower-end manufacture in the United States by imports from China arriving in the U.S. market. According to China, the USITC did not find that domestic producers shut plants or took other action due to fears about increasing Chinese capacity. China asserts that there is no evidence on the record to suggest such a fear. Furthermore, China contends that the increase in Chinese production capacity is only relevant in the context of a finding of threat of material injury.

7.278 **The United States** asserts that the USITC relied on the above article to demonstrate that market participants were well aware of the extraordinary growth in the size and export capacity of the Chinese industry before and during the period of investigation. According to the United States, the USITC reasonably relied on this article as evidence that U.S. producers had closed certain production

[386] "Goodyear announces planned closing of Tyler facility", 30 October 2006.
[387] USITC Report, pages I-16 through I-17 (citing "Goodyear announces planned closing of Tyler facility", 30 October 2006 (press release)).
[388] USITC Report, page 64 (dissenting Commissioners).
[389] USITC Report, pages 26-27.
[390] USITC Report, page 26.

facilities as a strategy to deal with the rapid growth in the size and aggressiveness of the Chinese industry, and the rapid increase in its exports to the United States.

Subject imports by U.S. producers

7.279 **China** notes that the USITC referred to the fact that:

> U.S. producers were not among the largest importers of subject tires from China during the period examined and collectively accounted for only approximately 23.5 percent of subject imports, including purchases in 2008.

7.280 **China** asserts that the fact that U.S. producers were not the largest importers of Chinese tyres is a *non sequitur*, and has no bearing on whether imports from China were a significant cause of the business strategy that these global producers adopted.

7.281 **The United States** asserts that, because U.S. producers were not the primary importers of the subject imports, they were also not responsible for the large bulk of the increase in Chinese imports over the period. The United States argues that 84.2 per cent of the growth in subject imports over the period of investigation was imported by companies other than U.S. producers.[391] According to the United States, it was reasonable for the USITC to conclude that this indicated that the industry's alleged "voluntary business strategy" was not itself responsible for the tremendous growth in the subject imports during the period.

2006 Article: imports from China expected to increase

7.282 China notes that, in concluding that "a more reasonable explanation for U.S. producers' capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future"[392], the USITC cites specifically to a March 2006 article in *MTD Modern Tire Dealer*, entitled "China and You: Expect more tire imports in the years to come". In particular, the USITC explains that:

> The article noted that China exported an estimated 21 million tires to the United States in 2005, and described the overall effect on domestic supply as "profound" and likely to remain so as imports increase. The article also said, with respect to Chinese production and shipments of tires for the replacement market, that "everyone agrees there will be rapid growth in the segment, especially with all the activity from foreign investing."[393]

7.283 **China** contends that an article positing an expectation that imports from China would increase by an unspecified amount in the future hardly suggests that the global sourcing strategy adopted by the U.S. producers was not "voluntary", or that it was somehow dictated by imports from China.

7.284 **The United States** asserts that this contemporaneous view of the "profound" effect that the increasingly large industry in China had had, and would have on the U.S. tyre market supports the USITC's view that the subject imports were likely to increase as China continued to expand its capacity, production, and share of shipments to the United States. According to the United States, it is

[391] USITC Report, Table II-3.
[392] USITC Report, pages 26-27.
[393] USITC Report, page 27, footnote 150.

no wonder that domestic producers soon realized that they could not compete with the increasing volumes of low-priced subject imports in that market, and reacted by substantially reducing capacity and closing U.S. plants.

*(ii) Evaluation by the Panel*

7.285 China presents the domestic industry's business strategy as an "other cause"[394] of material injury to the domestic industry, in the sense that declines in certain injury indicators (such as the volume-metrics, including production, shipments and net sales quantities) should be attributed to the domestic industry's withdrawal from the low-value segments of the replacement market (i.e., tiers 2 and 3), rather than subject imports. Under this theory, subject imports merely filled a "supply gap"[395] left by the retreating domestic industry.

7.286 The Chinese respondents presented similar arguments before the USITC.[396] Those arguments raised a serious issue that had to be addressed by the USITC, particularly given the lack of domestic producer support for the USW's petition, and the assertion by certain producers that they were not materially injured by subject imports from China[397], and would not change their operations in the event that a remedy were imposed.[398]

7.287 The USITC did address this issue in its Report. The USITC did so primarily in the follow extract from its Report:

> We do not agree that domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market and that the subject imports simply filled the void left by their departure. Imports from China were already increasing before Bridgestone, Continental, and Goodyear announced the plant closings that occurred in 2006 and 2008. The three companies confirmed in statements issued at the time of the announcements that low-priced competition from Asia, including China, was an important part of their decisions.** Moreover, articles in trade publications referred to a surge in the purchase of Western tire production equipment by Chinese tire manufacturers during the last ten years, indicating that Chinese producers were expanding their capacity to produce and export tires. U.S. producers were not among the largest importers of subject tires from China during the period examined and collectively accounted for only approximately 23.5 percent of subject imports, including purchases in 2008. Thus, we find that a more reasonable explanation for U.S. producers' capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future.[399]

** In a footnote, the USITC noted that:

> All three companies cited import competition as a factor in their plant closings: Bridgestone cited "fierce competition from low-cost producing countries" as a factor in closing its Oklahoma City plant in 2006; Continental cited "global competition" and "manufacturing

[394] *See* Section V.C.4 of China's First Written Submission, entitled "The USITC ignored or failed to assess fully other causes of injury".
[395] *See*, for example, China's Reply to Question 41 from the Panel, para. 58.
[396] *See*, for example, USITC Report, pages 19-20, and 26.
[397] USITC Report, page III-10.
[398] USITC Report, page VI-1.
[399] USITC Report, page 26, footnotes generally omitted.

> costs [that] are cheaper overseas" as contributing to the closure of its Charlotte, NC, plant in 2006; and for Goodyear, pressure from low-cost imports was cited as contributing to closure of its Tyler, TX, plant in 2008. CR at I-20-22, PR at I-15-17.[400]

7.288 The USITC also found that "significant and continuous" underselling by subject imports "eroded the domestic industry's market share", causing the domestic industry to "reduce capacity so as to focus on the parts of their business in which they could expect to remain profitable despite the impact of subject imports from China". The USITC found that "the substantial reduction in domestic capacity and the closures of U.S. plants during the period examined were largely a reaction to the significant and increasing volume of subject imports from China, and were not, as respondents argue, part of a strategy by domestic tire produces to voluntarily abandon the low-priced, 'value' segment of the U.S. market".[401]

7.289 China challenges the USITC's treatment of a number of factors, including in particular plant closures in 2006 and 2008, the purchase of tyre-manufacturing equipment by Chinese producers, the proportion of total subject imports made by U.S. producers, and a 2006 article regarding the "profound" effect of subject imports on the U.S. industry. While we necessarily consider the USITC's handling of these factors, and the relevant evidence, individually, we shall also assess the USITC's conclusion on the basis of the totality of the factors and evidence relied on by the USITC.

7.290 Before turning to the evidence regarding the abovementioned factors, we first consider it necessary to make a number of more general observations regarding China's arguments.

General observations regarding China's arguments

7.291 We note that China presents the domestic industry's business strategy as an "other cause"[402] of material injury to the domestic industry. China contends that, following the domestic's industry's abandonment of tier 3, "imports from other countries, including China, were then left to fill the 'supply gap'".[403] In this sense, subject imports are to some extent presented as an "own goal", since they result from the industry's own business strategy. At the same time, though, China argues that the U.S. producers are "global companies with global sourcing strategies"[404], and that their "[o]perations in China have enhanced the[ir] profitability".[405] China further argues that "the imports from China (and other low-cost jurisdictions) are a *positive* factor"[406] for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires".[407] In this sense, China also presents the subject imports resulting from[408] the domestic industry's strategy of off-shoring the production of low-value tyres as being non-injurious.[409] These different aspects of China's arguments prompt the following observations.

---

[400] USITC Report, footnote 147.
[401] USITC Report, pages 24-25.
[402] *See* Section V.C.4 of China's First Written Submission, entitled "The USITC ignored or failed to assess fully other causes of injury".
[403] China's Reply to Question 41 from the Panel, para. 58.
[404] China's First Written Submission, para. 345.
[405] China's First Written Submission, para. 348.
[406] China's First Written Submission, para. 349.
[407] China's First Written Submission, para. 349.
[408] This would seem to cover all subject imports, and not merely those imported by the U.S. producers.
[409] In the same vein, China argues that the decline in volume-based injury factors should not justify a determination of material injury, since those metrics simply reflect the domestic industry's desire to withdraw from the low-end of the tyre market.

7.292 First, the argument that subject imports are non-injurious is belied by the (increasing) margin of underselling established by the USITC.[410] Indeed, one might legitimately wonder why such underselling was necessary if the domestic industry had, as alleged by China, voluntarily ceded the low-end of the market, and if subject imports were merely filling the resultant "supply gap".

7.293 Second, if the domestic industry' withdrawal had really left a void in parts of the market, one would have expected that both subject and non-subject imports would have benefited from the domestic industry's withdrawal. Indeed, China claims that "imports from other countries, including China," were left to fill that "supply gap". The record clearly indicates, though, that only subject imports benefited from the domestic industry's alleged withdrawal from parts of the market.[411] Furthermore, although China refers specifically to the U.S. industry shifting production to Brazil and Indonesia[412], we note that Indonesia's share of imports only increased from 1.8 to 4.3 per cent over the period, while Brazil's share barely moved from 4 to 4.1 per cent. Over the same period, imports from China increased from 12.9 to 33.1 per cent of total imports.

7.294 Third, we note China's argument that "[f]rom 2006 to 2007, when the largest increases in imports from China and Chinese market share occurred, the U.S. tire industry in fact had its *best* financial performance".[413] Although the domestic industry generally did record its highest operating margin (i.e., operating income as a proportion of sales) of the period in 2007[414], when the rate of increase in subject imports was greatest, there were still three (out of ten) domestic producers who recorded operating losses that year.[415] In addition, when the absolute volume of subject imports was greatest, in 2008, the domestic industry recorded its worse operating loss of the period. We are not persuaded, therefore, that there is necessarily any positive connection between the volume of subject imports and the profitability of the domestic industry.

7.295 Fourth, although China contends that, as a result of their business strategy, domestic producers "were themselves responsible for manufacturing and importing many of these tires [from China]",[416] the USITC found[417] that domestic producers only accounted for 23.5 per cent of subject imports in 2008, the year when "the full effect of the industry's shifting business strategy" was allegedly being felt.[418] If subject imports really were being imported by U.S. producers consistent with their own business strategy of off-shoring production of tier 2 and 3 tyres, and if subject imports really were beneficial to domestic producers, we would expect domestic producers to account for a far greater proportion of subject imports. In fact, over the period of investigation as a whole, the USITC record showed that 84.2 per cent of the growth in subject imports was imported by companies *other than* U.S. producers.[419]

7.296 Fifth, regarding China's claim that the domestic industry's "[o]perations in China have enhanced the[ir] profitability",[420] we find no obvious nexus between any increase in the domestic industry's profitability and the volume of subject tyres imported by domestic producers. In particular,

[410] *See* USITC Report, page 23. China challenges the USITC's findings on underselling. We address, and reject, China's arguments at paras. 7.254 to 7.258 above.
[411] Overall, the share of non-subject imports in total U.S. imports declined from 87.1 to 66.9 per cent over the period (USITC Report, Table II-1).
[412] *See* China's First Written Submission, para. 346.
[413] China's First Written Submission, para. 11.
[414] USITC Report, Table C-1.
[415] USITC Report, Table III-5.
[416] China's First Written Submission, para. 349.
[417] USITC Report, page 26.
[418] China's comments on U.S. Reply to Question 49 from the Panel, para. 50.
[419] USITC Report, Table II-3.
[420] China's First Written Submission, para. 348.

as the volume of subject tyres imported by U.S. producers increased by 163 per cent between 2004 and 2008[421], the domestic industry's operating margin *fell* by 4.8 percentage points, going from a positive operating margin of 2.4 per cent to a negative operating margin of 2.4 per cent.[422] Furthermore, from 2006 to 2007, when the operating margin *increased* by 5.5 percentage points, the volume of subject imports by U.S. producers had increased by only 3.6 per cent. When the volume of subject imports by U.S. producers increased more substantially – by 33.6 per cent – from 2007 to 2008, the domestic industry's operating margin *fell* by 6.9 percentage points.

7.297 We now turn to China's arguments concerning the a number of the specific factors relied on by the USITC.

Plant closures

7.298 Put simply, the main issue concerning plant closures is whether such closures preceded, and indeed prompted, the increase in subject imports, or whether plants were closed as a result of competition from subject imports. In addressing this issue, the USITC relied on evidence regarding the closure of the Continental, Charlotte, plant in 2006, the Bridgestone, Oklahoma City, plant in 2006, and the Goodyear, Tyler, plant in 2008.[423] Our analysis will therefore focus on the evidence and arguments regarding these three plant closures.[424]

7.299 Regarding the Continental, Charlotte, plant, we note that a contemporaneous Continental press release attributed the closure of this plant to *inter alia* "global competition putting pressure on us as *our* manufacturing costs are cheaper overseas".[425] As observed above, the USITC interpreted this to be a reference to import competition from China. For our part, we consider that Continental's reference to "global competition" should be understood as competition from other *Continental* plants in the world. This is because the press release clearly refers to "our" manufacturing costs being "cheaper overseas". As to whether import competition from other Continental plants in the world might include subject imports from China, we note that the USITC Report clearly states that Continental did not have any production facilities in China.[426] Since Continental did not have any production facilities in China, there was no proper basis for the USITC to conclude that imports from Continental plants around the world might include subject imports from China. We also note that a former Continental employee testified before the USITC that "Chinese imports had nothing to do with [the Charlotte] closing[]".[427] In these circumstances, the USITC could not properly have attributed the closure of the Continental, Charlotte plant to subject imports from China.

7.300 Regarding Bridgestone's closure of its Oklahoma plant, the contemporaneous press release stated that "this plant produces tires in the low-end segment of the market where demand is shrinking and fierce competition from low-cost producing countries is increasing".[428] The press release further stated that "the market is quickly running away from the products we produce in Oklahoma City". To some extent, then, shifts in demand played a part in the closure of the Bridgestone, Oklahoma plant. However, the reference to "fierce competition from low-cost producing countries" suggests that shifts

[421] USITC Report, Table II-3.
[422] USITC Report, Table C-1.
[423] *See* USITC Report, footnote 147, and U.S. Reply to Question 51 from the Panel.
[424] Since the USITC did not rely on evidence regarding the Continental, Mayfield plant, or the three closures announced for 2009, we shall not consider the evidence regarding these additional closures.
[425] Continental press release, "CTNA announces indefinite suspension of tire production at Charlotte plant", 10 March 2006.
[426] USITC Report, pages IV-3 to IV-6, describing "U.S. Producers' Subject Tire Manufacturing Facilities in China". No Continental plant is included in this listing.
[427] USITC hearing transcript, page 234, lines 7-15.
[428] Bridgestone press release, "Bridgestone Firestone to close Oklahoma City Tire Plant", 13 July 2006.

in demand were not entirely responsible for the closure of that plant. The reference to "fierce" competition also suggests that import competition was not as benign as China suggests, and that imports were not merely filling a "supply gap" caused by the industry's retreat from the low-end of the market.[429]

7.301 As to whether the USITC could properly have understood Bridgestone's reference to "fierce [import] competition" to include competition from subject imports from China, we note that the press release makes no express mention of imports from China. However, footnote 130 of the USITC Report provides that the average margin of underselling by subject imports was 10.8 per cent in 2004, 14.8 per cent in 2005, and 18.8 per cent in 2006. Furthermore, the average unit price for non-subject imports was consistently higher than the average unit price for subject imports during the period 2004 - 2006.[430] Indeed, by 2006 only imports from Indonesia were cheaper than subject imports from China[431], and Indonesian imports represented only 3.4 per cent of total imports in 2006, compared to subject imports' 21.2 per cent share. Furthermore, the Chair of the USITC, in expressing separate views on remedy, stated that "information in the record shows that the volume of third-country imports has declined since 2005, and that unit values of third-country imports are on average well above those of imports from China and closer to those of domestic tires".[432] In fact, the volume of non-subject imports declined 1.8 per cent from 102,424,000 tyres in 2005 to 100,601,000 tyres in 2006, whereas the volume of subject imports increased 29.9 per cent from 20,790,000 to 27,005,000 in this period. In addition, the market share of subject imports nearly doubled from 4.7 per cent in 2004 to 9.3 per cent in 2006, whereas the market share of non-subject imports increased only slightly from 31.9 per cent to 34.5 per cent over the same period. In light of the increasing underselling by, and growth in, subject imports relative to non-subject imports in the years 2004-2006, we consider that it was not unreasonable for the USITC to understand the reference to "fierce [import] competition" to include subject imports from China.

7.302 In addition, we note that the USITC Report states:

> The 2006 announced closure of Bridgestone's Oklahoma City, OK plant was reportedly related to both the plant's product mix (low-end segment of the market) and intense competition from lower-cost sources - low-cost Korean and *Chinese-made* tires specifically cited.[433]

7.303 In response to a question from the Panel regarding this statement by the USITC, the United States explained that a senior Bridgestone employee was quoted in a contemporaneous press article as identifying "low-cost Korean and Chinese-made tires flooding the U.S. market as one of the reasons for the plant's economic troubles".[434]

7.304 For these reasons, we consider that the USITC could properly have attributed the closure of the Bridgestone, Oklahoma City, plant to subject imports.

7.305 Regarding the closure of the Goodyear, Tyler, plant in 2008, we note that Goodyear's contemporaneous press release noted that "[t]he Tyler plant principally produces small diameter passenger tires, a segment that has been under considerable pressure from low cost imports".[435] In

[429] China's Reply to Question 41 from the Panel, para. 58.
[430] USITC Report, Table C-1.
[431] USITC Report, Table II-1.
[432] USITC Report, page 42.
[433] USITC Report, page III-16, footnote 62, emphasis added.
[434] U.S. Reply to Question 52 from the Panel, para. 55.
[435] USITC Report, pages I-16 through I-17 (citing "Goodyear announces planned closing of Tyler facility", 30 October 2006 (press release)).

theory, it is possible that this generic reference to "low-cost imports" could apply to imports from any source, including non-subject imports. In the circumstances of this case, though, we consider that the USITC was entitled to understand this to be a reference to subject imports from China, particularly in light of the above considerations regarding the increasing underselling by, and growth in, subject imports relative to non-subject imports. The competition from subject imports was clearly greater than the competition from non-subject imports.[436]

7.306 We note China's argument that subject imports could not have played an important role in the decisions by U.S. producers to close the abovementioned plants because such closures were announced before the significant increase in subject imports in 2007. China also contends that subject imports only represented 6.8 per cent of the U.S. market by volume and 4.7 per cent by value at the end of 2005. China adds that subject imports were "dwarfed" by non-subject imports, with non-subject imports holding 33.6 per cent of the U.S. market by volume and 31.2 per cent by value in 2005.

7.307 The USITC record indicates that all three of the abovementioned plant closures were announced in 2006. The press release for the Bridgestone closure was dated July 2006.[437] The press release for the Continental closure was also dated July 2006.[438] The Goodyear closure was described in 2008 as being consistent with, and therefore presumably part of, a June 2006 announcement. It is true, therefore, that these closures were announced prior to 2007. However, although China seeks to focus the Panel's attention on 2007, and the fact that subject imports increased by their greatest amount in that year, the USITC record shows a very substantial increase in the volume of imports prior to 2006. In particular, the USITC found:

> Subject imports from China increased from 14.6 million tires in 2004 to 20.8 million tires in 2005 (or by 42.7 percent), 27.0 million tires in 2006 (or by an additional 29.9 percent), and 41.5 million tires in 2007 (or by an additional 53.7 percent).[439]

7.308 Thus, between 2004 and 2006, when the abovementioned plant closures were announced, subject imports had already increased significantly by 85 per cent.[440] Although the greatest growth in

---

[436] Furthermore, we note that union officials testified before the USITC to the effect that the Goodyear, Tyler, plant was closed as a result of subject imports from China. One union official testified that:

> Imports from China closed our plant …. From the very beginning, Goodyear told us the Tyler plant was at risk because of low-priced imports. … the company repeatedly identified imports from Asia, including fast-growing imports from China, as a threat to our plant. (USITC Hearing Transcript at 93-94).

Another union official testified that:

> In interim meetings with Goodyear since 2003, we've had open discussions about imports from China. In presentations to the union, Goodyear specifically identified low-priced Asian imports as a threat to our facilities, and they show that China's share of these imports are rising steadily. … To help the company survive the onslaught of tires from China, it was not enough just to cut costs. There was simply no way to compete with China on cost alone. Their prices are so far below any rational level you would get in a functioning market that even if we came to work for free we couldn't compete on the basis of cost. (USITC Hearing Transcript at pages 85-86.)

[437] USITC Report, page I-15, footnote 45.
[438] USITC Report, page I-15, footnote 51.
[439] USITC Report, footnote 146.
[440] At interim review, China argued that because the plant closures were announced only halfway through 2006, these decisions should be viewed in light of subject import data from 2005 – not totals for the

the rate of increase in subject imports was yet to occur, in 2007, the fact that subject imports had already increased by 85 per cent before the plant closures was sufficient for the USITC to properly find, in the context of the additional evidentiary considerations outlined above, that these plant closures were linked to the increase in subject imports from China. Regarding the importance of subject imports relative to non-subject imports, we recall our above finding concerning the increasing underselling by, and growth in, subject imports relative to non-subject imports.

7.309 We also note China's argument that U.S. producers "testified repeatedly that they had shifted domestic production away from lower-end tires to the premium, higher-value branded segment".[441] In making this argument, China cites only to the following finding by the dissenting commissioners:

> Domestic producers … made significant strategic business decisions to shift U.S. production toward higher-value tires and capitalize on consumer brand loyalty.[442]

7.310 This statement by the dissenting commissioners does not constitute, nor refer to, producer testimony. Furthermore, there is no doubt that U.S. producers reduced U.S. production of tyres for tiers 2 and 3 of the replacement market. The issue under examination is whether the U.S. industry did so voluntarily, independent of competition from subject imports, or whether the domestic industry was forced to close U.S. production capacity as a result of competition from Chinese imports. The abovementioned statement by the dissenting commissioners does not address this particular issue.

7.311 China also submits that testimony before the USITC by "businessmen directly engaged in buying and selling tier 3 tires emphasized that U.S. producers were not pushed out of tier 3 – but instead abandoned it".[443] We recall, though, that even in 2008 the U.S. industry still made 18.6 per cent of its shipments to tier 3 of the replacement market. We also recall the finding by the dissenting commissioners that.

> We recognize that domestic tire producers have not abandoned the tier 3 market, as respondents maintain.[444]

7.312 Accordingly, China has not presented convincing evidence that producers acknowledged that they voluntarily closed U.S. production operations for the low-end of the replacement market. While it is true that none of the U.S. producers expressed support for the petition, only four out of ten producers said they were not materially injured by subject imports. Other producers either said they were not in a position to answer, or took no position on the issue. Furthermore, although some producers said they would not change their operations in the event that a remedy was imposed,[445] this fact is hardly surprising given that a remedy of only three years' duration was under consideration. There would be little value in adapting to a market situation that would likely only last for three years, whereupon subject imports would resume. For the above reasons, we consider that the USITC could properly attribute plant closures to subject imports.

---

whole year 2006. We are not persuaded by this argument. First, as noted above, the USITC record indicated that subject imports had already increased by 42.7 per cent from 2004 to 2005. Second, the volume of imports at the end of 2006 is a fair reflection of the trend in subject imports during the course of 2006, while the plant closures were occurring.

[441] China's First Written Submission, para. 346.

[442] USITC Report, page 45, cited by China in footnote 386 of its First Written Submission.

[443] China's Reply to Question 41 from the Panel, para. 58.

[444] USITC Report, page 64.

[445] USITC Report, page VI-1.

Subject imports by U.S. producers

7.313 China suggests that the proportion of subject imports made by U.S. producers is not relevant to the issue of whether or not rapidly increasing subject imports played any role in the domestic industry's decision to shift the production of certain tyres overseas. However, we recall that the USITC was responding to an argument that domestic producers had voluntarily ceased production in the United States of lower-value tyres, as part of a restructuring of their global production operations, and replaced those tyres with imports from other sources, including China. Presumably, as discussed above,[446] if U.S. production of lower-value tyres had declined because domestic producers had decided to replace domestic production of low-value tyres with imports from their global production facilities, it would be expected that much of the growth in imports of subject merchandise would have been on behalf of those domestic producers. In this context, the volume of subject imports made by domestic producers is relevant. China also notes the proportion of subject imports made by U.S. producers, and that U.S. producers importing subject imports is "in line with" the abovementioned business strategy.[447] In other words, China itself refers to the proportion of subject imports made by U.S. producers as proof of the existence of the abovementioned business strategy.

7.314 We already touched upon this issue at para. 7.295 above. In this respect, we recall China's argument that "the imports from China (and other low-cost jurisdictions) are a *positive* factor"[448] for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires".[449] If China's argument were correct, it would seem reasonable to expect U.S. producers to account for a relatively large share of subject imports (as the more they would import, the better off they would be).

7.315 In these circumstances, we see no error in the USITC having considered the proportion of subject imports actually accounted for by U.S. producers. Furthermore, we see no error in the USITC having relied on the fact that U.S. producers only accounted for approximately 23.5 per cent of subject imports to support a finding – based also on other considerations – that U.S. producers had not voluntarily ceased U.S. production of the low-end tyres.

Purchase of tyre-manufacturing equipment by Chinese producers

7.316 As an initial matter, we note China's argument that any increase in Chinese production capacity should only be relevant in the context of a finding by the USITC of a threat of material injury. While this factor would be of particular relevance in an analysis of threat of material injury, we do not consider that an objective and impartial investigating authority should be precluded from relying on such evidence – in conjunction with additional evidence regarding other factors – to determine whether subject imports might have caused domestic producers to cease producing low-value tyres.

7.317 As to the significance of the evidence considered by the USITC, we note that the trade publication article cited by the USITC reports that Chinese producers had been increasing their production capacity for the ten years preceding 2008, long before the abovementioned plant closures in the United States occurred. The article also reports that the "China boom" (in purchases of tyre-making equipment) "has not ended", even though China already hosted half of the world's tyre-making facilities. In our view, this article provided a reasonable basis for the USITC to conclude that U.S. producers might well have decided that subject imports from China had already become an

[446] *See* para. 7.295 above.
[447] China's First Written Submission, para. 347.
[448] China's First Written Submission, para. 349.
[449] China's First Written Submission, para. 349.

inescapable part of the market, and would continue to grow in significance, such that U.S. producers should adapt their business strategy accordingly. Combined with other relevant evidence, this article could properly support a determination by an objective and impartial investigating authority that "a more reasonable explanation for U.S. producers' capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future".[450]

2006 Article: imports from China expected to increase

7.318 China contends that an article positing an expectation that imports from China would increase by an unspecified amount in the future hardly suggests that the global sourcing strategy adopted by the U.S. producers was not "voluntary", or that it was somehow dictated by imports from China.

7.319 We agree that the article, in and of itself, does not explain that the U.S. produces closed plants as a result of subject imports. However, the article does indicate that subject imports from China had already had a "profound" impact on the domestic industry, and that the industry generally agreed that subject imports would increase further ("everyone agrees there will be rapid growth in the segment, especially with all the activity from foreign investing"). When considered in light of other evidence, this evidence might properly be used to support a determination that domestic producers would have had an interest in adapting their business strategy in the face of, rather than independent of, subject imports from China.

*(iii) Conclusion*

7.320 The Panel was confronted with the fact that the majority of the USITC and the dissenting commissioners drew precisely the opposite conclusions on the issue of business strategy. The majority took the view that the strategy to reduce U.S. production and locate production in China was itself a response to increased imports and thus it was not an alternative cause that prevented the increasing imports from China to be a significant cause. The dissenting commissioners took the view that the business strategy of relocating production to China was an independent business strategy that began before imports were increasing. Yet both considered precisely the same evidence. There was no evidence considered by the dissenting commissioners that was not also considered by the majority. And, no further evidence that might have been considered by the majority but was not was adduced in this case.

7.321 In these circumstances, it would be inappropriate for the Panel simply to make a choice between the views of the majority and the dissenting commissioners. In fact, our own assessment of the record indicates that it is difficult to separate out the business strategy from the increasing imports. It may well be, as the dissenting commissioners say, that the strategy of relocating to China began before 2004 and before the substantial increases in subject imports.[451] But it is also true that plant closures occurred after the increase in imports and may well have been linked to the competition from imports. Indeed, the decision to locate production in China might have been the result of an independent business strategy, but the decision to close plants might well have been a response to imports.

7.322 In the light of these considerations, the Panel can see no basis for determining that the USITC's analysis of the alternative business strategy was in error. It was for China to establish a prima facie case of such error and it failed to do so.

[450] USITC Report, page 26.
[451] USITC Report, page 49 (dissenting Commissioners).

(b) Changes in demand

7.323 **China** claims that a proper evaluation of demand by the USITC would have shown that any injury suffered by the domestic industry was caused by changes in demand, rather than subject imports. China submits that the USITC overlooked four important changes in demand for tyres in the United States. First, there was a prolonged contraction in demand over the period of investigation, with apparent consumption falling by 10.3 per cent during the 2004-2008 period. China asserts that consumption was lower in every year except 2007, which saw a modest, but short-lived, increase. China recalls the dissent's observation that consumers were buying fewer tyres, and driving more miles on their existing tyres.[452] China also asserts that, from 2007 to 2008, there was almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments.

7.324 Second, China contends that the contraction in demand was particularly pronounced in the OEM market, with total shipments in that market falling by 28 per cent. China recalls that the U.S. producers devoted approximately 20 per cent of their domestic production to the OEM market.

7.325 Third, China submits that the recession of 2008, and the near-collapse of the U.S. auto industry, greatly accelerated this contraction in demand. China notes that consumer demand for vehicles – a key determinant for tyre demand – fell dramatically in 2008. China refers to the dissent's observation that:

> The near collapse of the US automobile industry lent a devastating blow to the OEM market in 2008. Thus the fact that the industry's performance turned negative in 2008 was not the result of subject imports (whose rate of increase had slowed), but was due to the effects of the economic recession on US producers' sales to both the OEM and replacement markets.[453]

7.326 Fourth, China asserts that, at the same time consumer demand shifted in favour of larger tyres, even for smaller, fuel-efficient vehicles. According to China, this required producers to shift production, and in some cases reduce capacity or close factories that produced smaller tyres.[454]

7.327 China contends that the USITC barely acknowledged these changes in demand in its Report.

*(i) Demand over the period of investigation as a whole: correlation with injury*

Arguments of the parties

7.328 **China** contends that there was a "prolonged contraction" in demand over the period of investigation, with apparent consumption falling by 10.3 per cent during the 2004-2008 period. China asserts that consumption was lower in every year except 2007, which saw a modest, but short-lived, increase. China also contends that the volume indicators (of the condition of the domestic industry) track demand more closely than subject imports. According to China, moderate declines in demand during the 2004-2005 and 2005-2006 periods correspond with moderate declines in domestic industry volume indicators. China asserts that, during the 2006-2007 period, demand increased, and the domestic industry volume indicators improved as a result. China contends that, during the 2007-2008 period, the trends reverse: demand and volume indicators fell sharply, while imports from China

[452] USITC Report, pages 47-48 (dissenting Commissioners).
[453] USITC Report, page 64 (dissenting Commissioners).
[454] *See* USITC Report, page 51, n. 47 (dissenting Commissioners); USITC Report, pages III-1 through III-6.

moderated. China also asserts that, from 2007 to 2008, there was almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments.

7.329 Regarding the trend in demand over the period of investigation, the **United States** denies that there was a "prolonged" contraction in demand "apparent across the entire period of investigation".[455] The United States asserts that the record showed that apparent U.S. consumption declined slightly by 0.8 per cent from 2004 to 2005, and by 4.4 per cent from 2005 to 2006, but actually increased by 1.6 per cent from 2006 to 2007, before declining by 6.9 per cent from 2007 to 2008. According to the United States, therefore, demand "fluctuated" somewhat during the period, even though it had declined overall by the end of the period.[456]

7.330 The United States submits that the USITC also considered the possibility that the recession in 2008 had affected the link between the increased imports and injury, by examining the impact of the recession in 2008 on the increasing volumes of the subject imports, and on the volumes trends for the U.S. industry and non-subject imports.[457] The United States notes that the USITC found that, "even in 2008 when U.S. apparent consumption was falling," the record showed that the subject "imports continued to increase rapidly".[458] Specifically, the USITC stated, "subject imports increased by 4.5 million tyres in 2008, while U.S. consumption declined by 20.4 million tyres".[459] The United States asserts that the USITC pointed out that, in contrast, the quantities of U.S. tyres and those of non-subject imports declined during 2008, with imports from third countries falling at roughly the same pace as the decline in consumption, and U.S. production falling by 11.1 per cent, a pace that was significantly faster than the 6.9 per cent decline in consumption in that year.[460] The United States argues that, given these trends in 2008, the USITC reasonably rejected the claims of Chinese respondents that the recession in 2008 explained all or most of the declines in the industry's production and shipment levels during that year[461], and therefore reasonably concluded that the recession did not indicate that the subject imports were not a significant cause of material injury to the industry.[462]

7.331 The United States asserts that if injury factors tracked demand, the 2007 1.6 per cent increase in demand should have resulted in a similar increase in the volume indicators. The United States asserts that this did not happen, as volume indicators all fell from 2006 to 2007. The United States notes, though, that in 2007 subject imports increased by 53.7 per cent, in excess of the increase in demand. The United States asserts that the lack of correlation between injury factors and demand is also evident from the 2004-2005 period, when demand fell slightly, by 0.8 per cent, but the injury indicia fell by a considerably faster pace. The United States acknowledges that both demand and injury indicators fell in 2006 and 2008, but asserts that the declines in the industry's condition considerably outpaced the declines in demand in those years.

7.332 **China** submits that the U.S. analysis is overly-simplistic, and based on the assumption that the only causal factor at work is subject imports from China. Regarding 2007, China contends that injury indicators do not have to precisely track the increase in demand. According to China, the changes in 2007 should rather be compared to the changes in 2006. In this regard, China asserts that, because 2006 saw a decrease in demand while 2007 saw an increase, the changes in the injury

[455] Oral Statement by China at First Panel Meeting, paras. 77-78.
[456] USITC Report, page 15 and 32.
[457] USITC Report, page 26.
[458] USITC Report, page 26.
[459] USITC Report, page 26.
[460] USITC Report, page 26.
[461] USITC Report, page 26 & 29.
[462] USITC Report, page 29.

indicators in 2007 should be much more modest than the changes in 2006. China contends that they were, in the sense that the volume indicators declined by less in 2007 than in 2006. According to China, the changes in all volume-based metrics significantly improved in 2007 when demand increased, as compared to the changes in 2006 when demand decreased. China contends that the changes experienced by the domestic industry in 2007 must also be viewed in light of the industry's change in business strategy, which inevitably caused volume indicators to decline. Regarding the other years, China contends that the U.S. argument rests on the false premise that when assessing the changes in demand it is proper to expect the injury factors to change by the *same amount*. China submits that, while correspondence in degrees of magnitude is important and indicative of coincidence, it is unlikely that there will be a precise one-to-one correlation in a multi-causal world. China contends that, where the degree of correspondence between demand and the industry's condition is not exact, the other causal factors, such as changing business strategy, should be taken into account.

Evaluation by the Panel

7.333 Although the USITC did not include in its report a discrete section on demand, in our view the USITC ultimately did properly address the issue of demand, and did properly find that subject imports had injurious effects independent of any injury caused by changes in demand. In particular, we note the USITC's finding that:

> The large increase in the volume of subject imports is also reflected in those imports' large and growing share of the U.S. market. Subject imports increased their share of the U.S. market by 12 percentage points (more than threefold) between 2004 and 2008, from 4.7 percent in 2004 to 16.7 percent in 2008. More than half of this increase, 7.4 percentage points, has occurred since 2006.[463]

7.334 In a footnote at the end of that finding, the USITC calculates subject imports' "share of the quantity of apparent U.S. consumption" for the whole period of investigation: 4.7 per cent in 2004, 6.8 per cent in 2005, 9.3 per cent in 2006, 14.0 per cent in 2007, and 16.7 per cent in 2008.[464] The USITC expressly found:

> The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008.[465]

7.335 In a related footnote, the USITC stated:

> ... The ratio of subject imports to U.S. apparent consumption increased from 4.7 percent in 2004 to 6.8 percent in 2005, 9.3 percent in 2006, 14.0 percent in 2007, and 16.7 percent in 2008.[466]

7.336 The USITC clearly found, therefore, that the ratio of subject imports to U.S. apparent consumption increased throughout the period of investigation. Even when demand increased by 1.6 per cent in 2007, the volume of subject imports increased by the significantly greater figure of 53.7 per cent. As a result, subject import market share increased by 4.8 percentage points, while the domestic industry's market share declined by 3.4 points (and the market share of non-subject imports

[463] USITC Report, page 22.
[464] USITC Report, footnote 127.
[465] USITC Report, page 12.
[466] USITC Report, footnote 52.

declined by 1.1 per cent).[467] In 2005, demand fell by a very modest 0.8 per cent. Subject imports in that year increased by 42.7 per cent, resulting in a 2.1 percentage point increase in market share, while the domestic industry's market share fell by 3.7 percentage points. In 2006, as demand fell by 4.4 per cent, the volume of subject imports increased by a further 29.9 per cent, resulting in a 2.4 percentage point increase in subject import market share. This contrasted with a 3.4 percentage point decline in the domestic industry's market share.

7.337 Regarding 2008 in particular, the USITC found:

> Moreover, imports continued to increase rapidly even in 2008 when U.S. apparent consumption was falling. Subject imports increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires. Imports from third countries declined by 6.0 million tires in 2008, or by 6.1 percent, roughly consistent with the 6.9 percent decline in U.S. apparent consumption in 2008. Meanwhile, domestic production of subject tires declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.[468]

7.338 We further note that, as demand fell by 6.9 per cent in 2008, the volume of subject imports continued to increase by an additional 10.8 per cent, resulting in a 2.7 percentage point increase in market share, compared with a fall in the domestic industry's market share of 2.9 percentage points.

7.339 Notwithstanding the above record evidence regarding the injurious effects of subject imports as distinct from the injurious effects of changes in demand, China asserts that the decline in the state of the domestic industry correlated with a "prolonged contraction" in demand, such that the USITC should have attributed any injury suffered by the domestic industry to that contraction in demand. We begin by considering whether or not there really was a "prolonged contraction" in demand over the period of investigation as a whole, as alleged by China. We note in this regard that apparent consumption[469] of all passenger vehicle and light truck tyres declined (by volume) by 10.3 per cent from 2004 to 2008. We also note, though, that the bulk of this fall in apparent consumption occurred at the end of the period of investigation, from 2007 to 2008.[470] Prior to 2007, apparent U.S. consumption declined slightly by 0.8 per cent from 2004 to 2005, by 4.4 per cent from 2005 to 2006, but actually increased by 1.6 per cent from 2006 to 2007. Accordingly, while there was a pronounced

[467] USITC Report, Table C-1.

[468] USITC Report, page 26, footnote omitted.

[469] During the Panel's second substantive meeting with the parties, China argued that the USITC improperly relied on apparent consumption as a proxy for demand. China pursued this argument in response to Question 31 from the Panel. In our view, it is entirely appropriate for investigating authorities to use apparent consumption as a proxy for demand in the context of trade remedy investigations. Indeed, we understand that it is common practice for investigating authorities to do so. Furthermore, in these proceedings China has itself referred to apparent consumption data as a proxy for demand. At page 32 of its first oral statement, for example, China submits a chart of graphs, the first of which is entitled "Changes in Total Consumption (Proxy for Demand)". Furthermore, at para. 76 of its second oral statement, China refers to the "broader trend of declining consumption over the entire period". In doing so, China refers to para. 322 of its Second Written Submission, which in turn refers to "the broader contraction in demand that was apparent over the entire period". In this context, therefore, China is clearly using the term "consumption" as a synonym for demand. Furthermore, at para. 332 of its First Written Submission China refers to the fact that "[a]pparent consumption ... fell by 10.3 percentage points" to support it argument that there was a "prolonged contraction in demand". Finally, in China's comments on the U.S. Replies to Questions from the Panel after the second meeting, China refers to USITC apparent consumption data to describe the movements in demand (*See* para. 42).

[470] According to Table V-1 of the USITC Report, apparent consumption fell from 307,484,000 to 296,091,000, i.e., 3.7 per cent, over four years between 2004 and 2007. Apparent consumption fell by 6.9 per cent in the single year from 2007 to 2008 (from 296,091,000 to 275,702,000).

decline in apparent consumption from 2007 to 2008, the record evidence does not demonstrate a "prolonged contraction" in demand over the period of investigation as a whole. In these circumstances, we see no error in the USITC's finding that demand (or apparent consumption) "fluctuated"[471] during the period of investigation.

7.340 We note China's assertion that demand declined by 4.4 per cent from 2005 to 2006, but improved by 1.6 per cent from 2006 to 2007, and that this improvement in demand correlates with an "improvement" in injury factors, in the sense that the continued downward movements in volume-based injury factors from 2006 to 2007 were "much more modest" than the changes from 2005 to 2006. We acknowledge that the decline in volume metrics from 2006 to 2007 was less than for 2005 to 2006.[472] In our view, though, if correlation between demand and injury were to exist, an improvement in demand should generally result in an *upward* movement in volume metrics.[473] In this case, the 1.6 per cent *increase* in demand coincided with a 2.4 per cent *decline* in production, a 5 per cent *decline* in U.S. shipments, a 5.5 per cent *decline* in net sales quantities, a 3.6 percentage point *decline* in market share, a 6.4 per cent *decrease* in the number of production-related employees, a 3.7 per cent *fall* in hours worked, a 6.3 per cent *decline* in wages paid, and a 2.7 per cent *fall* in hourly wages. Thus, injury indicators did not improve as demand increased.

7.341 Furthermore, we note that the change from 2006 to 2007 does not correlate in any meaningful manner with the change from 2004 to 2005. In 2005, demand fell by only 0.8 per cent. At the same time, production fell by 4.8 per cent, U.S. shipments quantities fell by 6.7 per cent, net sales quantities fell by 5.7 per cent, and market share fell by 3.7 percentage points. In other words, the 2005 0.8 per cent *fall* in demand had virtually the same effect on shipments and net sales as the 2007 1.6 per cent *increase* in demand.

7.342 Demand fell by 4.4 per cent in 2006, and by 6.9 per cent in 2008. Injury factors also declined in those two years. However, the decline in the volume-based injury factors was considerably more pronounced than the fall in demand. In 2006, compared to a 4.4 per cent decline in demand, U.S. industry production fell by 11 per cent, shipments fell by 9.9 per cent, and net sales fell by 8.9 per cent. In 2008, compared to a 6.9 per cent fall in demand, U.S. industry production fell by 11.1 per cent, U.S. shipments fell by 12.1 per cent, and net sales fell by 11.7 per cent. Although the declines in shipments and net sales were more pronounced in 2008 than 2006, the fall in production was virtually the same in those two years, despite the fall in demand in 2008 (6.9 per cent) being considerably greater than in 2006 (4.4 per cent).

7.343 Regarding 2008, China asserts that the fact that there was almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments from 2007 to 2008 shows that the decline of the domestic industry was closely linked to demand. We note, though, that the U.S. industry held only 49.6 per cent of the market in 2008.[474] Accordingly, there is no reason why the domestic industry should have absorbed more than its *pro rata* share, i.e., 49.6 per cent, of the decline in demand in that year. In our view, a decline in demand should generally have comparable effects on all sources of supply, including subject imports. The fact that the domestic industry was required to absorb virtually 100 per cent of the decline in demand in 2008, while subject

[471] USITC Report, page 15.

[472] From 2005 to 2006, production fell by 11 per cent, shipments fell by 9.9 per cent, and net sales quantities fell by 8.9 per cent.

[473] China itself made a similar argument in these proceedings. At para. 42 of its second oral statement, China argued that "production must go down if demand is going down". We agree. Just as production should decrease if demand declines, so production should increase if demand improves.

[474] USITC Report, Table C-1.

imports continued to increase by 10.8 per cent, demonstrates that subject imports were having effects on the domestic industry that could not be explained by that decline in demand.

7.344 We note China's argument that, where the degree of correspondence between demand and the industry's condition is not exact, the other causal factors, such as changing business strategy, should be taken into account (in the sense that the change in strategy would explain changes in the domestic industry's volume metrics, as the production, shipments and sales of low-value tyres are reduced). In the light of our earlier findings relating to the change in business strategy, this factor cannot be used to explain any absence of correlation between demand and the state of the industry.

7.345 Taking into account the above considerations, including in particular the USITC's findings regarding the effects of subject imports independent of changes in demand, we conclude that the USITC's finding that injury should be attributed to subject imports rather than demand is compelling.

*(ii) Demand in the OEM market*

Arguments of the parties

7.346 **China** contends that the fall in demand was "particularly pronounced"[475] in the OEM sector, where the domestic industry focused 20 per cent of its production. According to China, the USITC should therefore have analysed demand trends in the OEM sector separately from demand trends in the replacement market.

7.347 The **United States** submits that there was no need for the USITC to separately address the demand trend in the OEM market, as "there were similar demand and import volume trends in the OEM market and overall market, that is, that demand declined overall and that imports obtained an increasing share of the overall and OEM market".[476] The United States also asserts that the OEM market was relatively less important for both domestic producers and subject imports from China. In this regard, the United States notes the USITC's finding that the "replacement market [was] by far the more important market for both groups of producers".[477]

Evaluation by the Panel

7.348 In support of its claim that the fall in OEM demand was "particularly pronounced", China asserts that total OEM shipments fell by 28 per cent over the period of investigation. China derives this number from Table V-3 of the USITC Report. Using the same data source, we calculate that the fall in total shipments to the replacement market over the period was 33 per cent.[478] By this measure, therefore, the decline in OEM demand was actually less pronounced than the decline in demand in the replacement market.

7.349 Furthermore, we note that the OEM sector was generally less important than the replacement market for both the domestic industry and subject imports. In this regard, only 17.7 per cent of U.S. producers' shipments, and 5 per cent of subject imports, went to the OEM market. The domestic

[475] China's First Written Submission, para. 333.
[476] U.S. Reply to Question 32 from the Panel, para. 5.
[477] USITC Report, page 21.
[478] According to Table V-3, shipments from all sources to the replacement market in 2008 totalled 228,162,000. Total replacement shipments in 2004 totalled 341,332,000. This constitutes a decline of 113,170,000, which is 33 per cent of total 2004 replacement shipments.

industry therefore shipped less tyres to the OEM sector than to tier 3 of the replacement market alone.[479]

7.350 Since the decline in demand was not more pronounced in the OEM market than the replacement market, and since the OEM market was less important for the domestic industry and subject imports than the replacement market, we do not consider that the USITC was required to analyse demand in the OEM market separately from demand in the replacement market.

*(iii) The 2008 recession*

Arguments of the parties

7.351 **China** contends that the recession of 2008, and the near collapse of the U.S. auto industry, greatly accelerated the contraction in demand. China claims that the USITC majority only mentions the 2008 recession dismissively and in passing:

> We have also considered the other possible causes of material injury cited by respondents, including the *current recession*, the contraction in the OEM tire market, sharp increases in raw material costs and raw material shortages, automation for increased productivity, imports from non-subject countries, higher gasoline prices resulting in less driving, strikes and labor actions, U.S. tire producers' high legacy costs, and other factors such as equipment restraints.[480]

7.352 The **United States** contends that the USITC did consider the possibility that the recession in 2008 had affected the link between the increased imports and injury, and concluded that it had not broken that causal link.[481] The United States asserts that the USITC examined the impact of the recession in 2008 on the increasing volumes of the subject imports, and on the volumes trends for the U.S. industry and non-subject imports[482], and found that, "even in 2008 when U.S. apparent consumption was falling", the record showed that the subject "imports continued to increase rapidly".[483] Specifically, the USITC stated, "subject imports increased by 4.5 million tires in 2008, while U.S. consumption declined by 20.4 million tires".[484] In contrast, the USITC pointed out, the quantities of U.S. tyres and those of non-subject imports declined during 2008, with imports from third countries falling at roughly the same pace as the decline in consumption, and U.S. production falling by 11.1 per cent, a pace that was significantly faster than the 6.9 per cent decline in consumption in that year.[485]

Evaluation by the Panel

7.353 We recall the USITC's finding that:

> Moreover, imports continued to increase rapidly even in 2008 when U.S. apparent consumption was falling. Subject imports increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires. Imports from third

[479] USITC Report, Table V-3 indicates that U.S. producers shipped 24,211,000 units to the OEM market in 2008. According to data submitted by the United States in its Reply to Question 46 from the Panel, U.S. producers reportedly shipped 25,430,000 units to tier 3 in 2008.
[480] USITC Report, page 29, emphasis supplied, footnote omitted.
[481] USITC Report, page 26.
[482] USITC Report, page 26.
[483] USITC Report, page 26.
[484] USITC Report, page 26.
[485] USITC Report, page 26.

> countries declined by 6.0 million tires in 2008, or by 6.1 percent, roughly consistent with the 6.9 percent decline in U.S. apparent consumption in 2008. Meanwhile, domestic production of subject tires declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.[486]

7.354 In making this finding, the USITC properly established that the injury to the domestic industry could not be attributed in whole to the fall in demand resulting from the 2008 recession. The fact that subject imports continued to increase significantly during that recession, forcing the domestic industry to absorb virtually all of the resultant fall in demand, indicates that subject imports were having an adverse impact on the domestic industry independent of the effects of the fall in demand during the 2008 recession.

*(iv) Shift to larger tyres*

Arguments of the parties

7.355 **China** asserts that the domestic industry suffered injury as a result of consumer demand shifting in favour of larger tyres, even for smaller, fuel-efficient vehicles. According to China, this required producers to shift production, and in some cases reduce capacity or close factories that produced smaller tyres.[487]

7.356 The **United States** submits that the record evidence did not indicate that there was a "shift in demand in favor of larger tires" during the period of investigation. The United States asserts that, in its questionnaires, the USITC asked U.S. producers and importers to report the factors that had a significant impact on demand trends during the period of investigation.[488] The United States asserts that not one of the responding U.S. producers or importers reported that a "shift in demand in favor of larger tires" had affected demand trends during the period of investigation.[489] Instead, producers and importers identified such factors as the "downturn in the economy", "lower vehicle production", "fewer miles being driven", "overstretched tire life", "more radial tire use", "economic growth", "increased use in performance wheels", and "continued popularity of SUV's, light trucks, and crossover vehicles" as being factors affecting demand changes over the period.[490] The United States further asserts that, in the press release cited in the USITC Report's discussion of demand characteristics, the Rubber Manufacturers Association ("RMA") similarly did not attribute declines in the passenger or light truck tires markets in 2008 to a "shift in demand in favor of larger tires".[491]

Evaluation by the Panel

7.357 At para. 339 of its First Written Submission, and para. 322 of its Second Written Submission, China asserts that the shift towards larger tyre sizes caused U.S. producers to close factories that produced smaller tyres. In other words, China asserts that the shift to larger tyre sizes was bad for U.S. producers, as it reduced demand for their small-sized products. In this regard, we note, as argued

[486] USITC Report, page 26, footnote omitted.
[487] *See* USITC Report, page 51, n. 47 (dissenting Commissioners); USITC Report, pages III-1 through III-6.
[488] USITC Report, page V-9-V-11.
[489] USITC Report, page V-9-V-11.
[490] USITC Report, page V-9.
[491] USITC Report, page V-9.

by the United States[492], that none of the responding U.S. producers or importers reported that a "shift in demand in favor of larger tires" had affected demand trends during the period of investigation.[493]

7.358 Given that none of the respondent producers or importers reported any shift in demand in favour of larger tyres, we are not persuaded that the USITC should have considered any such shift in demand in its Determination.

*(v) Conclusion*

7.359 For the above reasons, we find no error in the USITC's consideration of changes in demand for tyres in the United States or the conclusion that any injury suffered by the domestic industry was caused by subject imports, rather than changes in demand.

(c) Non-subject imports

*(i) Arguments of the parties*

7.360 **China** argues that the USITC also failed to properly analyse the injury caused to the domestic industry by imports from countries other than China. China suggests that injury caused by non-subject imports was improperly attributed to subject imports.

7.361 In this regard, China notes the observation by the dissent that non-subject imports "dwarf" imports from China throughout the period. China observes that, although their share of the U.S. market declined over the period, non-subject imports accounted for 66.9 to 87.1 per cent of all U.S. imports by quantity, whereas subject imports from China accounted for only 12.9 to 33.1 per cent.[494]

7.362 China contends that non-subject imports were also cheaper than U.S.-made tyres. While China acknowledges that the average unit price for all non-subject imports in the period ($40 to $55) was $8-$10 higher than imports from China, this average unit price is still below the unit value of U.S.-produced tyres, which grew from $48/tyre to $69/tyre over the period. Moreover, China asserts that the unit value of tyres imported from Indonesia was lower than that of imports from China.

7.363 **The United States** asserts that the average unit values for non-subject imports were well above the average unit values for subject imports throughout the period. The United States further asserts that the absolute volumes and market share for non-subject imports remained relatively steady over the period, in contrast to the significant increases in both volume and market share by subject imports. The United States notes that China had become the largest producer of tyres in the world by 2006, producing 33 per cent of all passenger and light truck tyres produced globally in that year.[495] According to the United States, therefore, the USITC's finding that undersold subject imports, not non-subject imports, displaced domestic sales, is fully supported by the record.

[492] United States' Reply to Question 57 from the Panel, para. 67.

[493] USITC Report, pages V-9 to V-11. Later in this proceeding, China linked the increase in tyre sizes to the popularity of SUVs and light trucks. However, this is inconsistent with China's earlier arguments, as the decline in SUV production during the period of investigation would have affected the U.S. production of *large* tyres, whereas China initially argued that the shift to larger tyres would have affected the U.S. production of *small* tyres.

[494] USITC Report, page II-3, Table II-1.

[495] USITC Report, Table II-1.

*(ii) Evaluation by the Panel*

7.364 The USITC found that the average unit value of subject imports increased from $31.10 – 38.90 over the period, while the average unit value of non-subject imports increased from $40.42 – 55.29, and the average unit value of U.S. producers' shipments increased from $48.40 to 69.69.[496] Thus, the prices of non-subject imports were lower than those of U.S. producers throughout the period of investigation, and this may have impacted negatively on the domestic industry. We note, though, that the average unit value of non-subject imports remained 22-25 per cent higher than the average unit value of subject imports, suggesting that non-subject imports would have had considerably less price effect on the domestic industry than subject imports. Indeed, by 2006 only imports from Indonesia were cheaper than subject imports from China[497], and Indonesian imports represented only 3.4 per cent of total imports in 2006, compared to subject imports' 21.2 per cent share. Although imports from Indonesia remained cheaper than subject imports for the remainder of the period, the market share of Indonesian imports only reached 4.3 per cent by the end of the period, compared with a market share of 33.1 per cent for subject imports from China. Overall, the share of non-subject imports in total U.S. imports declined from 87.1 to 66.9 per cent over the period, as the share of subject imports to total U.S. imports increased from 12.9 to 33.1 per cent. In this regard, the USITC found that "since 2006, imports from China gained a greater share of the U.S. market than was lost by domestic producers, indicating that they also took market share away from third-country sources".[498]

7.365 The USITC further found that, whereas subject imports "increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires", "[i]mports from third countries declined by 6.0 million tires in 2008, or by 6.1 per cent, roughly consistent with the 6.9 per cent decline in U.S. apparent consumption in 2008". Furthermore, the Chair of the USITC, in expressing separate views on remedy, stated that "information in the record shows that the volume of third-country imports has declined since 2005, and that unit values of third-country imports are on average well above those of imports from China and closer to those of domestic tires".[499]

7.366 The USITC's record also showed that, whereas subject imports from China were the fourth largest single import source in 2004, subject imports accounted for the largest single share of imports by 2006, and substantially increased their share of total imports by 2008.[500]

7.367 Thus, although the volume of non-subject imports was greater than the volume of subject imports from China, and although non-subject imports remained cheaper than domestically-produced tyres, the dominant feature of the U.S. market was the rise of subject imports from China at the expense of both non-subject imports and the U.S. industry. In these circumstances, and in light of the above considerations, we find that the USITC did not fail to properly analyse injury caused by non-subject imports or improperly attribute injury caused by non-subject imports to subject imports.

(d) Miscellaneous other factors

*(i) Arguments of the parties*

7.368 **China** submits that the USITC also neglected several other alternative causal factors noted by respondents, including: sharp increases in raw material costs and raw material shortages; automation

[496] USITC Report, Table C-4.
[497] USITC Report, Table II-1.
[498] USITC Report, page 26.
[499] USITC Report, page 42.
[500] USITC Report, Table II-1, showing that subject imports accounted for 12.9 per cent of total imports in 2004, and 33.1 per cent of total imports in 2008.

for increased productivity; higher gasoline prices resulting in less driving; strikes and labour actions; U.S. tyre producers' high legacy costs; and other factors such as equipment restraints.[501] China does not develop any arguments regarding these factors, other than to claim that the USITC essentially listed and then dismissed these factors, without a reasoned and adequate explanation.

7.369 **The United States** submits that China has failed to offer evidence to support its claim that these factors were causes of material injury to the industry during the period, or to explain why they are significant enough to break the causal link between the subject imports and injury. The United States contends that China simply asserts that the "USITC essentially listed and then dismissed these factors, without a reasoned and adequate explanation" of them.[502] The United States argues that this is legally insufficient to meet China's burden, as complainant, to present evidence and argument sufficient to establish a presumption that the measure being challenged is inconsistent with a Member's WTO obligations.[503] The United States asserts that China has failed to explain why any of these factors was actually a cause of injury to the industry, or why these factors break the existence of a causal link between the subject imports and injury to the industry. Furthermore, the United States contends that the USITC did, in fact, address these other factors in its analysis.

7.370 **China** submits that it did meet its burden of proof regarding these other factors, as it "has pointed out that the USITC wrongly dismissed these factors with little or no discussion, because the statute did not require a weighing of causal factors".[504] China then challenges the United States' assertion that the USITC did adequately address the relevant other factors.

*(ii) Evaluation by the Panel*

7.371 It is not sufficient for a complaining party to simply point out that the investigating authority failed to address certain other factors, or failed to address them in sufficient detail. The complaining party must first establish prima facie the relevance of those other factors, i.e., their capacity to cause injury to the domestic industry, and their potential to break the causal link between the subject imports and the material injury to the domestic industry. This China has not done. Thus, while these other alternative factors might have been relevant, we do not consider that in this regard China has met its burden of proof.

(e) Cumulative assessment

*(i) Arguments of the parties*

7.372 **China** asserts that each of the abovementioned factors taken individually severs the causal link between subject imports and market disruption. China contends that, when these other factors are considered cumulatively, "the extent to which they sever the causal link is even more dramatic".

7.373 China acknowledges that "the requirement to consider all alternative causes together is not required in every case", but claims that "the interrelated nature of the various conditions of competition require them to be considered together."[505] China relies in this regard on the statement by the Appellate Body in *EC – Tube or Pipe Fittings* that "there may be cases where because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact

[501] USITC Report, page 29.
[502] China's First Written Submission, para. 356.
[503] Appellate Body Report, *US – Shirts and Blouses*, pages 14-15.
[504] China's Second Written Submission, para. 337.
[505] China's First Written Submission, footnote 240.

of other causal factors would result in the investigating authorities improperly attributing the effect of these other causal facts to dumped imports".[506]

7.374 The **United States** asserts[507] that China's argument ignores the fact that the Protocol itself imposes no obligation on the competent authority to perform an analysis of such other factors at all, and certainly does not require the authority to conduct an analysis of the effects of these factors on a cumulative basis. The United States asserts that, even under the *AD Agreement*, the Appellate Body has stated that an antidumping authority is not required to examine the collective impact of other causal factors.[508] The United States argues that, although the *AD Agreement*, unlike the Protocol, includes language contemplating that an authority should consider the injurious effects of other causal factors in its analysis, the Appellate Body stated that this specific language:

> does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.[509]

7.375 According to the United States, even when a particular agreement requires an analysis of other injury factors, the Appellate Body has refused to require the investigating authorities to examine the effects of those factors on a cumulative basis. The United States contends that since China has failed to establish why it would be necessary to conduct such an analysis here, and since the Protocol does not require any analysis of these factors, the Panel should reject China's interpretation of the Protocol on this matter.

*(ii) Evaluation by the Panel*

7.376 China claims that the USITC was required to demonstrate that the *collective* injurious effects of the industry's business strategy, the change in demand, non-subject imports and miscellaneous other factors were not sufficient to break the causal link between the increasing imports and the material injury to the domestic industry.

7.377 In *EC – Tube or Pipe Fittings* the Appellate Body found that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports".[510] Notwithstanding the lack of any requirement for cumulative assessment in the Protocol, we acknowledge that there may be cases where the collective injurious effect of other causal factors might be so dominant that the injury caused by increasing imports could not properly be found to be "significant". However China has not demonstrated that this was the case in the underlying USITC investigation.[511] Accordingly, we find that China has failed to establish that in the context of the present case the USITC should have provided a cumulative assessment of the effects of the other causes of injury.

---

[506] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[507] U.S. First Written Submission, paras. 329–330.
[508] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[509] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 191.
[510] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[511] Indeed, in rejecting China's claims regarding the USITC's assessment of the individual injurious effects of these other factors, we have reviewed record evidence indicating that subject imports from China had significant injurious effects, independent of any injurious effects of other causal factors.

(f) Conclusion

7.378 For all of the above reasons, we find that China has failed to establish that injury caused by other factors was improperly attributed to subject imports.

### 5. Conclusion

7.379 Having carefully considered all of the arguments of the parties, and taking into account our standard of review, we find that the USITC did not fail to properly establish that rapidly increasing imports from China were a "significant cause" of material injury to the domestic industry.

## E. WHETHER THE TRANSITIONAL SAFEGUARD MEASURE WENT BEYOND THE "EXTENT NECESSARY", CONTRARY TO PARAGRAPH 16.3 OF THE PROTOCOL

7.380 China has two broad claims. First, China claims that no remedy is appropriate in this case as the USITC failed to establish that 'increasing rapidly' imports from China are a 'significant cause' of market disruption. Second, China claims that even if the United States had complied with the other requirements of Paragraph 16, the specific remedy applied by the United States in this case was inconsistent with Paragraph 16.3 because the remedy was not limited to the market disruption caused by rapidly increasing imports from China. China claims that the United States instead imposed a remedy that addressed all of the alleged market disruption, including that caused by factors other than rapidly increasing imports.

7.381 The United States denies that the remedy went beyond the "extent necessary", contrary to Paragraph 16.3 of the Protocol.

7.382 Since China's first claim relates to its substantive claims concerning Paragraphs 16.1 and 16.4, we only address China's second claim in this Section of our Report. That claim concerns Paragraph 16.3 of the Protocol, which provides:

> If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

### 1. Arguments of the parties

(a) China

7.383 China argues that the ordinary meaning of the words "only" and "necessary" (in the first sentence of Paragraph 16.3) emphasise the need for any restrictions to be "narrowly defined and properly focussed".[512] China continues that the restrictions "cannot overcompensate and attempt to address broader injuries being suffered by the domestic industry".[513] China argues that "the restrictions must be narrowly drawn so that they are limited solely to the extent 'necessary' to address the market disruption resulting from rapidly increasing imports from China that are a significant cause of material injury, and that market disruption alone".[514] China argues that the objective is not to

[512] China's First Written Submission, para. 362.
[513] China's First Written Submission, para. 362.
[514] China's First Written Submission, para. 362.

provide "some general benefit to the domestic industry".[515] China claims that the word "remedy" "can be defined as 'a means of counteracting or removing something undesirable; redress; relief.' In other words, to 'remedy' market disruption means to remove that market disruption".[516]

7.384 China argues that the terms of Paragraph 16.3 must be read in context with "other provisions of Paragraph 16 and the provisions of other WTO agreements that address analogous issues."[517] China continues that this "context confirms that measures applied under Paragraph 16.3 can *only* address rapidly increasing imports from China that are a significant cause of material injury, and cannot be used to address the condition of the domestic industry more generally".[518] China claims that "the essential phrase of Paragraph 16.3 – that restrictions may be imposed "only to the extent necessary to prevent or remedy such market disruption" – can only be understood in the context of understanding the meaning of 'market disruption'. 'Market disruption' refers to a situation in which imports are 'increasing rapidly' and are a 'significant cause of material injury'".[519]

7.385 China submits that the focus of any permissible remedy must be on the effect of the allegedly injurious imports. Although it may be possible to consider permissibly other aspects pertaining to the domestic industry, any permissible remedy must be *limited* to the effect of the imports – and only the imports – themselves. China therefore asserts that the focus of a remedy should be on the effect of the allegedly injurious imports – not on the overall effect on the domestic industry. According to China, imports cannot be held responsible for the *entire* downturn being experienced by the domestic industry, and the remedy cannot seek to address that entire downturn. China submits that, without ever determining the amount or magnitude of the injurious impact subject imports were allegedly having on the domestic industry, the United States could not possibly have limited the imposed remedy to "only the extent necessary" to remedy this impact, as required by Paragraph 16.3.

7.386 China claims that there is no indication of "how the USITC took 'into account' the specific market disruption it had found to exist".[520] Quoting further from the USITC Report, China contends that the focus of the USITC was on the benefits to the domestic industry, not on the specific market disruption found to exist:

> "This increase in the tariff would significantly improve the competitive position of the domestic industry, increasing domestic production, shipments and employment and restoring the domestic industry to at least a modest level of profitability. The increase should accomplish this by reducing the quantity of subject imports and raising their price in the US market."[521]

7.387 China argues that the USITC's flawed approach to remedy is partly rooted in its flawed approach to causation.[522] China criticises the USITC for saying, without explanation, that it did not need to weigh other causes in the market as imports from China were themselves a significant cause.[523] China claims that the USITC failed to provide any "analysis of the role of alternative causes compared to that of imports from China".[524] China claims this failure carried through to its remedy

[515] China's First Written Submission, para. 363.
[516] China's First Written Submission, para. 363, quoting the Shorter Oxford English Dictionary.
[517] China's First Written Submission, para. 364.
[518] China's First Written Submission, para. 364.
[519] China's First Written Submission, para. 365.
[520] China's First Written Submission, para. 384.
[521] China's First Written Submission, para. 384, quoting the USITC Report at page 35.
[522] China's First Written Submission, para. 386.
[523] China's First Written Submission, para. 386.
[524] China's First Written Submission, para. 387.

analysis where the USITC made "no attempt to calibrate its remedy to the market disruption caused solely by rapidly increasing imports from China".[525]

(b) United States

7.388 The United States agrees that a remedy under the Protocol can only remedy the material injury that results from rapidly increasing imports from China. The United States notes that China argues that the USITC considered the effect that increased tariffs would have on the U.S. industry. In doing so, China claims that the USITC went beyond the extent necessary to remedy market disruption caused by rapidly increasing imports. The United States argues that this reasoning runs "directly contrary to the Protocol, which defines market disruption, in part, in terms of material injury and threat of material injury to the domestic industry".[526] Therefore, a Member seeking to comply with Paragraph 16.3 is entitled to consider the effect on the domestic industry otherwise "it cannot know whether its remedy properly addresses market disruption in the sense of material injury".[527]

7.389 The United States disagrees that the statements quoted from the USITC Report support China's claims. The United States argues that nowhere does the USITC suggest that the proposed tariffs will address all of the injury to the domestic industry.[528] The United States continues in paragraph 341 of its submission that the USITC gave a thorough explanation of its remedy determination. Part D of the remedy recommendation "analyses the proposed tariff increase and how it is the 'most appropriate remedy to address the market disruption caused by rapidly increasing imports from China' making clear that it addressed only the material injury caused by Chinese imports".[529] The United States argues that the USITC discussion of why it rejected the remedy proposed by the petitioners gives further evidence of how it addressed the market disruption caused by the subject imports only.[530] The USITC explained that the proposed quota by the petitioners would have been "equivalent to 65 *ad valorem* tariff 'which we view to be higher than necessary to remedy the market disruption caused by rapidly increasing imports from China'".[531] The United States continues that part E of the remedy recommendation "addresses the short- and long-term effects of the recommended remedy, explaining that economic modelling indicates that the proposed 55 per cent tariff would likely reduce shipments of Chinese tyres by 38.2 to 58.4 per cent in the first year. The USITC then explains how this reduction in shipments will have an effect on domestic and non-subject imports, on their prices, and eventually on the domestic industry's revenue".[532] The United States also quotes Chairman Aranoff's separate views on remedy as further evidence that only the material injury caused by subject imports was addressed in its remedy recommendation.[533] The United States concludes that the USITC conducted a detailed analysis to craft a remedy that would only address the injury caused by Chinese imports.

[525] China's First Written Submission, para. 387.
[526] U.S. First Written Submission, para. 333.
[527] U.S. First Written Submission, para. 333.
[528] U.S. First Written Submission, para. 339.
[529] U.S. First Written Submission, para. 341.
[530] U.S. First Written Submission, para. 341.
[531] U.S. First Written Submission, para. 341, quoting page 36 and footnote 200 of the USITC Report.
[532] U.S. First Written Submission, para. 341.
[533] U.S. First Written Submission, para. 342.

## 2. Evaluation by the Panel

7.390 China's basic argument[534] under Paragraph 16.3 of the Protocol is that a transitional product-specific safeguard measure should not exceed the amount necessary to prevent or remedy the market disruption *caused by the subject imports*. China claims that the *Tyres* measure necessarily exceeds the amount necessary to prevent or remedy the market disruption *caused by the subject imports* because the USITC never determined the extent of the injury *caused by those imports*. In other words, without knowing how much injury was caused by the subject imports, it was impossible for the United States to limit the measure to the amount necessary to prevent or remedy that injury.

7.391 We begin by noting that the parties agree that a remedy imposed under Paragraph 16 of the Protocol should be limited to the injury / market disruption caused by the subject imports, rather than the injury / market disruption caused by all injurious factors generally. We agree that the scope of the remedy should be limited in this way.[535]

7.392 We next consider China's argument that the USITC's flawed approach to remedy is partly rooted in its flawed approach to causation.[536] This raises issues regarding the relationship between the non-attribution requirement under the Protocol, and the scope of the remedy. The Appellate Body found[537] in *US – Line Pipe* that Article 5.1 of the *Safeguards Agreement* generally[538] does not impose any obligation on a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary." The Appellate Body went on to state:

> This does not imply, as Korea seems to assert, that the measure may be devoid of justification or that the multilateral verification of the consistency of the measure with the *Agreement on Safeguards* is impeded. The Member imposing a safeguard measure must, in any event, meet several obligations under the *Agreement on Safeguards*. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the *Agreement on Safeguards* should have the incidental effect of providing sufficient "justification" for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined.[539]

---

[534] We note China's argument that the United States was not permitted to impose any transitional safeguard measure as the substantive requirements of the Protocol had not been met. This argument concerns the claims addressed in the preceding sections of this Report.

[535] We note that this is broadly consistent with the findings of the Appellate Body in *US – Line Pipe*. We generally consider that the reasoning at paras. 252-259 of that Appellate Body Report is not fully applicable in these proceedings, since it is based in part on the text of the second sentence of Article 4.2(b) of the *Safeguards Agreement*, which is absent from Paragraph 16 of the Protocol.

[536] China's First Written Submission, para. 386. The reactions of the United States to this line of argument by China are included in Part C, on causation.

[537] Appellate Body Report, *US – Line Pipe*, para. 233.

[538] An exception is made in cases where the safeguard measure takes the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. This exception has no bearing on the present case.

[539] Appellate Body Report, *US – Line Pipe*, para. 236.

7.393 Thus, the Appellate Body considers that a non-attribution analysis under Article 4.2(b), second sentence, of the *Safeguards Agreement* will provide a "benchmark" (of injury attributed to the relevant imports), against which the permissible extent of the safeguard measure may be measured. Indeed, the Appellate Body went on to find that a violation of the obligation to perform a non-attribution analysis under Article 4.2(b), second sentence, was sufficient to establish a prima facie case of violation of the Article 5.1 obligation to restrict the measure to the extent necessary to prevent or remedy serious injury caused by the increased imports at issue. This finding is the basis for China's argument that, because the USITC never determined the extent of the injury caused by the subject imports, the *Tyres* measure is necessarily excessive.

7.394 Since Paragraph 16.4 of the Protocol does not require the same type of non-attribution analysis as that required by the second sentence of Article 4.2(b) of the *Safeguards Agreement*[540], the reasoning of the Appellate Body in *US – Line Pipe* is not applicable. Although we consider that increasing imports should be viewed "in the context of" other factors, to ensure a proper finding of causation, there is no obligation to separate and distinguish the injurious effects of factors other than increased imports from those caused by increased imports (as required by the second sentence of Article 4.2(b) of the *Safeguards Agreement*).[541] Since there is no "full-blown" non-attribution analysis under the Protocol, there is no benchmark against which to measure the scope of the remedy. Nor is there any basis for finding that a failure to separate and distinguish the injurious effects of rapidly increasing imports from the injurious effects of other causal factors establishes prima facie that the remedy is excessive. Instead, China must itself demonstrate that the scope of the measure is excessive.

7.395 While the lack of a benchmark creates difficulties in any challenge of the measure, nevertheless, the burden is on China to establish prima facie that the scope of the measure is excessive. But the burden is not impossible. For example, China might have challenged the accuracy of the analysis set forth in Exhibit US-20 which shows that the *Tyres* measure was based on an objective assessment of the impact of the measure over the first year, and that the impact of the measure would have addressed the volume and price effects of the subject imports. China has not challenged the accuracy of any of that analysis. Nor did China provide any type of assessment of what the maximum permissible extent of the measure should have been (i.e., in relation to the amount of injury caused by increased imports), and has therefore failed to provide any benchmark by which to conclude that the extent of the *Tyres* measure is excessive.

7.396 The only additional argument by China concerns the fact that the measure was focused on improving the condition of the domestic industry generally, rather than on the specific harm caused by subject imports. China alleges that the United States essentially assumed that the increasing imports from China were entirely responsible for the deteriorating condition of the domestic industry. China refers in this regard to the following reasoning by the USITC:

> We believe that the tariffs will significantly reduce subject imports and boost U.S. industry sales and prices, resulting in increasing profitability. This profitability will lead to the preservation of jobs and the creation of new ones, as well as encourage investment.[542]

[540] *See* para. 7.176 above.

[541] We note that China agrees that non-attribution under the Protocol does not require a precise quantification of the injury caused by the various injurious factors (*See* China's Reply to Question 17(b) from the Panel, para. 71).

[542] USITC Report, page 30.

> This increase in the tariff would significantly improve the competitive position of the domestic industry, increasing domestic production, shipments, and employment and restoring the domestic industry to at least a modest level of profitability. The increase should accomplish this by reducing the quantity of subject imports and raising their price in the U.S. market.[543]

7.397 However the Panel is not convinced that this demonstrates that the measure is excessive. First, a measure is not necessarily excessive simply because it seeks to improve the condition of the industry. To the extent that the condition of the industry deteriorated as a result of increased imports, a measure designed to improve the condition of the industry does address the injurious effects of the increased imports. While there is no guarantee that a measure imposed on this basis will not be excessive, there is similarly no certainty that a measure imposed on this basis will necessarily be excessive.

7.398 Second, since the USITC found that the domestic industry suffered market disruption as a result of rapidly increasing subject imports that were underselling domestic production, a measure that is aimed at "reducing the quantity of subject imports and raising their price in the U.S. market" can be justified. The Panel notes, however, that it does allow for the possibility of the expansion of non-subject imports rather than the improvement of the condition of the domestic industry, and observes that is a consequence of a country-specific safeguard and not a defect of the remedy in this case.

7.399 For these reasons, we find that China has failed to establish prima facie that the *Tyres* measure exceeds "the extent necessary to prevent or remedy" the market disruption caused by rapidly increasing subject imports, contrary to Paragraph 16.3 of the Protocol.

## F. WHETHER THE DURATION OF THE REMEDY EXCEEDED THE PERIOD OF TIME NECESSARY TO PREVENT OR REMEDY MARKET DISRUPTION

7.400 China claims that the three-year duration of the remedy exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of the Protocol. The first sentence of Paragraph 16.6 provides:

> A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption.

7.401 The United States denies China's claim.

### 1. Arguments of the parties

(a) China

7.402 China claims that the decision by the United States to impose a remedy for three years is inconsistent with Paragraph 16.6 of the Protocol, which provides that a remedy may be imposed "only for such period of time as may be necessary to prevent or remedy the market disruption". China asserts that this obligation limits the duration of any such safeguard measures to "such" market disruption, which is limited to that disruption properly attributed to rapidly increasing imports from China. In particular, China asserts that the ordinary meaning of the terms "only" and "necessary" in Paragraph 16.6 makes it clear that a remedy measure can be in place only for the exact amount of time that is necessary to address and remedy the "market disruption" caused by the rapidly increasing imports. China further contends that the term "necessary" adds an additional meaning, in the sense

[543] USITC Report, page 35.

that the use of this term confirms that a remedy measure cannot simply be tangentially useful or helpful, but must rather be essential and indispensable to prevent or remedy the market disruption that has been significantly caused by the rapidly increasing imports from China. According to China, the ordinary meaning of Paragraph 16.6 will not permit a remedy measure that lasts longer than necessary, or one that is not precise in addressing the market disruption that has been properly justified as having been caused by rapidly increasing imports from China. China also refers to the context of Paragraph 16, and the object and purpose thereof, in support. In particular, China contends that the *Safeguards Agreement*, the *AD Agreement* and the *SCM Agreement* all contain durational limitations, indicating that any remedy must be "narrowly tailored in terms of duration".[544]

7.403 China notes the discussion of the majority of the USITC regarding the duration of the remedy:

> We recommend that the remedy remain in place for a three-year period because we believe that a remedy of such duration is needed to give firms and workers in the industry time to identify and implement needed adjustments to import competition. Although domestic producers did not identify any specific planned adjustments in their questionnaire responses, other information in the record indicates that domestic producers have put plant and equipment upgrades on hold pending more favourable market opportunities. Moreover, we anticipate that the relief may encourage certain domestic producers to reconsider plant closures.[545]

7.404 According to China, this rationale says nothing about why tariffs need to last for three years to address the specific market disruption that had been found – the market disruption that the USITC allegedly linked to imports from China that were "increasing rapidly", and that were the "significant cause" of injury to the domestic industry (rather than injury caused by "import competition" more generally). China understands the USITC's logic to be that because imports from China could be blamed for certain problems, and since the domestic industry would benefit from three years, the remedy should last for three years. But China contends that, under Paragraph 16.6 of the Protocol, whether the domestic industry would benefit from a three-year remedy is irrelevant, since this provision only allows a remedy to last for the period of time needed to address the specific market disruption at issue.

7.405 China also asserts that the USITC's rationale is defective because the USITC failed to give any significant weight to what U.S. producers themselves were saying, and the fact that the domestic producers had not provided specific restructuring plans, even though the USITC asked them to do so.[546] Instead, the USITC opined, that "the relief *may* encourage certain domestic producers to reconsider planned plant closures".[547] China contends that such "speculation" is inadequate, since it fails to demonstrate that the three-year remedy measures imposed are necessary to remedy the market disruption (and why this three-year duration is needed to prompt producers to "reconsider" closure decisions). China asserts that the President also imposed a remedy for three years without any regard to the specific market disruption "significantly caused" by rapidly increasing imports.

[544] China's First Written Submission, para. 401.
[545] USITC Report, page 36.
[546] USITC Report, page VI-1, Table VI-2. China asserts that the public version of the determination does not provide any details, but does confirm the question was asked. China notes that the USITC majority then confirms in its commentary that no specific adjustment plans were presented.
[547] USITC Report, page 36 (emphasis added).

(b) United States

7.406 The United States does not dispute China's arguments regarding the ordinary meaning of Paragraph 16.6 of the Protocol. However, the United States rejects China's argument that the duration requirements in the *Safeguards Agreement*, the *AD Agreement*, and the *SCM Agreement* demonstrate that "any remedy imposed must be narrowly tailored in terms of duration".[548] The United States notes in this regard that the *AD Agreement* and the *SCM Agreement* allow the imposition of relief as long as the injurious dumping or subsidization continues.

7.407 Regarding China's argument that a remedy measure may remain in place "only for the exact amount of time" or "for that period of time specifically found" to address the market disruption[549], the United States submits that such level of exactitude is neither required nor possible. The United States asserts that authorities cannot know at the time of taking a measure the "exact amount of time" it will be necessary. According to the United States, this is why paragraph 246(f) of the Working Party Report explicitly allowed authorities to extend a measure based on a finding that "action continued to be necessary to prevent or remedy market disruption".

7.408 The United States submits that China also fails to give appropriate weight to the remaining elements of Paragraph 16.6, which allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. According to the United States, these elements indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tyres, or even longer in the case of an extension under paragraph 246(f) of the Working Party Report. The United States notes China's reference to these provisions as "rights that China has under certain circumstances"[550], but contends that they maintain their utility as context for the first sentence of Paragraph 16.6 or as an indication of the expectations of the negotiators of the Protocol.

7.409 Regarding China's argument that the USITC's rationale "focuses entirely on the condition of the domestic industry and the time it needs to adjust", the United States recalls its argument (see preceding section) that the effect of the remedy on the domestic industry is not merely relevant, but critical, in understanding whether it is "necessary to prevent or remedy market disruption".

7.410 Regarding China's argument that the USITC did not give sufficient weight to the views of domestic producers who "had not provided specific restructuring plans"[551], the United States refers to its earlier arguments (see preceding section) to the effect that the USITC weighed all of the evidence before it, and considered that the evidence favouring its remedy outweighed the evidence cited by China against the remedy.

7.411 Regarding China's argument that the USITC relied on "speculation" based on a quotation of part of one sentence stating that "we anticipate that the relief may encourage certain domestic producers to reconsider planned plant closures"[552], the United States contends that China draws the wrong conclusion. The United States notes that, in the preceding paragraph, the USITC explained that it provided for progressive reduction of the level of the relief because "[w]e also expect the level of tariff protection that is necessary to offset market disruption to decrease as new investments and

[548] China's First Written Submission, para. 401.
[549] China's First Written Submission, paras. 397 and 405.
[550] China's First Written Submission, para. 399.
[551] China's First Written Submission, para. 414.
[552] China's First Written Submission, quoting USITC Report, page 36.

other adjustments are implemented".[553] According to the United States, the subsequent statement that the industry "may reconsider" plant closures reflects only the understanding that there are many "investments" or other "adjustments" the industry might take, and that it was impossible to know with certainty at the time of its determinations which ones the prevailing business climate would allow.

### 2. Evaluation by the Panel

7.412 As a preliminary matter, we note China's argument that the United States was not permitted to impose any transitional safeguard measure of any duration as the substantive requirements of the Protocol had not been met. This argument is tied to the China's claims under Paragraphs 16.1 and 16.4 of the Protocol, which we address in the preceding Sections of this Report. The present Section focuses on China's arguments regarding the consistency of the remedy imposed by the United States with Paragraph 16.6 of the Protocol.

7.413 The core of China's claim under Paragraph 16.6 is based on the same arguments that China advanced under Paragraph 16.3. As China itself explains:

> The arguments presented above regarding Article 16.3 are also applicable as regards the U.S. failure to comply with Article 16.6. Similar to the requirements of Article 16.3, Article 16.6 of the Protocol limits a remedy to "only for such period of time as may be necessary…." The USITC's failure to determine – either quantitatively or qualitatively – what effect subject imports were allegedly having on the domestic industry makes it virtually impossible for a remedy to comply with Article 16.6's requirement. Without knowing the effect that must be prevented or remedied, it is impossible to know for how long a remedy needs to be imposed.[554]

7.414 We recall that there was no obligation on the United States to explain why a three-year measure was needed to prevent or remedy the market disruption caused by subject imports.[555] We further recall that there was also no obligation on the United States to quantify the injury caused by increasing imports, or separate and distinguish that injury from injury caused by other factors. Accordingly, it is not enough for China to simply "demonstrate[e] that the USITC failed to ascertain the amount of the alleged effect of subject imports on the domestic industry".[556] Instead, the onus is on China to establish prima facie that a three-year measure was excessive. China has failed to meet this burden.

7.415 For these reasons, we find that China has failed to establish prima facie that the *Tyres* measure exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of the Protocol.

## G. WHETHER THE U.S. *TYRES* MEASURE IS INCONSISTENT WITH ARTICLES I:1 AND II:1(B) OF THE GATT 1994

7.416 China claims that the imposition of additional (transitional safeguard) duties on imports of subject tyres from China is inconsistent with Article I.1 of the GATT 1994, whereby:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments

[553] USITC Report, pages 35-36.
[554] China's Second Written Submission, para. 361.
[555] *See* para. 7.20 above.
[556] China's Second Written Submission, para. 362.

> for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.417 China also claims that the imposition of the additional (transitional safeguard) duties on imports of subject tyres from China is inconsistent with Article II.1(b) of the GATT 1994, whereby:

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.418 China's GATT 1994 claims are entirely dependent on its claims under Paragraph 16 of the Protocol.[557] Since we have not accepted China's claims under Paragraph 16 of the Protocol, we similarly do not accept China's claims under Articles I:1 and II:1 of the GATT 1994.

## VIII. CONCLUSION

8.1 For the reasons set forth above, we find that in imposing the transitional safeguards measure on 26 September 2009 in respect of imports of subject tyres from China, the United States did not fail to comply with its obligations under Paragraph 16 of the Protocol and Articles I:1 and II:1 of the GATT 1994.

---

[557] The dependent nature of China's GATT 1994 claims is shown by China's argument that there is "also" a GATT 1994 violation because of the additional duties "not having been justified as emergency action under relevant WTO rules" (*See* China's First Written Submission, paras. 417 and 421).

# ANNEX A

## EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

# ANNEX A-1

## EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

### I. THE UNITED STATES FAILED TO EVALUATE PROPERLY WHETHER IMPORTS FROM CHINA WERE "IN SUCH INCREASED QUANTITIES" AND "INCREASING RAPIDLY," AS REQUIRED BY ARTICLE 16.1 AND ARTICLE 16.4 OF THE PROTOCOL

1. The United States failed to evaluate properly whether imports from China were in "such increased quantities" and "increasing rapidly" as required by Articles 16.1 and 16.4 of the Protocol of Accession. Simply finding any increase does not satisfy the requirements of the Protocol. The text creates the obligations to find both that the increase is occurring over the more recent period of time and that the recent increase is "rapid." This standard was not met by the United States in this case.

#### A. ARTICLES 16.1 AND 16.4 REQUIRE THAT IMPORTS FROM CHINA BE IN "SUCH INCREASED QUANTITIES" AND "INCREASING RAPIDLY"

2. The text of Article 16 uses specific language to define the narrow circumstances under which increasing imports from China can be subject to product-specific safeguards. The ordinary meaning of the language, and its use of the present tense, emphasizes the importance of time – specifically the most recent period. The use of the term "such" indicates that not just any increase will be sufficient. Accordingly, a Member seeking to restrict imports from China must focus on the recent period of time, and must find that the increasing imports during that recent period of time are of such a magnitude as to cause or threaten injury. The Member must *also* find that the recent imports from China are increasing "rapidly." This key additional requirement sets a standard even higher than that for global safeguards.

3. The context of both Article 16 and other WTO agreements supports this interpretation. For safeguards to be imposed under Article 16, imports from China must be "in such increased quantities" or under such conditions as to cause market disruption to the domestic industry. Article 16.4 adds an additional requirement, stating that for market disruption to exist, imports from China must be increasing "rapidly" (absolutely or relatively).

4. Because both Article 2.1 of the *Agreement on Safeguards* and Article 16.1 of the Protocol use the phrase "in such increased quantities," the Appellate Body decisions interpreting this identical language provide context in this case. These decisions state that the use of the present tense requires domestic authorities to focus on the most recent past. The Appellate Body has stated that trends – especially in the most recent past – must be examined and interpreted in context of the entire period. In addition, the language of "in such increased quantities" requires increased imports to have been recent, sudden, sharp and significant enough to cause or threaten to cause serious injury. Thus, the context reveals that a finding of increased imports is not a mere mathematical calculation, or simple end-point-to-end-point analysis.

#### B. THE USITC DID NOT COMPLY WITH THE "IN SUCH INCREASED QUANTITIES" AND "INCREASING RAPIDLY" REQUIREMENTS OF ARTICLES 16.1 AND 16.4

5. The United States did not respect the requirements of Articles 16.1 and 16.4 for finding increasing imports under the Protocol. Instead, the USITC devoted just a single page of its

determination to this issue and failed to address adequately the most recent period of time and trends within the period. The USITC also failed to find an increase in imports qualitatively and quantitatively sufficient as required by Articles 16.1 and 16.4. Thus, the USITC analysis failed to meet the higher standard for product-specific safeguards against China under Article 16.

6. Although the Appellate Body requires an adequate explanation of findings, none was provided by the USITC. The USITC never discussed the implications of the low base-level of imports from China that existed at the beginning of the period. The USITC also relied too heavily on an "end-point-to-end-point" analysis, and ignored trends – an approach the Appellate Body has condemned as insufficient. Had the USITC properly analyzed the more recent trends, it would have found a sharp difference between trends over the earlier periods and the more recent 2007 to 2008 period. In 2008, both the increase in quantity and the percentage of increase in imports fell. The increases in imports from China were the smallest of the period during 2008. The average increase in imports from China from 2004 to 2007 in quantity was 9 million tyres, and the average rate of increase was 42.1 percentage points. Yet in 2008, the increase in quantity was just 4.5 million tyres and the average rate of increase was only 10.8 percentage points. A quarterly breakdown of imports from China demonstrates even more dramatically that imports were not rapidly increasing.

7. Moreover, the USITC ignored its standard practice and refused to gather data for the first quarter of 2009, data which show a sharp decline in imports from China – i.e. over 2 million tyres. The data show that over the most recent two-year period, from Q2 2007 to Q1 2009, imports from China fell by 14.2 per cent. Notably the USITC gathered interim data in every other Section 421 safeguard investigation in which an interim period was completed, and even collected interim data in a separate investigation that commenced the same month as this case, only *11 days prior*.

8. The USITC findings also did not explain why the import trends over the most recent two years were sudden enough, sharp enough, or significant enough to qualify as "increasing rapidly" as required by Article 16. The imports from China were not "sudden enough" because the modest increase over the period was steady, not sudden. The largest jump in imports occurred in Q2 2007 – two years before the USITC decision, and approximately 86 per cent of the increase in volume of imports occurred between 2005 and 2007, not 2008. Nor were the imports from China "sharp enough," as increases in market share were consistently in the 2 to 3 percentage point range during the period. Imports peaked in Q2 2008, and then declined 7.8 per cent relative to Q2 2008 over the next two quarters. Increasing imports from China were not "significant enough" to meet the high standards of Article 16. The rate of increase declined in 2008 (53 per cent to 10.8 per cent), with a further, absolute decline (-14.7 percentage points) in import levels in first quarter of 2009 as compared to Q1 2008.

## II. THE U.S. IMPLEMENTING STATUTE'S CAUSATION STANDARD IS INCONSISTENT AS SUCH WITH ARTICLE 16.1 AND ARTICLE 16.4 OF THE PROTOCOL

9. The U.S. statute implementing the causation standard of Article 16 into U.S. law is inconsistent "as such" with Articles 16.1 and 16.4 of the Protocol. Article 16 expressly requires that imports from China be "a significant cause" of the material injury being alleged. Yet the U.S. statute defines "a significant cause" to mean merely "a cause that contributes significantly" to the material injury. This language, "contributes significantly," has no basis in the text of Article 16, and impermissibly lowers the standard for "significant cause."

10. The text of Article 16 is explicit and unambiguous as to the conditions under which the transitional product-specific safeguard mechanism can be implemented. Article 16.1 requires that imports from China "cause or threaten to cause market disruption." And Article 16.4 states that "market disruption" may exist only if rapidly increasing imports from China are a "significant cause" of material injury. Thus, the ordinary meaning of the language requires a strong causal connection to

show that rapidly increasing imports are a "significant cause" of injury. As with increasing imports, this causation standard is more demanding than the standard for global safeguards. The context supports this interpretation as the Working Party Report on the Protocol of Accession confirms that Article 16 requires a "causal link" between imports and injury. The term "causal link" appears at Article 4.2(b) of the *Agreement on Safeguards*, and has been interpreted by the Appellate Body to require "a genuine and substantial relationship of cause and effect" between the imports and the alleged injury. Moreover, Article 16.4 further strengthens and raises this basic requirement, by modifying the term "cause" with "significant" and thus creating a higher standard.

11. The U.S. statute that implements Article 16.4 departs from the text of the Protocol and defines "a significant cause" to mean merely "a cause that contributes significantly." In this manner, the U.S. statute attempts to weaken the standard for causation, even though Article 16 uses the word "significant" to raise the causation standard for China-specific safeguards under Article 16 as compared to global safeguards under the *Agreement on Safeguards*. The ordinary meaning of "contributes significantly" conveys a meaning that is weaker than both "significant cause" and the requirement in global safeguards that there be "a genuine and substantial relationship of cause and effect." Moreover, the U.S. statute provides that a "significant cause" can be less important than any other cause that may also be affecting the domestic industry. By eliminating any requirement of causal comparison, it becomes impossible to determine whether imports from China are indeed a "significant cause" of material injury. The U.S. definition thus contradicts the express language of Article 16.4, and is inconsistent "as such" with the WTO Agreement. This statutory definition requires the U.S. to apply a flawed definition of "significant cause" in all Section 421 cases and, as such, is inconsistent with Article 16 of the Protocol of Accession.

## III. THE USITC FAILED TO EVALUATE PROPERLY WHETHER IMPORTS FROM CHINA WERE A "SIGNIFICANT CAUSE," AS REQUIRED BY ARTICLES 16.1 AND 16.4

12. Article 16 imposes a strict standard under which "rapidly" increasing imports from China must be a "significant cause" of alleged material injury. The USITC's causation analysis, however, used the WTO-inconsistent definition of "significant cause" contained in the U.S. statute. The obligation to apply this standard resulted in the USITC's causation analysis being inconsistent as applied with Article 16. The USTIC's lack of discretion fundamentally forced its causation analysis to be flawed.

13. The USITC determination is inconsistent with Article 16 of the Protocol as applied. The USITC failed to evaluate properly whether imports from China were a "significant cause" of material injury. The USITC did not consider adequately the conditions of competition in the domestic tyre market and failed to establish any correlation between rapidly increasing imports from China and material injury to the U.S. tyre industry. Absent this correlation, the USITC failed to provide a "compelling analysis" of why causation still exists. Finally, the USITC failed to assess alternative causes of alleged injury. Thus, the USITC determination was inconsistent with Articles 16.1 and 16.4.

### A. THE USITC FAILED TO SHOW THAT THE CONDITIONS OF COMPETITION SUPPORT A FINDING OF CAUSATION

14. The USITC misinterpreted and distorted the conditions of competition in the domestic tyre market. This failure undermined its entire causation analysis. In the context of global safeguards, the Appellate Body and panels have repeatedly affirmed the importance of a thorough examination of the conditions of competition in the relevant market, especially in cases, such as this, where the relevant market encompasses a broad range of products and market segments. Bare reliance on industry-wide statistics is insufficient for purposes of assessing the conditions of competition, as is excessive reliance on subjective questionnaire responses.

15. The USITC failed to acknowledge the importance of changing demand patterns in the U.S. tyre market – especially the role of declining demand in explaining the drop in industry performance in 2008. The USITC also failed adequately to consider the U.S. producers' long-term strategy which shifted production in the United States towards the higher-end segments of the market. Even though the U.S. producers testified that they were engaged in a global sourcing strategy, entailing a shift in the U.S. market away from lower-end tyres to premium production, the USITC rejected this testimony and the relevance of this strategy's impact on the domestic industry.

16. The USITC also failed to appreciate the attenuated nature of competition between Chinese and domestic tyres in the U.S. market. During the period, U.S. producers had between 17.7 per cent and 23.3 per cent of their shipments in the OEM market, whereas imports to the OEM market accounted for only 0.8 per cent to 7.3 per cent of the total imports from China. In turn, imports from China accounted for just 0.2 per cent to 4.9 per cent of all OEM shipments in the U.S. market. Furthermore, in 2008, there were approximately nine times as many non-subject import tyres in the OEM market than imports from China, and over the period non-subject imports grew from 30.2 per cent to 43.5 per cent of the U.S. OEM market. The USITC also failed to offer an adequate or reasoned explanation of why rapidly increasing imports from China were a "significant cause" of material injury, given that U.S. production in the replacement market is predominately in the higher-end segment, whereas imports from China are predominately in the lower-end segment. In its faulty analysis, the USITC asserted that there was "significant competition" between imports from China and domestic tyres, finding that there was "close substitutability" between them. This assertion, however, rests principally on a faulty questionnaire, in which no differentiation was sought for product category, characteristics, or market segment. The USITC should not have relied upon such subjective questionnaire.

17. Each of these conditions of competition – declining demand, an industry strategy to globalize production, and attenuated competition between imports from China and domestic tyres – individually sever the requisite causal link. They also work together to create the overall conditions of competition in the market place and, when assessed cumulatively, the extent to which they sever the causal link is even more dramatic. To justify the imposition of a product-specific safeguard under Article 16 in this case, the United States needed to show that, even in the face of these interrelated conditions of competition, imports from China were still themselves a "significant cause" of material injury. The United States has not made, and cannot make, that showing.

## B. THE USITC FAILED TO ESTABLISH A CORRELATION BETWEEN RAPIDLY INCREASING IMPORTS AND MATERIAL INJURY TO THE DOMESTIC INDUSTRY

18. The USITC failed to establish that there is a temporal correlation, or "coincidence," between rapidly increasing imports from China and injury. In the context of global safeguards, the Appellate Body has explained that "coincidence" analysis plays a "central" role in determining whether or not a causal link exists. Coincidence analysis is equally important when evaluating the application of a product-specific safeguard under Article 16 of the Protocol. Under Article 16.4 of the Protocol, the injury correlation is between "increasing rapidly" imports that are a "significant cause" of material injury. In other words, the correlation must be between the period of time when imports were increasing rapidly and the adverse trends being identified. Moreover, there must be a "significant" causal link.

19. In determining whether "market disruption" exists, an investigating authority should gauge the extent of any correlation between rapidly increasing imports and (a) price, and (b) "the effect of imports on the domestic industry." When import trends and the USITC's ten factors relating to the condition of the domestic industry are properly examined, it is clear that there is no correlation between them.

20. ***Price***: There is no temporal correlation between rapidly increasing imports and domestic prices in this case. Average annual unit price for tyres shipped by U.S. producers increased over the period while quantities of imports from China also rose. Indeed, average unit value rose from $47.90 in 2004 to $68.59 in 2008. Prices rose by 10.9 percentage points during 2007, when the rate of increase in imports was at its highest of the period. Conversely, the rate of increase in prices fell in 2008, when the rate of increase in imports from China witnessed a precipitous decline. To get around this absence of correlation, USITC posited a "cost-price squeeze" hypothesis, but this speculative theory does not correlate with movements in COGS/sales ratio as the ratio dropped by 5.3 percentage points in 2007 (when imports from China were at their highest) and rose 5.8 percentage points in 2008 (when imports dropped precipitously). Thus, no "cost-price squeeze" is attributable to imports from China. Furthermore, non-subject imports "dwarfed" imports from China during the period. U.S. market share of non-subject imports ranged from 66.9 to 87.1 per cent by quantity during the period, whereas imports from China amounted to just 12.9 to 33.1 per cent.

21. ***Production***: Data concerning production volume also does not correlate with rapidly increasing imports from China as the decline in production was the smallest of the period (-2.4 percentage points) in 2007, when imports from China were at their highest. In 2008, production fell by its greatest extent during the period, while imports from China also fell to their lowest level during the period.

22. ***Net Sales***: Net sales also fail to demonstrate a correlation with imports from China as net sales (value) increased by 2.7 percentage points over the period. In 2007, net sales (quantity) fell by their lowest margin in the period (-5.5 percentage points) when the rate of increase in imports from China was at its highest level of the period. In 2008, net sales witnessed their largest year-to-year decline (-11.7 percentage points) of the period, while imports from China grew at their lowest rate of the period.

23. ***Market Share***: As to market share, the USITC relied heavily on aggregate data to assume that imports from China "displaced" U.S.-produced tyres, but this displacement theory is unsupported by the record. First, there is no "close substitutability" of Chinese and U.S. tyres due to attenuated competition. Second, the USITC failed to take into account the U.S. industry's long-term business strategy of shifting towards branded, higher-end tyres which resulted in U.S. producers importing up to 25 per cent of total imports from China themselves. Indeed, this strategy allowed U.S. producers to achieve their highest profits in 2007 – the year in which they experienced the second-highest decline in domestic market share. Furthermore, the U.S. displacement theory does not distinguish between market share for different types of tyres, and ignores the fact that total consumption of tyres in the United States declined over the period. Year-to-year declines in U.S. producer market share mirror annual declines in consumption, and further undermine the suggestion that imports from China were causing the declines in market share.

24. ***Profits***: Profits also do not correlate with rapidly increasing imports from China, as operating income was positive for U.S. producers in 3 of the 5 years of the period while imports from China increased. In 2006, before the allegedly rapidly increasing imports, the industry had its second-worst performance of the period, with operating losses of -1.1 per cent. But in 2007, when imports from China increased at their highest rate, operating income rose to 4.5 per cent – the highest level of the period and the highest year-to-year increase of the period.

25. ***Productivity***: Trends in productivity also do not correlate with imports from China. Productivity declined by a mere 0.2 tyres per hour from 2004 to 2007. Only in the year of the recession, 2008, was there a significant drop (a 5.3 per cent decline) and that drop was not caused by imports from China. Furthermore, productivity increased at its highest rate of the period (1.3 percentage points) during 2007 when imports from China were increasing at their fastest rate of the period.

26. ***Capacity***: Changes in the levels of imports from China over the period also do not correlate with data concerning U.S. producer capacity. Neither capacity utilization nor plant closure data correlate with rapidly increasing imports from China. Domestic capacity utilization increased by 6 percentage points in 2007, when imports from China were increasing at their fastest rate, and then dropped in 2008, when increased imports from China were the lowest. There is no temporal coincidence between plant closures and imports from China, and there is no record evidence to suggest that imports from China caused any of these closures. Additionally, the USITC failed to account adequately for capacity increases in the U.S. market, and improperly relied on data concerning increases in capacity in China.

27. ***Employment***: The USITC also incorrectly inferred causation from employment data. Consistent with the U.S. producers' rationalization strategy, hours worked per PRW jumped from 2,049 to 2,109 between 2006 and 2007. Restructuring measures, such as reduced hours, were part of a global restructuring strategy to improve profitability and shareholder value for the domestic producers. These restructuring measures bore fruit in the greater profitability witnessed in 2007, and it was only due to the recession in 2008 that hours worked per PRW declined.

28. ***Capital Expenditures***: The USITC noted that trends in capital expenditures do not support a finding of causation, much less material injury. The USITC stated that capital expenses "trended upwards," and "were at their highest level in 2008."

29. ***R&D Expenditures***: Furthermore, the USITC also noted that R&D expenditures do not support a finding of causation because they, too, trended upwards and increased from 2004 and 2008. As with capital expenditures, R&D investments are consistent with the industry's shift towards premium, higher-end production in the United States. Moreover, average return on investment rose to 4.8 per cent in 2007 when imports from China were at their highest.

## C. ABSENT A CORRELATION BETWEEN RAPIDLY INCREASING IMPORTS AND ALLEGED MATERIAL INJURY, THE USITC FAILED TO PROVIDE A "COMPELLING ANALYSIS" OF WHY CAUSATION WAS STILL PRESENT

30. The USITC failed to recognize the absence of a meaningful correlation between industry performance and imports from China, much less offer a "very compelling" account of why causation is nonetheless present. Instead, the USITC principally focused on end-point-to-end-point comparisons of performance indicators over the period. This approach was highly misleading, particularly given the profound recession that occurred in 2008. The USITC did not engage in a meaningful year-to-year analysis of the data. The USITC made no attempt to explain the absence of correlation between imports and various injury factors in this year-to-year data. Instead, the USITC relied on the bare juxtaposition of frequently aggregate, undifferentiated data on imports and injury factors. It was incumbent on the USITC to provide a "very compelling" explanation of why causation still exists in the face of this clear lack of correlation. Such explanation must be express, reasoned and adequate. WTO jurisprudence confirms that panels should not have to hunt for "implicit" findings or explanations in an investigating authority's report. The USITC's failure to provide such an express explanation was inconsistent with Appellate Body jurisprudence and WTO obligations.

## D. THE USITC IGNORED OR FAILED TO ASSESS FULLY OTHER CAUSES OF INJURY

31. The absence of correlation between trends in imports from China and the condition of the domestic industry strongly suggests that other factors are responsible for the domestic industry's injury. Yet the USITC dismissed the array of alternative causes noted by respondents, asserting that under the U.S. statute, it did not need to engage in a "weighing of causes." This approach was not only intellectually flawed, but also inconsistent with the Article 16's requirement that a Member demonstrate a "causal link" between imports and injury, and that rapidly increasing imports (and not other factors) are a "significant cause" of material injury. Contrary to the USITC's determination, the

evidence shows that trends in industry conditions reflect, among other factors, fundamental changes in demand and the industry's strategic shift to higher-end production in the United States.

32. The USITC barely acknowledged alternative causes of injury despite the fact that Article 16 of the Protocol requires there be a "causal link" between increasing imports and injury, defined as a "genuine and substantial relationship between cause and effect." It is impossible to make such a determination without considering the role played by causes other than subject imports. The "assumption" that other factors are not causing the alleged injury cannot be made consistently with the obligation to find a "causal link" – a "genuine and substantial" relationship of cause and effect. An authority thus cannot conclude that a "causal link" exists without first assessing whether other factors are actually responsible, or better explain the data. Had the USITC investigated alternative causes, it would have determined that the domestic producers would have experienced the same conditions and trends even without imports from China. This is because other factors – such as falling demand and industry business strategy – provide a much more compelling interpretation of the data, and disprove any notion that imports from China are a "significant cause" of material injury to U.S. producers.

33. The USITC failed to consider important changes in demand for tyres in the United States. First, the U.S. tyre market experienced a prolonged contraction in demand as apparent consumption of all passenger vehicle and light truck tyres (by volume) fell by 10.3 percentage points during the 2004-2008 period. The recession of 2008, and the near-collapse of the U.S. auto industry, greatly accelerated this contraction in demand. Consumer demand for vehicles fell dramatically in 2008 and manufacturing of light vehicles declined 4.3 percentage points over the 2005-2007 period – only to drop an additional 15.2 percentage points in 2008. At the same time, consumer demand shifted in favour of larger tyres, even for smaller, fuel-efficient vehicles. Finally, from 2007-2008, total consumption dropped by about 20 million tyres, and total U.S. producer shipments dropped by almost 19 million tyres during the same time. This was an almost one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments. The USITC barely acknowledged these changes in demand and did not offer a reasoned and adequate explanation of why, in light of these changes, imports from China were still a "significant cause" of material injury.

34. The USITC also chose to attribute plant closings and other indicators of industry performance to imports from China, when the record in fact demonstrates that domestic producers were engaged in a long-term strategy that shifted production in the United States towards the higher-end segments of the market. For the U.S. producers, imports from China (and other lower-cost jurisdictions) were, and are, a *positive* factor. Far from being injured by imports from China, the producers were themselves responsible for manufacturing and importing many of these tyres. Accordingly, the producers stated that they would not reverse this strategy and increase lower-end manufacturing in the United States, *even if* the President imposed tariffs or took other action against imports from China. Remarkably, the USITC rejected the testimony of the U.S. producers concerning their own business strategy. Notably, each alternative cause individually severs the necessary causal link, yet they also operate collectively and are mutually reinforcing in breaking the causal link.

## IV. THE U.S. TARIFF REMEDIES WERE BEYOND THE "EXTENT NECESSARY" AND THUS ARE INCONSISTENT WITH ARTICLE 16.3 OF THE PROTOCOL

35. The requirements for applying a transitional product-specific safeguard under Article 16 have not been met in this case. Because the USITC failed to establish that rapidly increasing imports from China were a "significant cause" of market disruption, no remedy is appropriate. Even if the United States had complied with the other requirements of Article 16, and thus had the theoretical right to apply safeguard measures, the tariff remedies imposed were nonetheless inconsistent with the requirements of Article 16.3 of the Protocol because they were beyond the "extent necessary" to "remedy" the alleged market disruption. The obligations of Article 16.3 limit the extent of any such safeguard measures to "such" market disruption, which is limited to that disruption properly attributed to "increasing rapidly" imports from China. Neither the USITC nor the President drew this important

distinction, and instead imposed an excessive remedy that addressed the entire problem facing the domestic industry, and not only the market disruption significantly caused by rapidly increasing imports from China. This error led to an excessive, three-year remedy that was beyond the "extent necessary" and therefore inconsistent with Article 16.3.

## V. THE U.S. TARIFF REMEDIES HAVE BEEN IMPOSED FOR A PERIOD OF TIME LONGER THAN PERMITTED UNDER ARTICLES 16.3 AND 16.6 OF THE PROTOCOL

36. The requirements for applying a transitional product-specific safeguard under Article 16 have not been met in this case. Because the USITC failed to establish that rapidly increasing imports from China were a "significant cause" of market disruption, no remedy for any period of time is appropriate. Even if the United States had complied with the other requirements of Article 16, and thus had the theoretical right to apply safeguard measures, the tariff remedies imposed were nonetheless inconsistent with the requirements of Articles 16.3 and 16.6 of the Protocol because the three-year tariff period is beyond "such period of time" that is "necessary." The obligations of Article 16.3 and Article 16.6 limit the duration of any remedy measure imposed. Article 16.3 obligation limiting the "extent" of remedies applies to their duration, which is further reinforced by Article 16.6's obligation to limit remedies to only "such period of time" that is "necessary." Yet the decision by the United States to impose tariffs for three years ignores both of these obligations. Because the requirements for imposing safeguards was not been met, no remedy was appropriate. Subsequently, the U.S. imposition of excessively high tariffs for three-years is inconsistent with the durational limitations of Article 16.3 and Article 16.6 of the Protocol.

## VI. THE U.S. TARIFF REMEDIES DO NOT ACCORD CHINA THE SAME TREATMENT AS OTHER COUNTRIES, AND ARE INCONSISTENT WITH ARTICLE I:1 OF GATT 1994

37. The U.S. tariff remedies do not accord China the same treatment as other countries. Accordingly, China considers these higher tariffs, not having been justified as emergency action under relevant WTO rules, to be inconsistent with Article I:1 of the GATT 1994. The United States does not accord the same treatment it grants to passenger and light truck tyres originating in other countries to the like products from China. The U.S. tariff measures are "customs duties" within the meaning of Article I:1 and must comply with the disciplines of this provision. Yet the U.S. measures ignore the requirements of Article I:1. The imposed 35 per cent tariffs apply only to China. Other countries still enjoy the benefits of much lower applied tariffs of 4.0 per cent for radial tyres in HTS codes 4011.10.10 and 4011.20.20.10, and at 3.4 per cent for other tyres in HTS codes 4011.10.50 and 4011.20.50. The 35 per cent tariffs applied only to China are much higher than the lower rates applied to other countries, and thus are inconsistent with Article I:1 of GATT 1994 because they have not been justified by the United States. Because the U.S. measures are inconsistent with Article 16 of the Protocol, they are also inconsistent with Article I:1 of GATT 1994.

## VII. THE U.S. TARIFF REMEDIES EXCEED THE BOUND RATES OF THE U.S. SCHEDULE OF CONCESSIONS, AND ARE INCONSISTENT WITH ARTICLE II:1(B) OF GATT 1994

38. The U.S. tariff remedies exceed the bound rates specified in the U.S. Schedule of Concessions. Accordingly, China considers these higher tariffs, not having been justified as emergency action under relevant WTO rules, to be inconsistent with Article II:1(b) of GATT 1994. These higher tariffs consist of unjustified modifications of U.S. concessions on passenger and light truck tyres under the GATT 1994. The U.S. tariff measures are "customs duties" within the meaning of Article II:1(b) and must comply with the disciplines of this provision. Yet the U.S. measures ignore the requirements of Article I:1. The United States has bound its tariffs on such tyres at 4.0 per cent for radial tyres in HTS codes 4011.10.10 and 4011.20.20.10, and at 3.4 per cent for other tyres in

HTS codes 4011.10.50 and 4011.20.50. The imposed 35 per cent tariffs are dramatically in excess of these bound rates, and thus are inconsistent with Article II:1(b) of GATT 1994 because they have not been justified by the United States. Because the U.S. measures are inconsistent with Article 16 of the Protocol, they are also inconsistent with Article II:1(b) of GATT 1994.

# ANNEX A-2

## EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

### I. INTRODUCTION

1. Over a five-year period from 2004-2008, imports of tyres from China into the United States more than tripled, growing from 14.6 million tyres to 46 million tyres. As a result of this rapid growth, there was a decline in nearly all of the economic indicators for the U.S. tyre industry. Because WTO Members anticipated that this kind of development might arise following China's accession to the WTO, they negotiated the transitional product-specific safeguard mechanism ("the transitional mechanism") contained in paragraph 16 of China's Protocol of Accession.

2. China argues that the standards of the transitional mechanism must be interpreted so as to be both "more demanding" than what the text's ordinary meaning would indicate, and "more demanding" than the standards applicable under the Safeguards Agreement. The United States will demonstrate that the plain text of paragraph 16 does not support China's arguments; that the U.S. law implementing the transitional mechanism is fully consistent with that mechanism; and that the rigorous and detailed investigation undertaken by the ITC and the remedy imposed are fully in accordance with the Protocol.

### II. NO SPECIAL INTERPRETIVE APPROACH IS REQUIRED BY THE PROTOCOL

3. China argues that the "object and purpose" of the Protocol necessarily make the terms of the transitional mechanism stricter than those of the Safeguards Agreement. The Protocol, as part of the WTO Agreement, does not have its own "object and purpose." The "purpose" of any provision (in this case the transitional mechanism) can be determined only by ascertaining what the provision means under customary rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention (and DSU Article 3.2). Any attempt to identify *a priori* some supposed "purpose" for the provision and then interpret the text on the basis of that "purpose" is an invitation to import into the agreement obligations not found there.

### III. PARAGRAPH 16 DOES NOT INCORPORATE GATT 1994 ARTICLE XIX OR THE SAFEGUARDS AGREEMENT

4. It is evident from the text of paragraph 16, in light of the context provided by the Working Party Report, that the Protocol does not incorporate the disciplines of Article XIX of the GATT 1994 or the disciplines of the Safeguards Agreement. There is no cross-reference in paragraph 16 to Article XIX or to specific provisions of the Safeguards Agreement. The only reference to the Safeguards Agreement is found in Paragraph 16.1. That paragraph simply states that "whether the affected Member should pursue application of a [global safeguard]" is one of the options that may be discussed in negotiations over seeking a mutually agreed solution. This cannot be interpreted to incorporate the disciplines of the Safeguards Agreement, explicitly or implicitly. On the contrary, this indicates that the transitional mechanism exists apart from the global safeguard disciplines of GATT 1994 Article XIX and the Safeguards Agreement.

5. Textual differences also indicate that the Protocol does not incorporate the standards and obligations of Safeguards Agreement or GATT 1994 Article XIX. The injury standards are the most significant of these. The Safeguards Agreement provides for a "serious injury" standard, while paragraph 16.4 provides for a "material injury" standard. This is the standard provided for in Article VI of the GATT 1994, the SCM Agreement, and the Anti-dumping Agreement. The Appellate Body has explained that "the word 'serious' connotes a much higher standard of injury than the word 'material'." This distinction demonstrates that the negotiators of the Protocol did not intend to incorporate the Safeguards Agreement or Article XIX of the GATT 1994, either directly or by implication.

6. Finally, the Safeguards Agreement itself demonstrates the error in China's argument. That Agreement contains several explicit references to Article XIX of the GATT 1994. If the negotiators of the Protocol had sought to make portions of Article XIX, or of the Safeguards Agreement, applicable to the transitional mechanism, they would have done so explicitly. The Protocol's silence indicates that the obligations under the Safeguards Agreement and Article XIX of the GATT 1994 are not incorporated.

## IV. THE ITC REASONABLY CONCLUDED THAT IMPORTS FROM CHINA WERE "INCREASING RAPIDLY" UNDER PARAGRAPH 16 OF THE PROTOCOL

**7. The ITC found that imports from China increased rapidly on an absolute and relative level. The quantity of subject imports rose by 215.5 per cent between 2004 and 2008, by 53.7 per cent between 2006 and 2007, and by 10.8 per cent between 2007 and 2008. The market share of the imports increased by 12.0 percentage points between 2004 and 2008, with the two largest year-to-year increases in market share occurring in 2007 and 2008. On an absolute and a relative basis, imports were at their highest levels in 2008, at the end of the period of investigation. The ITC reasonably concluded that these increases were rapid and were in such quantities as to cause material injury to the industry.**

**8. Contrary to China's contentions, the Protocol does not impose a more demanding standard for the "rapidly increasing" standard than the Safeguards Agreement. Paragraph 16.4 makes clear that there should be a "rapid" increase in imports, either on an absolute or relative level, and that the level of increase must be such "as to be a significant cause of material injury or threat of material injury" to the industry. The Protocol's language linking "rapid increases" of imports to material injury or threat of material injury establishes that the import increases required by the Protocol are less significant than those required in the context of the Safeguards Agreement, where increased imports are linked to "serious injury."**

9. Although the Protocol does not specify how rapid an increase must be to meet the "increasing rapidly" standard, **the language of the Protocol does suggest that a competent authority should examine whether the rapid increases have continued in the recent past, rather than at some distant point during the period of investigation. The ITC complied with this standard by focusing on recent increases in imports, specifically those in the last two years of the period of investigation, 2007 and 2008.**

10. China's assertions that the ITC's analysis is inconsistent with the Protocol have no merit. First, the ITC did not rely exclusively on an "end-point-to-end-point" analysis. The ITC specifically considered the growth in the absolute and relative quantities for the subject imports during each year of the period of investigation and concluded that the imports increased, both absolutely and relatively, throughout the period, by significant amounts in each year. **Moreover, the Appellate Body has not stated that a competent authority should never examine or analyse trends in import increases between the end-points of an investigation.**

11. The ITC also reasonably rejected the argument that import increases had "abated" in 2008. **It pointed out that the subject imports had increased "by significant amounts" in each year of the period, that they had been "at their highest levels at the end of the period in 2008," and that, on both an absolute and relative level, the increase in 2008 "alone" was a "large, rapid, and continuing" increase over the increase in their levels in 2007. The Protocol does not require that subject imports be growing at an increasingly rapid rate at the end of the period, or that imports be increasing at a rate that is higher than the rate of growth of imports earlier in the period.**

12. Furthermore, China's alternative quarterly analysis of the import data is flawed. It completely ignores all data before 2007, thereby concealing the increases that occurred in 2007 and 2008. China also ignores that quarterly data has the potential to introduce distortions that do not typically exist in annual data. Moreover, China's quarterly data only shows changes in the absolute levels of the Chinese imports and ignores data on relative imports.

13. The ITC's decision not to seek data for the first quarter of 2009 was reasonable and consistent with its established practice. The ITC does not have a practice of collecting data for any fiscal quarter that is completed before the beginning of its investigation, as China asserts. **Instead, the ITC considers a number of factors, including the time elapsed between the end of the most recent quarter and the issuance of its questionnaires, the likelihood of obtaining full information from the parties for the interim period, and the number of parties from whom data must be sought. It is not true that the ITC's decision not to collect interim data in the *Tyres* case was at odds with its practice in other cases.**

## V. ITC'S CAUSATION ANALYSIS WAS IN ACCORDANCE WITH THE REQUIREMENTS OF THE PROTOCOL

### 1. Causation standard of U.S. Statute is fully consistent with Protocol

14. The U.S. statute tracks, on an almost verbatim basis, the language contained in paragraphs 16.1 and 16.4 of the Protocol. Moreover, in its determinations, the ITC has explained that the U.S. statute requires the ITC to find a "direct and significant causal link" between the rapidly increasing imports and the material injury or threat of material injury suffered by the industry. This requirement is fully consistent with the Protocol's requirement that the competent authority establish that imports from China are "a significant cause" of material injury or threat to an industry.

15. There is nothing in the language of the statute that indicates that its definition of "significant cause" somehow weakens or reduces the causal link required under the Protocol. On the contrary, the U.S. statute's definition of a "significant cause" of material injury as one that "contributes significantly" to that injury is consistent with Appellate Body analysis and the language of the Protocol itself. The Protocol specifically provides that "market disruption shall exist" whenever rapidly increasing imports from China are "a significant cause of material injury, or threat of material injury" to a domestic industry. By stating that imports from China can be "a significant cause" of material injury or threat to an industry, the text of the Protocol establishes that there may be multiple significant causes of material injury or threat to an industry.

16. In the Safeguards Agreement context, the Appellate Body has stated that, when assessing whether there is a "causal link" between imports and injury, a competent authority need only establish that there is a "relationship of cause and effect such that increased imports contribute to 'bringing about,' 'producing,' or 'inducing' the requisite level of injury." It follows from this reasoning that, under paragraph 16.4, imports from China can be one of several "significant causes" that contribute to the overall level of material injury or threat of injury.

17. Finally, neither the Protocol nor the Working Party Report links the causation standards of paragraph 16 of the Protocol to the causation standards of the Safeguards Agreement. Thus, nothing in the Protocol or the Working Party Report instructs or implies that the competent authority needs to satisfy a more demanding, strict, or stringent showing of the "causal link" between imports from China and material injury than that specified in the Safeguards Agreement or the Anti-dumping or Subsidies Agreements, as China claims. In fact, the absence of restrictions, such as the non-attribution language of Article 4.2(b) of the Safeguards Agreement, suggests that the threshold for application of a measure under the transitional mechanism is lower.

**2. ITC's causation analysis, as applied, was in accordance with the Protocol**

18. The ITC's causation analysis, as applied, was fully in accordance with paragraphs 16.1 and 16.4 of the Protocol. The ITC objectively analysed the record evidence in detail and then established unambiguously that rapidly increasing imports from China were a significant cause of material injury to the domestic industry. The arguments made by China simply ignore the pertinent obligations required of the United States by the plain language of the Protocol.

19. Throughout its submission, China improperly attempts to create standards and impose obligations on the United States that are not found in the language of the Protocol. Moreover, China has opted to ignore the numerous and detailed factual findings by the ITC establishing clearly that rapidly increasing imports from China were a significant cause of material injury to the domestic industry. Instead of addressing the ITC's analysis as a whole, China opts to present carefully selected portions of the ITC's determination in isolation and attempts to rebut each one on its own by suggesting alternative interpretations of the data.

20. The ITC, however, properly rejected such a piecemeal approach to causation. In accordance with the plain language of the Protocol, and in the context of the conditions of competition in the U.S. tyre market during the period examined, the ITC focused instead on the entirety of the evidence relating to the volume of the imports, the effect of imports on prices for the domestic like product, and the effect of such imports on the domestic industry.

21. In terms of volume, the ITC found that subject imports increased in each year of the period and were at their highest levels of the period in 2008. The record also showed that subject imports increased by 215.5 per cent over the period, with the greatest and most rapid increases occurring after 2006. The Commission noted that the large increase in the volume of subject imports was also reflected in the large and growing share of the U.S. market held by subject imports. Subject imports increased their share of the U.S. market more than three-fold over the period of investigation, growing from 4.7 per cent in 2004 to 16.7 per cent in 2008. The record showed that more than half of this increase has occurred since 2006.

22. The ITC also examined the effect of subject imports on prices for the domestic like product. **The ITC conducted a detailed and thorough evaluation of pricing in the tyres market during the period of investigation, and explained that persistent and significant underselling by subject imports contributed to the deteriorating condition of the domestic industry.**

23. To conduct its pricing analysis, the ITC collected quarterly data over the period examined for six specific products, each of which was defined by specific dimensions, load indexes, and speed ratings of each to ensure compatibility. These comparisons showed underselling by the subject imports in 119 out of 120 comparisons, with the average margins of underselling at their highest in 2007 and 2008, coinciding with the largest volumes of subject imports. As the ITC found, the consistent underselling by the large and rapidly increasing volume of subject tyres displaced domestic shipments by U.S. producers, and eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period

examined. The ITC also found that continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs and thus suppressed prices.

24. The ITC examined the effect of subject imports on the domestic industry during the period of investigation. As subject imports increased both absolutely and relatively in every year of the period, virtually all of the domestic industry's performance indicators declined as well. As the ITC explained, the underselling by large and rapidly increasing Chinese tyres eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment. Moreover, the evidence showed that all of these indicators were at their lowest levels in 2008 when subject imports were at their highest. Even though some factors, such as profitability and productivity, improved somewhat in 2007 when imports continued to increase, numerous other injury factors including capacity, shipments, net sales quantities, market share, and employment-related factors all continued to decline in that year. Finally, even the improvement in profitability and productivity was temporary given that both factors declined in 2008 to levels below the start of the period, at the same time subject imports rose to their highest levels both in terms of absolute volume and market share.

**3. ITC reasonably concluded that other factors did not sever the causal link**

25. In its analysis, the ITC also considered and addressed other factors allegedly causing material injury to the industry, and found that these other factors did not break the clear causal link between increasing imports from China and the material injury to the industry. China alleges that the ITC failed to comply with its obligations to address these other factors fully. China's arguments are flawed in two significant respects.

26. First, China's arguments are legally flawed. China is, again, seeking to import into the Protocol analytical standards developed under the Safeguards Agreement that have no basis in the text of the Protocol. Unlike the Safeguards Agreement, the Protocol does not specifically require a competent authority to consider the possible effects of other factors causing material injury or threat of material injury as part of its causation analysis. Instead, the competent authority must assess only whether increasing imports are a significant cause of material injury or threat of material injury to the industry, and to consider the "volume of imports," their "effect . . . on prices for like or directly competitive articles, and the effect of such imports on the domestic industry" producing such articles in that analysis. Given the absence of any language in the Protocol requiring the competent authority to consider and then "separate and distinguish" other factors causing injury as part of its causation analysis, China has no textual basis for claiming that the Protocol requires a competent authority to perform such an analysis.

27. As a result, a competent authority may use any reasonable methodology to consider such other factors when assessing whether market disruption exists. A competent authority's need to address the effects of other possibly injurious factors will depend on the facts and circumstances of the particular case. In some cases, such a factor might arguably be so significant a cause of injury that a competent authority would need to perform a more detailed explanation of its effects. In other cases, the factor may be contributing to injury in a considerably less significant fashion. In those circumstances, the competent authority could reasonably refer to the factor and indicate that the factor does not explain the injury caused to the pertinent industry. In still other cases, the authority could simply find that there was no evidence establishing that a particular factor caused injury to the industry, or it might find that the parties have not presented sufficient evidence to establish that the factor causes any injury at all. The ITC's analysis was consistent with this analytic structure.

28. Second, China's arguments are mistaken because they claim the ITC "apparently refused to investigate alternative causes," or that "[it] barely acknowledged" them in its analysis. The ITC investigated, considered, and analysed all of the factors that could reasonably be considered

significant enough to break the causal link between imports and material injury. Indeed, the ITC directly considered and addressed the industry's alleged "business strategy" of shifting their U.S. production away from low-end tyres to high-end products and the declines in demand in the U.S. tyres market over the period, the two main factors cited by China as breaking the causal link between imports and injury. The ITC also specifically considered other alleged causes of injury, such as increases in the industry's raw material costs, changes in its productivity levels, changes in the levels of non-subject imports, and the impact of rising gas prices on demand, and found that they too did not indicate that the subject imports from China were not a significant cause of material injury to the industry.

29. For example, with respect to the industry's alleged business strategy of shifting production of low-end tyres to China, the ITC explained that imports of tyres from China were rapidly increasing before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006 and 2008, and that fierce competition from low-cost producing countries was a factor in the decision to close certain plants. Similarly, with respect to declining demand, the ITC found that, "even in 2008 when U.S. apparent consumption was falling," the record showed that the subject "imports continued to increase rapidly." Because a decline in demand should typically have comparable effects on all sources of supply, domestic and import, the ITC reasonably concluded that demand changes were not the source of the industry's injury.

30. The ITC also considered and discussed the effect that increases in raw materials pricing had on the industry, finding that the industry's ratio of cost of goods sold to net sales increased considerably over the period. The ITC nonetheless concluded that the presence of the growing levels of lower-priced subject imports prevented the U.S. producers from passing these "increasing raw materials costs on to their customers," thus leading to a decline in the industry's operating margins over the period of investigation. Finally, with respect to the impact that higher gasoline prices had on driving habits, the ITC specifically acknowledged this factor in its analysis, stating that "demand for replacement tyres fell in 2008 as the number of miles driven decreased, consumers tried to get more miles from current tyres, and the economy weakened." The ITC reasonably found, however, that demand declines resulting from these factors did not sever the causal link between imports and injury.

## VI. THE UNITED STATES APPLIED A REMEDY CONSISTENT WITH THE PROTOCOL REQUIREMENTS

### 1. The additional duties are only to the "extent necessary" per paragraph 16.3

31. China argues that the ITC impermissibly considered the effect of the tariffs on the domestic industry and disregarded testimony from domestic producers that no remedy was necessary. Neither argument is valid.

32. The United States agrees that any remedy under paragraph 16.4 of the Protocol may only remedy the material injury that results from the rapidly increasing imports from China. The United States also agrees that the Appellate Body's analysis of the phrase "no more than the extent necessary to prevent or remedy serious injury" in Article 5.1 of the Safeguards Agreement can provide useful reasoning in interpreting the similar phrase in paragraph 16.3 of the Protocol. The United States does not agree with China's conclusion that the Appellate Body's findings signify that "the remedy measure provision has an exceedingly narrow reach." Although the authority to impose a measure is circumscribed by the extent of the injury caused by the relevant imports, where imports have a broad injurious effect, the authority would be correspondingly broad. It is also significant that paragraph 16.3 of the Protocol provides that a Member facing rapidly increasing imports from China that cause market disruption is "free, in respect of such products, to withdraw concessions or otherwise to limit imports. . . .". This authority grants a Member latitude in crafting an appropriate remedy.

33. The evaluation of whether a safeguard approaches or passes the permissible extent cannot be a matter of scientific precision. As the working group that reviewed the U.S. Article XIX measure on felt hats and hat bodies under the GATT 1947 noted, "it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market." This observation remains true today. Although economic modeling allows a generalized evaluation of market conditions, it cannot measure with any precision the effect of rapidly increasing imports or the effect of measures designed to remedy their effect.

34. China's criticism of the "focus" on the benefits to the domestic industry and not on "specific market disruption" simply makes no sense. Paragraph 16.4 defines market disruption in terms of "material or threat of material injury" of which rapidly increasing imports from China are a significant cause. It further requires a Member to examine "objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products." Thus, the effect of imports on prices and on the domestic industry are crucial elements in the existence of market disruption. The ITC found that the market disruption to the domestic industry consisted of, *inter alia*, declining capacity, capacity utilization, profitability, and employment. It is difficult to imagine how it could "address[] the specific market disruption found to exist" without examining the potential benefits of a remedy to these identified effects of increased imports. Therefore, China's criticism is invalid as a legal matter.

35. Contrary to China's arguments, the ITC conducted a detailed analysis, based on the facts on the record and using economic tools available, to craft a remedy that would only address the injury caused by Chinese imports. Parts C, D, and E of the remedy determination and Chairman Aranoff's separate views on remedy demonstrate a focus on addressing the material injury caused by Chinese imports. One particular manifestation of this, is the ITC's discussion of why it rejects the remedy proposed by petitioners. The ITC explains that the proposed quota would be equivalent to a 65 *ad valorem* tariff, "which we view to be higher than necessary to remedy the market disruption we have found." The ITC is clearly calibrating its remedy to ensure that it addresses the injury caused by the increasing Chinese imports. **China is simply wrong to assert that the ITC did not distinguish between the injury caused by Chinese imports and other factors.**

36. China's argument that the ITC disregarded the testimony from U.S. producers that they were not materially injured by Chinese imports and would not change their behaviour if there were to be a remedy is also misguided. China relies on the views of the dissenting Commissioners. However, their reasoning reveals that there was a difference of opinion among the Commissioners as to the appropriate weight to give to the evidence on this issue, with the two dissenters believing that more weight should have been given to the views presented by some of the U.S. producers. This is a matter for the fact-finder – the ITC as a whole. Four Commissioners evaluated the evidence differently. The ITC's determination before this Panel is that reflected in the majority opinion.

37. It is clear that U.S. producers' views on this issue were hardly unanimous, and therefore needed to be evaluated, along with the other evidence of record, by the fact finder – the ITC. The fact that U.S. producers did not provide specific restructuring plans does not imply a deficiency in the ITC's analysis as the Protocol does not require the filing or consideration of industry restructuring plans in the analysis of market disruption or of an appropriate remedy. In any case, it is not true that the ITC disregarded the evidence before it. Finally, whether individual producers said they would not change their business plans is not determinative of whether the proposed remedy was "to the extent necessary to remedy" the market disruption found with respect to the industry as whole. A remedy must by necessity seek to address the material injury caused on the industry. This means that the remedy must seek to address the various factors that indicate the health of the industry "as a whole",

as it has been affected by the market disruption found. The impact on individual companies will necessarily vary.

38. Thus, China has failed to meet its burden of proof to demonstrate that the ITC recommended remedy failed to comply with paragraph 16.3. It is noteworthy that after soliciting further information from interested parties and providing for a hearing, President Obama determined that the most appropriate action to remedy the market disruption found by the ITC was an additional duty set at 35 per cent *ad valorem* for the first year (instead of a 55 per cent *ad valorem* duty). In addition, the President determined that, although not required by the transitional mechanism or U.S. law, the additional duty should be reduced by five percentage points in the second and third years of the remedy, resulting in each case in additional tariffs lower than those recommended by the ITC. The only argument China makes against the final remedy imposed by the United States is that "President Obama's determinations apparently assume the USITC had provided the necessary analysis, when in fact the USITC had not done so." We have shown that China has failed to meet its burden with regard to its challenge to the ITC's remedy analysis. Therefore, its challenge to the measure actually applied by President Obama must also fail.

**2. The U.S. measure is consistent with paragraph 16.6 of the Protocol**

39. Based on the ordinary meaning of paragraph 16.6, any safeguard measure must be limited to the period of time as is necessary to prevent or remedy the material injury caused by rapidly increasing Chinese imports. The United States does not agree with China's attempts to heighten the burden under this requirement based on comparisons to the Safeguards, Anti-dumping, and SCM Agreements. China also argues that a remedy may remain in place "only for the exact amount of time" to address the market disruption. This level of exactitude is neither required nor possible. The Protocol requires competent authorities to make decisions regarding safeguard measures based on evidence and formal proceedings providing for participation by interested parties. Those authorities cannot know at the time of taking a measure the "exact amount of time" it will be necessary. The Working Party Report recognized that a Member taking a safeguard need not identify an exact time period by explicitly allowing them to extend a measure based on a finding that action continues to be necessary to prevent or remedy market disruption.

40. China fails to give appropriate weight to the remaining elements of paragraph 16.6, which allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. These indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tyres, or even longer in the case of an extension under paragraph 246(f) of the Working Party Report. The ITC found that Chinese imports had increased both in absolute terms and in relative terms, and the United States applied a safeguard measure for three years, as envisaged in the third sentence of paragraph 16.6 of the Protocol.

41. **China argues, as it did with regard to its paragraph 16.3 claim, that the ITC's rationale "focuses entirely on the condition of the domestic industry and the time it needs to adjust," a consideration that in China's view "is irrelevant." The United States has already explained that this assertion is incorrect as a matter of fact, as the ITC conducted a detailed analysis involving a number of factors, and law, as the effect of the remedy is not merely relevant, but critical, in understanding whether it is "necessary to prevent or remedy market disruption." That logic applies to the duration of a measure as well as its other terms.** China also repeats its argument that the ITC did not give sufficient weight to the views of domestic producers who "had not provided specific restructuring plans." The United States has already explained that the ITC weighed all of the evidence before it, and considered that the evidence favouring its remedy outweighed the evidence cited by China against the remedy.

## VII. CONCLUSION

42. China's claims that the additional duties imposed by the United States on subject tyres from China are inconsistent with U.S. obligations under Articles I:1 and II:1(b) of the GATT 1994 are dependent on a finding of inconsistency with U.S. obligations under the transitional mechanism. China has failed to demonstrate that the United States has acted inconsistently with its obligations under the transitional mechanism. Therefore these claims must be rejected.

43. The United States requests that the Panel reject China's claims in their entirety.

# ANNEX B

## EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS

# ANNEX B-1

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. The European Union intervenes in this dispute because of its interest in the correct interpretation of the *Transitional Product-Specific Safeguard Mechanism* (the "TPSSM") laid down in Article 16 of the *Protocol on Accession of the People's Republic of China* (the "Protocol").

2. The present dispute raises complex factual issues on which the European Union is not in a position to comment. The European Union will not, therefore, express any views on the compatibility of the measure in dispute with the requirements of Article 16 of the Protocol.

3. China's First Written Submission stresses certain textual differences between the TPSSM, on the one hand, and GATT Article XIX and the AS, on the other. China's analysis, however, fails to consider the most important differences.

4. First, China glosses over the crucial fact that, unlike GATT Article XIX, the TPSSM does not provide that the increase of imports must be the result of "unforeseen developments". Furthermore, China also disregards that, consistent with the omission of that circumstance, Article 16 of the Protocol does not, unlike GATT Article XIX and the AS, characterise the measures taken pursuant to the TPSSM as "emergency actions".

5. Second, the TPSSM lays down a different standard of injury. GATT Article XIX and the AS require that the increase in imports must be such as to cause "*serious* injury" or threat thereof. In contrast, under the TPSSM, it is enough if the increase in imports causes "*material* injury" or threat thereof. The Appellate Body has observed "the word 'serious' connotes a much higher standard of injury than the word 'material'".

6. Third, while the TPSSM uses similar words as the AS and GATT Article XIX in order to describe the requirement of increased imports ("being imported […] in such increased quantities"), the Appellate Body has underlined that those terms must be interpreted in the specific context in which they appear. In the case of the AS and GATT Article XIX, that context includes the circumstance that the increased imports must be the result of "unforeseen developments", as well as the condition that they must cause "serious injury". Relying on those two contextual elements, the Appellate Body has concluded that the increase in imports must be "recent" and "sudden". In the TPSSM the terms "being imported […] in such increased quantities" appear in a very different context. In view of these contextual differences, the increase in imports required under the TPSSM can be, to paraphrase the Appellate Body, less recent, less sudden, less sharp and less significant than that required under GATT Article XIX and the AS.

7. Last, it is worth noting that Article 16.6 of the Protocol allows China to suspend the application of substantially equivalent concessions or obligations under the GATT to the trade of a Member applying a safeguard measure on the basis of a relative increase in the level of imports only if such a measure remains in effect more than two years. In contrast, GATT Article XIX and the AS allow for the immediate adoption of suspension of concessions in the same situation.

8. When the minor textual differences invoked by China are considered in the light of the fundamental differences discussed above, it becomes clear that the former do not have the implications alleged by China.

9. If the TPSSM uses the term "rapidly" it is precisely because, due to the contextual differences discussed above, there is no requirement that the increase be "sudden", or at least as "sudden" as under GATT Article XIX and the AS.

10. Despite the minor grammatical differences highlighted by China, the phrase "imports […] are increasing" has the same meaning as the phrase "being imported […] in such increased quantities", as already interpreted by the Appellate Body.

11. Although GATT Article XIX and the AS do not expressly require that increased imports be a "significant" cause of injury, the Appellate Body has clarified that there must be a "genuine and *substantial* relationship of cause and effect". On the basis of any of the ordinary meanings of those terms, China would be wrong in arguing that increased imports must be a less "important" cause of injury under GATT Article XIX and the AS than under the TPSSM. Indeed, some of the ordinary meanings strongly suggest that, if anything, under GATT Article XIX and the AS increased imports must be an even more "important" cause of injury.

12. Finally, China's restrictive interpretation of the TPSSM finds no support in the "object and purpose" of the Protocol. The Protocol may "impose obligations on China that are not imposed on other Members under the WTO Agreement, or are stricter than those applicable to other Members". The TPSSM is one such obligation. Furthermore, the Protocol constitutes a single 'package' of rights and obligations. The obligations imposed upon China by the TPSSM have their counterpart in other provisions of the Protocol conferring rights on China, including provisions that accord a transitional period to China for implementing certain obligations.

# ANNEX B-2

## EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

### I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) reasoned and adequate explanation of importing Members' decision to impose a transitional safeguard measure; (b) implication of the *Agreement on Safeguards* and the Article XIX of the *General Agreement on Tariffs and Trade 1994* (the "*GATT*"); (c) the substantive obligation to determine the existence of market disruption; (d) to the extent necessary to prevent or remedy market disruption; and (e) period of time as may be necessary to prevent or remedy market disruption.

### II. DISCUSSION

#### A. REASONED AND ADEQUATE EXPLANATION OF IMPORTING MEMBERS' DECISION TO IMPOSE A TRANSITIONAL SAFEGUARD MEASURE

2. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Dispute* (the "*DSU*") sets forth the standard of review of the Panel that it "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."

3. As the Appellate Body stated "an 'objective assessment' under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."[1] The covered agreement in this case is the *Protocol*.

4. In the context of *Agreement on Safeguards*, the Appellate Body clarified that the standard of review of the panel in connection with the specific obligation dictates the actions that an investigating authority must have taken in its safeguard investigation. The Appellate Body found that the Panel was obliged to assess whether the competent authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.[2]

5. The rationale under the *Agreement on Safeguards*, together taking account of case laws developed under the *Agreement on Subsidies and Countervailing Measures* and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, would provide a good framework for this Panel to consider the Member's obligations derived from the Article 11 of the *DSU* and specific obligation under Section 16 of the *Protocol*. The "determination" requirement is significant in clarifying the importing Member's obligation. Paragraph 16.4 of the *Protocol* obliges the importing Member to "determin[e]" if market disruption exists by reference to the definition of market disruption that imports of an article are increasing rapidly so as to be a significant cause of material injury and to "consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry".[3]

---

[1] *See* Appellate Body Report, *United States – Countervailing Duty Investigation on DRAMS*, para. 184.
[2] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 121 (emphasis added).
[3] The second sentence of paragraph 16.4 of the *Protocol*.

6. Paragraphs 16.1, 16.3 and 16.6 do not explicitly provide that the importing Member must "determine" particular issues. Even if a provision does not set forth a specific obligation to "determine", the Appellate Body has explained that a general obligation under such provision nevertheless obliges the Member to provide a reasoned and adequate explanation in its notice to impose a measure through the context of other provisions and stated, "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction."[4] Since, these provisions are an "inseparable package of rights and disciplines" to which the importing Member is entitled and to which it is obliged to obey before imposition of a transitional safeguard measure, as explained by the Appellate Body, these provisions "have to be considered in conjunction."

7. Paragraph 16.5 of the *Protocol* requires the importing Member to "provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration."[5] This procedural requirement clarifies that satisfaction of the underlying substantive requirements must be explicitly explained in the written notice of the decision to impose a particular transitional safeguard measure.

## B. IMPLICATION OF THE *AGREEMENT ON SAFEGUARDS* AND THE ARTICLE XIX OF THE *GATT* TO THE *PROTOCOL*

8. In light of the language of Section 1 of the *Protocol* and the lack of any express cross-reference to Article XIX of the *GATT* or the *Agreement on Safeguards*, substantive rules to impose a transitional safeguard measure under Section 16 are separate and independent from the provisions of these WTO Agreements. The text of Section 16, therefore, as required by Article 31.1 of the *Vienna Convention*[6], should be interpreted in accordance with the ordinary meaning of the language in the context of Section 16 of the *Protocol* and the light of its object and purpose.

9. The Panel also should note that "these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[7] While Japan agrees that prior panel and Appellate Body reports clarifying the language of Article XIX of the *GATT* and the *Agreement on Safeguards* provide a good basis to consider the language of Section 16 of the *Protocol*, the Panel should carefully apply their rationale so as not to incorporate obligations under these WTO Agreements in accordance with language that does not exist in Section 16 of the *Protocol*.

## C. THE SUBSTANTIVE OBLIGATION TO DETERMINE THE EXISTENCE OF MARKET DISRUPTION

### 1. Paragraph 16.4 of the *Protocol*: The Requirement of "Imports of an Article Shall be Found to Be Increasing Rapidly" to Find the Market Disruption

10. China argues that the use of the present tense in paragraph 16.4 emphasizes the need to look at the most recent period of time for actions under Article 16 of the *Protocol*.[8] As set forth in paragraph 16.4, the importing Member must determine that imports "are increasing". The ordinary meaning of the term "increase" is "make or become greater in size, amount or degree".[9] The *Protocol*,

[4] Appellate Body Report, *Argentina – Footwear (EC)* , para. 81.
[5] Emphasis added.
[6] *See* Article 31.1 of the Vienna Convention on the Law of Treaties.
[7] Appellate Body Report, *India – Patent (US)*, para. 45.
[8] China First Written Submission, para. 101.
[9] Concise Oxford English Dictionary, tenth edition, revised, p. 718.

however, does not set forth any particular methodology to determine whether imports are becoming greater.

11. In the context of the *Agreement on Safeguards*, the Appellate Body found that "the competent authorities are required to consider the *trends* in imports over the period of investigation."[10] The panel in *US – Line Pipe* drew conclusion based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the authority allows it to focus on the recent imports; and third, the period selected by the authority is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.[11] This finding may give guidance to this Panel in reviewing the appropriateness of such period of investigation.

12. China also argues that "The increase cannot be in the past."[12] It might be ideal if the importing Member could base its determination as of the time of imposition, but the nature of the determination inherently prevents the importing Member from doing so. The Member necessarily relies on import data for a recent past period, as recognised by the Appellate Body and panels in the context of anti-dumping and countervailing duty investigations.[13]

13. With respect to the term "rapidly," the ordinary meaning is "happening in a short time or at great speed".[14] The phrase "increasing rapidly" would mean that the increase should have happened either over a short period of time or at a speed greater than the ordinary speed of increase. *No fu*rther guidance was provided in the terms or context of the *Protocol*. Accordingly, the importing Member has certain discretion to choose a methodology to assess whether the imports are increasing rapidly.

## 2. Paragraph 16.4 of the *Protocol:* A Significant Cause of Material Injury

14. As clarified in the panel, "significant" means something more than just a nominal or marginal cause of the material injury.[15] The use of the article "a" in "a significant cause" in paragraph 16.4 suggests that material injury does not have to be caused solely by the imports of Chinese product. It would be sufficient to find the market disruption by imports if they are one of various other factors, which as a whole, cause the material injury.

15. In the context of the *Agreement on Safeguards*, the Appellate Body stated that "the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury... Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, *even though other factors are also contributing…*".[16] Considering the similarity of the term "cause" in paragraph 16.4 of the *Protocol* to the term "causal link" in the first sentence of Article 4.2(b) of the *Agreement on Safeguards*, the above-mentioned findings by the Appellate Body may provide a good basis in considering paragraph 16.4 of the *Protocol*.

[10] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[11] *See* Panel Report, *US – Line Pipe*, para. 7.201.
[12] China First Written Submission, para. 74.
[13] *See* Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.239; Panel Report, *Japan – DRAMs (Korea)*, para. 7.357.
[14] Concise Oxford English Dictionary, tenth edition, revised, p. 1187.
[15] *See* Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307.
[16] Appellate Body Report, *US – Wheat Gluten*, para. 67 (emphasis in original).

D. PARAGRAPH 16.3 OF THE *PROTOCOL:* TO THE EXTENT NECESSARY TO PREVENT OR REMEDY MARKET DISRUPTION

16. Paragraph 16.3 of the *Protocol* provides that the measure must be "necessary" and may not exceed the "extent" to prevent or remedy such market disruption and such necessity and such extent are determined by "such market disruption". To justify a transitional safeguard measure, the importing Member must analyze the factors creating market disruption ((i) imports of Chinese products, which are increasing rapidly; (ii) the material injury to the domestic industry; and (iii) causal link between these imports and the injury) and the measure may not extend beyond the extent to make such factors cease to exist or be prevented from recurrence.

17. Prior findings in the context of *Agreement on Safeguards* would suggest that the importing Member would have been required to provide a reasoned and adequate explanation that the transitional safeguard measure addressed the above-mentioned factors, and it would not exceed the extent to make such factor cease t*o exist or being prevent*ed from recurrence.

18. It should be noted that the rationale of Appellate Body reports on the lack of a general procedural obligation to demonstrate compliance with Article 5.1 of the *Agreement on Safeguards* would not apply to paragraph 16.3 of the *Protocol*. Unlike Article 5.1 of the *Agreement on Safeguards*, the *Protocol* does not have any exceptions or specific provisions and thus , the procedural obligation to provide "the reasons for such measure and its scope" applies to all transitional safeguard measures.

E. PARAGRAPH 16.6 OF *PROTOCOL*: ONLY FOR SUCH PERIOD OF TIME AS MAY BE NECESSARY TO PREVENT OR REMEDY THE MARKET DISRUPTION

19. Paragraph 16.6 differs from paragraph 16.3 by providing "as may be necessary" instead of "(as) necessary". The term "may" is the word "expressing possibility."[17] The words "may be" therefore provide that the required certainty of the necessity analysis of a transitional safeguard measure with respect to its period of time to impose would be less than the extent of the measure in paragraph 16.3. It would be sufficient to show that such period would possibly be needed.

20. As the *Protocol* does not set forth any particular methodologies on how the importing Member should examine the appropriate period of the time to impose the transitional safeguard measure, the importing Member has the discretion. It is required, however, to provide the reasons for the "duration" in its written notice of the decision, according to paragraph 16.5.

## III. CONCLUSION

21. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the provisions of the *Protocol*.

[17] Concise Oxford English Dictionary, tenth edition, revised, p. 881.

# ANNEX C

## ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

# ANNEX C-1

## EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

### I. STANDARD OF REVIEW

1. It is common ground among the parties that Article 11 of the DSU provides the basic, foundational standard for the Panel's review. A panel must engage in an "objective assessment." The United States and Japan agree with China that, in carrying out this inquiry in the present case, the Panel should examine whether the investigating authority's decision is "reasoned and adequate" – the classic formulation applying Article 11. This standard applies regardless of the nature of the textual obligations at issue. We agree with the view that the *Agreement on Safeguards* and jurisprudence interpreting it provide a good framework for considering how the general standard of review should apply to safeguard measures under Article 16.

### II. INTERPRETATION OF ARTICLE 16

2. The United States' attempt to isolate Article 16 of the Protocol from the broader global safeguards regime both ignores the fact that the Protocol is an integral part of the WTO Agreement and is at odds with the substantial overlap in structure and language between Article 16 and the *Agreement on Safeguards*. The United States' interpretative position is also internally inconsistent, as the United States liberally cites to and relies upon global safeguards principles and jurisprudence. Article 16 is fundamentally a form of trade remedy, and should be read in the context of other WTO trade remedies, including the global safeguards provisions. These concepts – increasing imports, causal link – appear in many different trade remedies under the WTO Agreement. The consistent application of the contextual guidance provided by other trade remedies, coupled with Article 16's similarities and differences with these other remedies, supports China's interpretation.

3. Regarding the differences between the text of Article 16 and the *Agreement on Safeguards*, two important additions are noteworthy. Under Article 16, imports must be "increasing <u>rapidly</u>" – instead of merely increasing. And under Article 16, these imports must also be a "<u>significant</u> cause" of injury – as opposed to just a cause of injury. These key additional words must be given meaning. The United States, however, largely sidesteps the interpretative significance of these two key words.

4. The fact that the threshold for injury is lower in Article 16 than in the global safeguards context does not change the fact that the Article 16 standards for increasing imports and causal link are stronger. The fact that the injury threshold in Article 16 is "material injury," as opposed to "serious injury," does not imply that the threshold of <u>causation</u> is weaker. One simply does not follow from the other. Either the threshold of "significant" causation has been reached, or it has not.

5. The United States bases its extreme interpretation of Article 16 in large part on repeated reference to the "*inclusio unius*" canon of interpretation. The argument generally proceeds as follows: where Article 16 does not provide express direction or requirements on a topic, the investigating authority enjoys complete discretion to do as it wishes. This argument is fundamentally flawed. Discretion in how to apply a standard does not mean that there is no standard and that the authorities are always correct. The United States' argument invites action that is contrary to the object and purpose of the WTO Agreement, generally, and the Protocol, in particular.

## III. INCREASING IMPORTS

### A. MEANING OF "INCREASING RAPIDLY"

6. The text of Article 16 uses specific language to define the circumstances under which increasing imports from China may be subject to product-specific safeguards. The ordinary meaning of the phrases "are being imported" and "are increasing rapidly," and their use of the present continuous tense, emphasizes the importance of time – specifically, the most recent period. A Member seeking to restrict imports from China must also find that the imports from China are not just "increasing," but that they are "increasing rapidly." Read in the context of other WTO provisions that address "increasing" imports as a requirement to impose a trade remedy, this addition of the word "rapidly" must be given interpretative meaning. It is not enough to find just any increase. Appellate Body decisions confirm that domestic authorities must focus on the most recent past. Trends – especially the most recent ones – must be examined and interpreted in context of the entire period. An increase must have been recent, sudden, sharp and significant enough to cause the requisite injury.

7. The United States tries to sidestep the importance of finding "rapidly increasing" imports by conflating two distinct issues. Increased imports and material injury are two discrete issues, *both* of which must be satisfied under Article 16. First, the authority must find that imports are "rapidly increasing." Second, this increase must be a significant cause of "material injury." The fact that the injury standard is lower does not mean that the other requirement – the "rapidly increasing" imports – is any lower. Rather the authority must first satisfy the "rapidly increasing" imports standard. The United States improperly conflates these two discrete steps.

8. The United States also misinterprets the need to focus on the most recent period and claims "there is no meaningful distinction" in the language of Article 16 compared to global safeguards, focusing only on Article 16.1. Yet as China has noted, Article 16.4 uses the phrase "are increasing rapidly" whereas Article 4.2 of the *Agreement on Safeguards* uses the phrase "increased imports." The Appellate Body has noted the difference between "increasing" and "increased" in the global safeguards context under the *Agreement on Safeguards*, and stressed their different meanings. The United States ignores this application to Article 16. China, however, believes this is a meaningful distinction that requires the analysis under Article 16 to focus on an *even more recent* period to determine whether imports are "increasing."

### B. USITC APPLICATION OF THE STANDARD

9. The United States did not respect the requirements of the Protocol for finding rapidly increasing imports. The USITC devoted just a single page of its determination to this issue and failed to address adequately the most recent period of time or the trends within the period in any meaningful way. Nor did the USITC find an increase in imports qualitatively and quantitatively sufficient as required.

10. The United States confuses what the USITC said and what the USITC did. The USITC generally articulated the correct standard – the need to focus on the recent period, and the need to find "rapidly increasing" imports. But the USITC did not apply the correct standard. Mouthing the correct standard does not save a fundamentally defective application of the standard to a particular set of facts. The USITC neither explained how imports were increasing "rapidly" in this case, nor even bothered to explain what it interpreted "rapidly" to mean. Because the words of the text control, the addition of "rapidly" to the safeguards framework for the Protocol must be given meaning. An adequate explanation must detail how imports are increasing "rapidly" over the most recent period. The USITC's failure to do so renders its explanation of increased imports inadequate and inconsistent with its WTO obligations. Furthermore, the USITC relied too heavily on an "end-point-to-end-point" analysis and, in doing so, ignored trends, and particularly recent trends – despite the fact that such an approach has been rejected by the Appellate Body.

11. Had the USITC analyzed properly the most recent trends at the end of the period of investigation, it would have found a sharp difference between trends over the earlier periods and the more recent 2007 to 2008 period. In 2008, both the increase in quantity and the percentage of increase in imports fell sharply as the increases in imports from China were at their smallest of the period. The largest increase was from 2006 to 2007 – hardly the most recent period. By employing a simple end-point-to-end-point analysis, the USITC masked the fact that imports from China were dramatically slowing during the end of the period. Such an approach is inconsistent with the Appellate Body's guidance on these analyses and ignores Article 16's requirement that imports be "increasing *rapidly*" if measures are to be imposed. The USITC also failed to explain why the import trends from 2007 to 2008 were sudden enough, sharp enough, or significant enough to qualify as "increasing rapidly." Over this period, the increases were consistent and stable for three out of four comparison periods. The increase from 2007 to 2008 was the smallest of the overall period, and was down sharply from the prior year.

12. Imports from China were not "sudden enough" because the modest increase over the period was steady, not sudden. Nor were they "sharp enough," as increases in market share were consistently in the 2 to 3 percentage point range during the period. Finally, imports were clearly not "significant enough" as the rate of increase declined sharply in 2008. The USITC's analysis of increased imports is insufficient under both global safeguard standards and the distinct standard created by the requirement of "increasing rapidly" under the Protocol. Instead of properly focusing its analysis on the more recent period of time, the USITC obscured the more recent period of time. The USITC deviated from existing practice and improperly refused to gather data on the first quarter of 2009 that showed declining imports from China.

13. The USITC masked clear downward trends within 2008 by considering only the full-year data. Looking at quarterly trends of imports, the trend is down, whether one considers only 2008 data or both 2008 and the first quarter of 2009. The first quarter of 2009 simply confirms and significantly reinforces a trend that had already begun early in 2008 – imports from China were declining. The annual data for 2008 as a whole, in contrast, masks this important change in trends.

## IV. CAUSATION – AS SUCH

14. Imports from China were neither "in such increased quantities" nor "increasing rapidly" as required by Article 16. The fact that the USITC nonetheless found such increases to be a significant cause of material injury rests in large part on the WTO-inconsistent causation standard in the U.S. implementing statute. Article 16 expressly requires that imports from China be a "significant cause" of the material injury being alleged. The U.S. statute defines "a significant cause" to mean merely "a cause that contributes significantly" to the material injury, and provides that the significant cause "need not be greater than or equal to any other cause." This language, however, has no basis in Article 16 and impermissibly lowers the standard.

15. The addition of "significant" to the Protocol's causation standard must be given meaning when interpreting the obligations for Article 16. "Significant" is commonly understood to mean "important, notable, consequential." Thus, the ordinary meaning of the language requires a strong causal connection if rapidly increasing imports are to be deemed a "*significant* cause" of injury. Just as was the case with the addition of "rapidly" to the increasing imports standard, this addition of "significant" results in a more demanding standard than for global safeguards. This interpretation is supported by the Working Party Report on the Protocol of Accession, which confirms that Article 16 requires a "causal link" between imports and injury. "Causal link," from Article 4.2(b) of the *Agreement on Safeguards*, has been interpreted by the Appellate Body to require "a genuine and substantial relationship of cause and effect" between the imports and the alleged injury.

16. The United States argues that the "significant cause" standard is somehow lower than for global safeguards and unfair trade remedies, pointing to the absence of specific language on non-attribution in Article 16. This argument ignores the interpretative significance of adding the word "significant." It would be truly bizarre for a fair trade remedy, such as Article 16, to employ a lower standard than an unfair trade remedy such as antidumping.

17. The U.S. implementing statute departs dramatically from the text of the Protocol in two respects. First, the statute defines "a significant cause" to mean merely "a cause that contributes significantly." This attempt to weaken the standard for causation is impermissible because the ordinary meaning of "contributes significantly" conveys a meaning that is weaker than both "significant cause" as well as the requirement in global safeguards that there be "a genuine and substantial relationship of cause and effect." The statute also adds the language that a significant cause "need not be equal to or greater than any other cause." This language allows the U.S. investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be "a significant cause." The core meaning of "significant" – important, notable, consequential – makes sense when one cause is considered relative to other causes. It is hard to see how a minor cause could still be considered properly to be "significant." The U.S. legislation reduces "a significant cause" to nothing more than "a cause."

18. In response, the United States attempts to cut short the Panel's inquiry by stating that the U.S. statute cannot be inconsistent as such unless it "specifically mandates that the ITC take action in a manner that is inconsistent with the Protocol." Yet that is what this U.S. statute does. This statute requires the USITC to apply a fundamentally flawed definition. The United States has not argued – and cannot argue – that the USITC was free to disregard this statutory definition at its discretion.

19. Rather than defend the language of the statute, the United States chooses instead to defend the language of the USITC determination – language that is different than the statute itself. The USITC's gloss on the statute, however, does not change the statutory language, which must stand on its own. If the U.S. statute said "direct and significant causal link," as does the USITC determination, this dispute would be very different. But the U.S. statute instead says "contribute significantly" and "need not be equal to or greater than any other cause," both of which have very different meanings than either "significant cause" in the language of Article 16 or "direct and significant causal link" in the words of the USITC.

## V. CAUSATION – AS APPLIED

### A. MEANING OF "SIGNIFICANT CAUSE"

20. Unlike global safeguards and trade remedies that require imports to be simply a "cause," Article 16 adds the key modifier "significant." The ordinary meaning of this modifier strengthens the nature of the causal link that must be found. Extensive WTO jurisprudence on the meaning of "cause" in the context of trade remedies provides contextual guidance for understanding the meaning of "significant cause."

21. The United States never grapples with the addition of the word "significant." Instead, the United States notes the absence of any specific analytic methodologies, the possibility of there being other causes, and the need for the imports under investigation only to play some part in causing the injury. All of these points, however, are equally true of the causation standard for global safeguards and other trade remedies. Yet none of these factors have prevented the Appellate Body from interpreting "cause" and "causal link" to mean a "genuine and substantial relationship of cause and effect." Furthermore, the United States stresses the discretion for investigating authorities to use whatever methods they wish. China does not disagree that authorities have some discretion in *how* they make this showing. But as China has demonstrated, the USITC has not made that showing in this case.

B. USITC APPLICATION OF STANDARD

22. Article 16 imposes the specific standard that "rapidly" increasing imports from China must be a "significant cause" of any alleged material injury. The USITC's causation analysis, however, used the WTO-inconsistent definition of "significant cause" from the U.S. statute. The context of the requirement for imports to be a "significant cause" requires much more than some *de minimis* connection. The USITC's statutory obligation to apply a faulty standard resulted in its causation analysis being inconsistent as applied. The USITC determination is also inconsistent with Article 16 as applied because in the USITC failed to evaluate properly whether imports from China were in fact a "significant cause" of material injury.

**1. Conditions of competition**

23. Panels and the Appellate Body have repeatedly affirmed the importance of examining the conditions of competition for any proper causation analysis. Contrary to the U.S. suggestion, this analysis of the conditions of competition is not optional – it is required. The U.S. improperly relies on the use of the term "or" in Article 16.1 (i.e., "or under such conditions" in the English text). China observes that both the French and Spanish texts use the term "et" and "y" (which translate into English as "and"), and confirm that this analysis is required. The USITC recognized such an analysis was necessary by engaging in a conditions of competition analysis, but misinterpreted and distorted the conditions of competition in the domestic tyre market. Notably, the USITC's failed to recognize and consider objectively the attenuated nature of competition between Chinese and domestic tyres in the U.S. market.

24. The record confirms that tyres from China were not competing significantly with U.S.-made tyres. The record shows that Chinese imports are virtually absent in approximately 74 per cent of the U.S. tyre market. With respect to the OEM market, while U.S. producers made many of their shipments to the OEM market for new vehicles, imports from China consistently accounted for less than 5 per cent of all OEM shipments in the U.S. market. Competition in this segment, if any even existed, was negligible. U.S. production in the replacement market is predominantly in the higher-end segment, whereas imports from China focused predominately in the lower-end segment. It is hard to believe that imported tyres in a different segment of the market could be a significant cause of injury to producers of tyres in another segment. The USITC offered no reasoned explanation as to why this was, allegedly, the case. China is not arguing that there was no competition at all between subject imports and domestic tyres – rather, such competition was highly attenuated and thus the likelihood of subject imports being a "significant cause" of material injury is low.

25. If imports from China were having such a direct competitive impact, then why did the largest increase in imports from China in 2007 have so little impact on the market? In the same year U.S. producers' operating income rose to the level of 4.5 per cent and their gross profit increased by 58 per cent compared with 2006. The United States claims that "the record showed that tyres from China and tyres from the United States compete in all segments of the market." This statement does not withstand scrutiny. The U.S. producers and non-Chinese imports consistently and completely dominate the OEM segment. Yet the USITC asserts that even the trivial Chinese market share was somehow meaningful competition in this segment. As regards the replacement market, China also notes that there was significant attenuation. Instead of addressing this attenuation, the United States simply relies on the fact that there was some competition between U.S.-produced tyres and China-produced tyres. Yet the question for this Panel regarding competition is not whether any competition exists, but rather what is the extent and impact of that competition. And that impact, due to the high degree of attenuation, is minimal at best.

26. China would like to emphasize that each of these conditions of competition – declining demand, an industry strategy to globalize production, and attenuated competition between imports

from China and domestic tyres – are capable of individually disproving the requisite causal link. These conditions, however, do not stand alone. Rather, they each work together to create the overall conditions of competition in the market place and, when assessed cumulatively, confirm the absence of the requisite causal link.

**2. No correlation exists between imports and injury**

27. The USITC failed to establish any temporal correlation, or "coincidence," between rapidly increasing imports from China and injury. In the context of global safeguards, the Appellate Body has explained that "coincidence" analysis plays a "central" role in determining whether or not a causal link exists. China notes that coincidence analysis is equally important when evaluating the application of a product-specific safeguard under the Protocol. Under Article 16.4 of the Protocol, the correlation must exist during the period of time when imports were increasing rapidly, correlate with the adverse trends at issue, and constitute a "significant" causal link.

28. The U.S. assertion that a "coincidence" analysis is not required under Article 16 of the Protocol is incorrect. It is based on two strained readings – one of the Protocol and one of Appellate Body and Panel decisions. The United States asserts that no such analysis is required because the text of Article 16 does not explicitly state that a Member must conduct a "coincidence" analysis. Yet in the global safeguards context, even though the text of the *Agreement on Safeguards* nowhere mentions "coincidence," the Appellate Body still found such analysis to be required.

29. The United States also argues that the "coincidence" requirement is derived solely from the words "rate and amount" and "changes" in Article 4.2(a) of the *Agreement on Safeguards*. Both the Panel and Appellate Body decisions in *Argentina – Footwear* revolved around whether increased imports caused injury. They were interpreting both the language "to cause" in Article 2 and the language "have caused" in Article 4.2(a). The illustrative list of factors to consider in Article 4.2(a) does not change the meaning of "cause." Accordingly, the Panel noted that the "trends" regarding "rate and amount" and their "changes" "matter as much as their absolute levels." Adopting this common sense notion, the Appellate Body stated, "in an analysis of causation, 'it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.'" Similarly, the term "rapidly" from Article 16 is a reflection of the "rate and amount" factor.

30. The "coincidence" analysis requirement, therefore, is not "specifically linked" to specific words from the *Agreement on Safeguards* as the United States claims. Rather, it is intrinsically linked to the causation analysis that investigating authorities must conduct under the *Agreement on Safeguards* – namely whether increased imports are causing injury. Likewise, Article 16 of the Protocol involves the same causal analysis of whether rapidly increasing imports are causing injury. A "coincidence" analysis is logically required under the Protocol. In fact, we find the U.S. argument rather curious, since the USITC (as the United States itself notes) "did, in fact, use a 'coincidence of trends' analysis."

31. When properly examined, the ten factors the USITC discussed relating to the condition of the domestic industry show the lack of any correlation between imports from China and alleged injury. The U.S. claim that China is only able to point to "one or two variations in trends" is false. To highlight this fundamental lack of correlation, the periods 2006 to 2007 and 2007 to 2008 should be considered. The year over year changes demonstrate a clear lack of correlation. Domestic shipment quantities do not correlate with rapidly increasing Chinese imports. The large change in imports from China from 2006 to 2007 corresponds with the smallest decline in domestic shipments. In the preceding period and the following period, the opposite is true – with modest changes in imports from China corresponding to much larger decreases in domestic shipments.

32. The same disconnect is true for average unit values. The increases in average unit value were greatest when the increases in imports from China were greatest. Even as the cumulative level of imports from China grew over the period, the average unit value continued to climb – U.S. producers were earning more and more for every tyre they sold. Operating profits – which combines both the volume effects and price effects into a single measure show no correlation. The 2006 to 2007 period shows the opposite of the 2007 to 2008 period. When imports increased the most, operating profits surged. When imports increased the least, the domestic industry experienced record losses. Furthermore, China's analysis considers more than just the volume of domestic shipments. China considers the trends in the value associated with each tyre being sold and the net effect of both price and volume – namely, operating profits. This more complete picture demonstrates dramatically the lack of overall correlation.

33. In response, the United States tries to diminish these examples by claiming that the 2006-2007 period was an "anomaly." Imports from China were increasing in 2006-2007 at the highest rate in the entire period. If correlation between increased imports and injury truly exists, it should be most obvious during the year when imports increased the most. The fact that correlation is completely absent during 2007 speaks volumes. Such absence of correlation is repeated across virtually every correlation factor examined. The same absence of correlation is true for the 2007-2008 period. Given that there are four year-to-year data points in the period of investigation, that means that two of these four – 50 per cent - show an absence of correlation. Putting aside any *ex post* rationalizations that the United States attempts to offer, the USITC failed to provide any compelling explanation in this respect.

34. Even considering actual prices, there still is no temporal correlation between rapidly increasing imports and domestic prices. In an attempt to get around this absence of correlation, the USITC posited a "cost-price squeeze" hypothesis. This theory, however, does not match up with reality, nor does it correlate with movements in the COGS/sales ratio, which plunged in 2007 (when Chinese imports grew at their fastest rate), and rose in 2008 to its highest rate in the period when the rate of increase in imports was at the lowest level of the period. The United States ignores that, for a "cost-price squeeze," it is not about the cost in isolation, or the price in isolation; it is the relationship between the two over time. Thus, no "cost-price squeeze" can be attributed to imports from China based on the evidence before the USITC. And for other factors, such as capital expenditures and R&D expenditures, the USITC acknowledged that both "trended upwards" – which therefore cannot support a finding of causation.

35. Finally, China is puzzled by the U.S. claim that our analysis of each factor in "isolation" is "not the appropriate analysis." Any proper correlation analysis must first examine individual factors and then assess them cumulatively to determine their overall impact. China has done just this.

### 3. The USITC offered no "compelling analysis" of causation

36. Despite this absence of any meaningful correlation between industry performance and imports from China, the USITC failed to offer a "very compelling" account of why causation is nonetheless present. The USITC principally focused on end-point-to-end-point comparisons of performance indicators over the period and made no attempt to explain the absence of correlation between imports and various injury factors in this year-to-year data. The U.S. claim that it did not need to offer a "compelling analysis" impermissibly disregards the guidance and analysis of the Appellate Body. Such guidance should not be cast aside. The failure to provide a compelling explanation was inconsistent with the United States' WTO obligations.

### 4. The USITC failed to assess fully other causes of injury

37. The absence of correlation between trends in imports from China and the condition of the domestic industry strongly suggests that other factors are in fact responsible for the condition of the

domestic industry. Yet the USITC dismissed the array of alternative causes noted by respondents and simply claimed that, under the U.S. statute, it did not need to engage in a "weighing of causes." This approach is inconsistent with Article 16's requirement that a Member demonstrate a "causal link" between imports and injury, and that rapidly increasing imports – not other factors – are a "significant cause" of material injury. It is impossible to determine adequately whether imports are a "significant" cause of injury without considering the role played by other causes. An "assumption" that other factors are not causing the alleged injury cannot be made consistent with the obligation to find a "causal link."

38. The USITC's decision to forgo any analysis of other causal factors meant that it largely ignored the U.S. tyre markets' prolonged contraction in demand. This contraction resulted in apparent consumption of all passenger vehicle and light truck tyres by volume falling by 10.3 percentage points during the 2004-2008 period. From 2007-2008, there was an almost one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments. Without even acknowledging these changes in demand, the USITC could not offer a reasoned and adequate explanation of why, in light of these changes, imports from China were still a "significant cause" of material injury.

39. Unlike the changes in imports from China, the changes in demand correlate very closely with the changes in key domestic indicators. The improvement in 2007 and the decline in 2008 both correspond closely with the improvement in demand in 2007, and the sharp drop in demand in 2008. The improving and worsening trends correspond directly with the changes in demand. The United States nonetheless claims that the USITC "concluded that declining demand did not sever the causal link." Nowhere in the USITC Determination, however, is a meaningful analysis of declining demand to be found.

40. The United States tries to equate overall declining demand with the fallout of the recession, and claims that the USITC's conclusory statements regarding the effects of the recession should be deemed as sufficient analysis for both. The USITC's acknowledgement in passing of the existence of the recession does not adequately address this important phenomenon, which is fundamental to understanding data for 2008. The USITC failed adequately to address and explain the broader, structural shift – i.e., the contraction in demand (both worldwide and in the U.S.) that was apparent across the entire period of investigation. These omissions fatally undermine the USITC's conclusions.

41. The USITC also attributed plant closings to imports from China but the record does not support such a conclusion. The record demonstrates that domestic producers were engaged in a long-term strategy that shifted production in the United States towards the higher-end segments of the market. For the U.S. producers, imports from China were, and are, a positive factor. U.S. producers were responsible for manufacturing and importing in China many of these tyres. The producers stated that they would not reverse this strategy and increase lower-end manufacturing in the United States, *even if* the President imposed tariffs or took other action against imports from China. Remarkably, the USITC rejected the testimony of the U.S. producers concerning their own business strategy.

## VI. OVERBROAD U.S. TARIFF REMEDIES

42. The requirements for applying a transitional product-specific safeguard under Article 16 have not been met in this case, thus no remedy is appropriate. Even if the United States had complied with the requirements of Article 16 and thus had the right to apply safeguard measures, the remedies imposed were inconsistent with the requirements of Article 16.3 and 16.6. The remedies imposed are beyond the "extent necessary" to "remedy" the alleged market disruption and the three-year period for which they were imposed is beyond "such period of time" that is "necessary."

43. The U.S. refusal to make any comparison of different causes, or assess the effect of different causes on the condition of the domestic industry, necessarily renders the imposed tariffs overbroad.

Without determining the amount of injury that imports from China were allegedly responsible for, any imposed remedy cannot be tailored – as required – to address only the market disruption at issue. Although the U.S. states that "the authority to impose a measure is circumscribed by the extent of the injury caused by the relevant imports," the U.S. attempts to go further, and states that "where imports have a broad, injurious effect, the authority would be correspondingly broad." Even if this were the correct approach, it is inapplicable to the case at hand. The United States never established what effect imports from China were having – much less that they were having a "broad, injurious effect." The U.S. states that an evaluation of a safeguard's permissibility "cannot be a matter of scientific precision." This does not excuse the USITC's complete failure to establish anything remotely approximating the extent of the injury allegedly caused by imports from China, resulting in a remedy (35 per cent tariffs) that is both arbitrary and overbroad.

# ANNEX C-2

## EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

### I. INTRODUCTION

1. The *Tires* investigation presents the very situation that was intended to be covered by the transitional mechanism contained in China's Protocol of Accession. Between 2004 and 2008, the Chinese tyre industry grew at an extremely rapid rate, more than doubling in size. Chinese tyre exports increased as a percentage of their total tyre production, growing to 59.5 per cent of total shipments in 2008. Exports to the United States, China's single largest export market throughout the period, increased significantly as a result.

2. Between 2004 and 2008, imports from China more than tripled, growing from a level of 14.6 million tyres in 2004 to 46 million tyres in 2008. Due to this tremendous growth in their import volumes, Chinese imports were able to increase their share of the U.S. market by 12.0 percentage points between 2004 and 2008, and had a 16.7 per cent share of the market in 2008. They achieved this increase in market share by consistently and significantly underselling U.S. tyres during the period of investigation.

3. Because of this extraordinary growth in the volume and market share of the low-priced Chinese imports, there was a decline in nearly all of the economic indicators for the U.S. tyre industry between 2004 and 2008. The U.S. industry lost 13.7 percentage points of market share, almost all of which was taken by the Chinese imports over the period. As a result, the industry's production quantities fell by 26.6 per cent, its capacity utilization rates fell by 10.3 percentage points, its U.S. shipments fell by 29.7 per cent, and its net sales quantities dropped by 28.3 per cent. The industry experienced a decline of 11.5 per cent in its productivity levels and was forced to reduce its work force by 14.2 per cent.

4. Finally, the industry's profitability fell considerably between 2004 and 2008. Its gross profits declined by 33.6 per cent, and its operating income margins fell by 4.8 percentage points during this period. The record of the ITC's investigation established that imports of tyres from China were increasing rapidly so as to be a significant cause of material injury to the U.S. tyre industry. The ITC's findings on this issue were reasoned and supported by the record evidence.

5. The question for this Panel is whether, as China claims, the U.S. measure is inconsistent with U.S. obligations under Section 16 of the Protocol. The Protocol requires a Member to determine that imports of an article from China are "increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry." In addition, it requires a Member to "consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry . . . ". Contrary to China's arguments, the ITC performed an analysis that was fully consistent with the Protocol requirements.

6. China's arguments that the U.S. measure does not comply with the Protocol rest on a fundamentally flawed reading of Section 16. China not only seeks to import the standards of GATT

Article XIX and the Safeguards Agreement into the text of the transitional mechanism, China also claims that the standards for applying a measure under the transitional mechanism are more demanding than the ones for applying a global safeguard measure. Nothing in China's Protocol of Accession, or the Safeguards Agreement, for that matter, supports these notions.

7. It is evident that the Protocol contains no cross-reference to the disciplines of Article XIX or the Safeguards Agreement. This stands in sharp contrast with the Safeguards Agreement itself, which contains explicit references to Article XIX of the GATT 1994. This context shows that if the negotiators of the transitional mechanism had sought to import the requirements of Article XIX or the Safeguards Agreement, they would have done so through explicit references.

## II. IMPORTS FROM CHINA DID, INDEED, INCREASE RAPIDLY OVER THE PERIOD OF INVESTIGATION

8. Imports from China increased rapidly on an absolute and a relative basis. These increases were sustained and consistent, as they increased in *every year* of the ITC's five-year period of investigation, with the largest increases occurring over the last two years of the period.

9. For example, the record showed that:

- The quantity of the subject imports increased by 215 per cent between 2004 and 2008, and their market share more than tripled between 2004 and 2008.

- 60 per cent of the growth in the volume of imports during the period of investigation occurred in 2007 and 2008, the final two years of the period.

- 62 per cent of the growth in the market share of the imports occurred in 2007 and 2008, again the final two years of the period.

- Imports from China were at their highest levels, in absolute and relative terms, in 2008, and China was the single largest import source for tyres in that year.

Quite clearly, these trends establish a rapid and recent increase.

### A. ITC'S FINDING THAT IMPORTS WERE INCREASING RAPIDLY IS FULLY CONSISTENT WITH THE STANDARD SET FORTH IN THE PROTOCOL

10. China's theory that the Protocol of Accession imposes a more stringent standard for finding increasing imports than the Safeguards Agreement is unpersuasive.

11. China ignores the critical fact that paragraph 16.4 of the Protocol makes clear that the increase in imports must be rapid enough "to be a significant cause of material injury, or threat of material injury" to the industry. The Appellate Body has made clear that the standard of "material injury" is lower than that of "serious injury" used in the Safeguards Agreement. Thus, the Protocol's language linking "rapid increases" of imports to material injury suggests that the import increases required by the Protocol are linked to a different and lower standard of injury than the increases required by the Safeguards Agreement. In claiming the Protocol has a higher standard for increasing imports than the Safeguards Agreement, China completely ignores this crucial distinction between the Agreement and the Protocol.

B. THE ITC REASONABLY FOUND THAT IMPORT INCREASES HAD NOT ABATED IN 2008

12. China also argues that the ITC supposedly failed to recognize that import increases had "abated" in 2008. The ITC addressed this argument and correctly rejected it. It pointed out that the subject imports increased "by significant amounts" in each year of the period, and that the subject imports were at their highest levels in 2008. On an absolute and a relative basis, the increase in 2008 alone was a "large, rapid, and continuing" increase over the increase seen in 2007. The subject imports did not "abate" in 2008; instead, the subject imports were larger and were continuing to increase over the levels seen in 2007.

13. The Protocol does not require that imports be growing at an accelerating rate at the end of the period. Rather, it requires that the volumes of the subject imports be "increasing rapidly", which is exactly what happened in this case. Moreover, China's argument that imports had "abated" in 2008 ignores the fact that imports in that year were 10 per cent higher than the level seen in 2007, which is when imports rose by a stunning 53 per cent on an absolute basis.

C. CHINA'S ALTERNATIVE QUARTERLY ANALYSIS IS FLAWED

14. China also asks the Panel to disregard the ITC's analysis and focus instead on only the last two years of data, examining it on a quarterly basis. China's proposed alternative methodology is flawed for a number of reasons.

15. China's approach ignores all import data before 2007, thus making it impossible to place the increases that occurred in 2007 and 2008 in context. The Appellate Body has explained that competent authorities should not consider data from the most recent past in isolation from the data pertaining to the entire period of investigation because doing so limits the ability of the authority to place that data within an adequate context for analysis. Yet that is exactly what China is advocating here.

16. China's comparison of succeeding quarters has the potential to introduce distortions. Variations in production schedules, weather conditions and seasonal demand can affect how much producers sell during any particular quarter. It is for this reason that the ITC typically compares quarterly data at comparable times of year, rather than for succeeding quarterly periods. As we have pointed out, there were significant increases in the quarterly volumes of the subject imports between comparable periods in three of four quarters in 2008.

D. THE DECISION NOT TO SEEK DATA FOR THE FIRST QUARTER OF 2009 WAS REASONABLE

17. China maintains that the ITC should have obtained or analyzed import data for the first quarter of 2009. Contrary to China's assertions, the ITC was not required to collect and obtain data for that period. The Protocol does not require that the ITC obtain and analyze data for any specific period. As WTO panels have indicated in the trade remedies context, the ITC need only use a period of investigation that "allows it to focus on the recent imports" and that is "sufficiently long to allow conclusions to be drawn regarding the existence of increased imports." The ITC's use of a five year period of investigation, which ended less than four months before the institution of the investigation, certainly satisfies this standard.

18. The ITC's decision not to collect data for the first quarter of 2009 was consistent with its handling of other investigations. When the ITC collects interim quarterly data in its trade remedy investigations, the time that elapses between the end of the interim quarter and the institution of the

investigation is typically longer than the 20 days between the end of the interim quarter and the beginning of the investigation in this case.

19. There is also no merit to China's argument that the ITC should just have used the available official import statistics for the first quarter of 2009, even though it had not collected any other data for that quarter. Information on absolute imports would have been quite useless without data on relative import levels, given that the ITC needed to ascertain whether imports were increasingly rapidly, either absolutely or relatively. As the ITC correctly said in its decision, analyzing the absolute volume data for the first quarter of 2009 would not have had "probative value" because the ITC would not have been able to assess whether "the subject imports [were] increasing in relative terms in the absence of a data series that includes first quarter 2009 data on U.S. production and U.S. apparent consumption."

## III. ITC'S CAUSATION ANALYSIS WAS CONSISTENT WITH THE REQUIREMENTS OF THE PROTOCOL

### A. U.S. STATUTE'S CAUSATION STANDARD IS CONSISTENT WITH THE PROTOCOL

20. We are puzzled by China's claim that the causation provisions of the U.S. statute are inconsistent with the requirements of the Protocol. Why? Because the U.S. statute incorporates all of the specific requirements of the Protocol, and does so on an almost verbatim basis.

21. China focuses on the fact that the U.S. statute defines a factor as being a "significant cause" of material injury or threat if it "contributes significantly" to material injury or the threat of material injury. China claims that this definition of "significant cause" somehow weakens or reduces the causal link requirement of the Protocol.

22. This definition clearly does not weaken the causal link requirement of the Protocol. The text of the Protocol makes clear that this is the case. It provides that "market disruption" exists whenever imports from China are "a significant cause of material injury, or threat of material injury" to the domestic industry. By stating that imports from China can be "a significant cause" of material injury to the industry, the text of the Protocol establishes that there may be more than one significant cause of material injury. The Protocol does not require a ranking of causes. It is clear, therefore, that when imports from China are contributing significantly to material injury they can be "a significant cause" of such injury.

23. The U.S. statute's definition of "significant cause" is also consistent with the way in which the Appellate Body has defined the terms "cause" and "causal link" under the Safeguards Agreement. The Appellate Body has stated that an authority may find increased imports to be a "cause" of serious injury if there is "a relationship of cause and effect such that increased imports contribute to 'bringing about,' 'producing,' or 'inducing' the serious injury." Given this line of reasoning, it is entirely clear that the Protocol's requirement of a significant "causal link" between imports and material injury would be satisfied by a finding that imports from China are "contributing significantly" to the industry's injury, which is what the U.S. statute requires.

24. Finally, China has no textual or analytic basis for claiming the Protocol contains a more rigorous or demanding causation standard than the Safeguards Agreement. Nothing in the text of the Protocol indicates this. Unlike the Safeguards Agreement, the Protocol does not contain specific language stating that the transitional mechanism is to be used as an "extraordinary remedy," or that increases in imports must result from "unforeseen developments."

25. Similarly, the Protocol does not require that the increasing imports be the cause of "serious injury," as does the Safeguards Agreement. Instead, the Protocol simply requires only that imports be

a significant cause of "material injury," a standard the Appellate Body has stated is lower than the "serious injury" standard set forth in the Safeguards Agreement. Indeed, the absence of these requirements from the Protocol indicates that the transitional mechanism was actually intended to be subject to less rigorous standards than those of the Safeguards Agreement.

## B. ITC'S CAUSATION ANALYSIS, AS APPLIED, WAS IN ACCORDANCE WITH THE PROTOCOL

### 1. ITC Reasonably Analyzed The Conditions of Competition

26. China claims that the ITC misinterpreted and distorted the conditions of competition in the U.S. market. The ITC did nothing of the sort. Instead, the ITC provided a detailed and reasoned explanation of the pertinent conditions of competition affecting the U.S. tyre market.

27. China's challenges to the ITC's findings do not withstand scrutiny. For example, China claims that the ITC did not recognize that the industry was impacted by declining demand for tyres, particularly in 2008. China is mistaken in this regard. In its analysis, the ITC specifically explained that demand for replacement tyres and for OEM tyres was falling throughout the period, and fell in 2008 when the economy weakened.

28. But, even in the face of declining demand, the subject imports increased rapidly in every year of the period. Moreover, the subject imports continued to grow even in 2008, when the global economic recession occurred. The fact that the volumes of low-priced subject imports continued to increase throughout the period, even during the decline in demand in 2008, shows the industry's injury was not simply caused by demand declines, as China now contends.

29. China is also mistaken when it claims the ITC failed to consider the industry's purported "business strategy" of shifting U.S. production from low-end to high-end tyres. The ITC addressed this issue and rejected China's contentions. The ITC pointed out that imports were already increasing before the announced plant closings, and that U.S. producers confirmed at the time of these closings that low-priced imports played an important part in the closings. In short, the ITC reasonably concluded that domestic producers did not voluntarily abandon the low-end part of the U.S. tyre market, as China alleges.

30. Finally, the ITC also considered and rejected the argument that competition between Chinese and U.S. tyres was attenuated. As the ITC pointed out, most market participants found that the subject and U.S. tyres were at least frequently interchangeable. The Chinese and U.S. tyres were sold in all market sectors, and there was significant competition between the Chinese and U.S. tyres in the low-end sector of the market, the sector that was allegedly a focus for the subject imports. As the ITC correctly found, the record showed that competition between the subject and U.S. tyres was significant, not attenuated, during the period.

### 2. ITC Reasonably Considered Volume, Price Effects, and Effect on the Industry and Reasonably Concluded There Was A Causal Link

31. After considering conditions of competition in the market, the ITC then analyzed the volume of imports, the effect of imports on prices, and the effect of such imports on the domestic industry. It provided a reasoned explanation why increasing imports of the subject tyres were a significant cause of material injury to the industry.

32. The ITC's analysis was entirely consistent with the Protocol. The record showed that:

- The volumes and market share of the subject imports increased in each year of the period and were at their highest levels of the period in 2008.

- Subject imports increased by 215.5 per cent over the period, with the largest part of this increase occurring in 2007 and 2008.

- The subject imports increased their share of the U.S. market more than three-fold over the period of investigation, growing from 4.7 per cent in 2004 to 16.7 per cent in 2008. More than half of this increase occurred in 2007 and 2008.

33. The ITC reasonably found that these increasing volumes of subject imports affected domestic producers' market share, shipment levels, and prices. The consistent underselling by the large and rapidly increasing volume of subject tyres displaced domestic shipments by U.S. producers and eroded the domestic industry's market share, leading to a substantial reduction in domestic capacity, production, shipments, and employment during the period examined.

34. At the same time that subject import volumes increased rapidly in every year of the period, the record showed that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;

- The domestic industry's production declined in every year of the period, resulting in an overall decline of 26.6 per cent;

- The domestic industry's capacity declined in every year of the period, for an overall decline of 17.8 per cent;

- The domestic industry's U.S. shipments declined in every year of the period, for an overall decline of 29.7 per cent;

- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 per cent; and

- The domestic industry's employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2 per cent, the number of hours worked falling by 17.0 per cent, and wages paid falling by 12.5 per cent over the period.

All of these factors were at their lowest levels in 2008, while Chinese tyre imports were at their highest in 2008.

35. The ITC also reasonably found that the subject imports affected prices for the domestic like product. After a thorough evaluation of pricing in the tyres market during the period of investigation, the ITC found that subject imports undersold the domestic product throughout the period. Specifically, the subject imports undersold U.S. tyres in 119 out of 120 comparisons. Moreover, the average margins of underselling were at their highest in 2007 and 2008, which was also when the volumes of subject imports were at their highest.

36. The ITC also reasonably concluded that this continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs. Domestic producers' ratio of cost of goods sold to net sales increased from 84.7 per cent in 2004 to 90.1 per cent in 2008, an increase of 5.4 percentage points over the period. The sharp increase in this

ratio in 2008 – which occurred when the volume of subject imports was highest and the margins of underselling were high – indicated that U.S. producers were experiencing a cost-price squeeze and were unable to pass increasing raw material costs on to their customers. In other words, this case presented a classic case of price suppression for the industry.

37. Finally, the ITC also reasonably found that the subject imports significantly affected other aspects of the domestic industry's condition during the period of investigation. The industry suffered significant declines in its operating income, operating margins, capacity utilization, and productivity in three out of four years of the period. Moreover, all of these factors, except for capacity utilization, were at their lowest levels for the period in 2008, which is precisely when the volumes and market share of the subject imports were at their greatest.

**3. China's Arguments to Rebut the Causation Finding Are Unavailing**

38. China's argument that changes in demand caused the declines in the industry's condition ignores the fact that the declines in the industry's production, capacity, shipments and net sales quantities far exceeded, on a percentage basis, the declines in apparent consumption in every year of the period. China's argument overlooks the fact that the volumes of the subject imports from China increased more than three-fold during the period, despite the overall decline in demand during the period of investigation. This consistent and rapid increase stands in stark contrast to the volume-related declines exhibited by the domestic industry and by non-subject imports over the period. In fact, even in 2008, when apparent consumption declined by almost 7 per cent, subject imports increased by more than 10 per cent over the levels seen in 2007.

39. China has no basis for its claim that there was a lack of coincidence between import volume trends and injury factors in 2007. There is no support in the text of the Protocol for China's apparent belief that there must be a perfect coincidence between import volume movements and every single injury factor during each year of the period of investigation. Even in the context of the stricter causation requirements under the Safeguards Agreement, panels have recognized that an authority is not required to establish a coincidence in trends for every factor and for all years of the period examined. Rather, in cases such as *US – Wheat Gluten* and *US – Steel Safeguards*, panels have recognized that an overall coincidence in trends is sufficient to satisfy causation.

40. The record did show that there was an overall coincidence in import volume and industry condition trends, which we describe in our first written submission. Even though a few factors, such as profitability and productivity, improved somewhat in one year – 2007 – numerous other injury factors (including the industry's capacity, shipments, net sales quantities, market share, and employment-related factors) declined in that year. And the improvements in profitability and productivity that were seen in 2007 were short-lived. Both of these factors declined to their lowest levels in 2008, which was when the volume and market share of the subject imports were at their highest levels.

**4. ITC Reasonably Considered Other Factors**

41. Finally, China claims that the ITC failed to consider the injurious impact of other factors in its causation analysis. China argues that the text of the Protocol specifically requires the ITC to address the injurious effect of these other factors in detail.

42. First, China's argument is legally flawed. Unlike the Safeguards Agreement, the Protocol does <u>not</u> specifically require a competent authority to perform a detailed "non-attribution" analysis of the possible effects of other factors causing material injury in its causation analysis. Instead, the Protocol directs a competent authority to assess only whether increasing imports are a significant cause of material injury to the industry by taking into account the "volume of imports," their "effect . .

. on prices for like or directly competitive articles, and the effect of such imports on the domestic industry . . . ". Given that the Protocol does not require the competent authority to address the effects of other factors in its analysis, China has no textual basis for claiming that the ITC should perform the same type of non-attribution analysis that may be expected under the Safeguards Agreement.

43. Second, China's argument is factually flawed. The ITC did not "refuse to investigate alternative causes" or " barely acknowledge" them in its analysis. Even though the Protocol does not so require, the ITC investigated, considered, and analyzed all of the factors that could reasonably be considered significant enough to potentially break the causal link between imports and material injury.

44. For example, as we discussed earlier, the ITC specifically considered and addressed the claim that the industry had adopted a "business strategy" of shifting their U.S. production away from low-end tyres to high-end products and the declines in demand in the U.S. tyres market over the period. Similarly, the ITC also considered the impact of demand declines on the industry's condition over the period. It concluded, based on the evidence, that the decision to shut down certain facilities was related to the subject imports. The ITC also found that demand declines did not explain the deteriorating condition of the industry, because the subject imports continued to grow throughout the period of investigation despite the demand declines.

45. The ITC also specifically considered the other alleged causes of injury cited by China in its submission. It considered such factors as the industry's raw material costs, changes in its productivity levels, changes in the levels of non-subject imports, and the impact of rising gas prices on demand. For example, the ITC specifically discussed the effect that increases in raw materials pricing had on the industry, finding that the industry's ratio of cost of goods sold to net sales increased considerably over the period. The ITC concluded that the presence of the growing levels of lower-priced subject imports prevented the U.S. producers from passing these "increasing raw materials costs on to their customers," thus leading to a decline in the industry's operating margins over the period of investigation.

46. Similarly, the ITC also considered the impact that higher gasoline prices had on driving habits. In its analysis, the ITC expressly noted that "demand for replacement tyres fell in 2008 as the number of miles driven decreased, consumers tried to get more miles from current tyres, and the economy weakened." As the ITC concluded, the demand declines resulting from these factors did not sever the causal link between imports and injury, given that the subject imports were actually increasing during periods of declining demand, including 2008.

47. The U.S. first written submission details the ITC's consideration of other factors cited by China, but we do not need to repeat the ITC's analysis here. The point remains a simple one: the ITC considered the significant factors allegedly causing injury to the industry, addressed any impact in an appropriate manner, and reasonably explained, why these factors failed to sever the causal link between the subject imports and material injury. In sum, the ITC's analysis was fully consistent with the text of the Protocol and reflects a reasoned approach to the consideration of these issues.

## IV. THE UNITED STATES APPLIED A REMEDY CONSISTENT WITH PARAGRAPHS 16.3 AND 16.6

### A. U.S. ADDITIONAL DUTIES WERE ONLY TO THE EXTENT NECESSARY

48. The United States agrees that any measure applied under the transitional mechanism may only remedy the material injury that results from the rapidly increasing imports from China. This is what the United States has done. The ITC rejected the remedy recommended by the petitioner because it would have been "higher than necessary to remedy the market disruption [. . .] found." In addition,

the ITC used economic modeling to assess the likely impact of various options and proposed an additional tariff of 55 per cent in the first year, which was estimated to reduce shipments of Chinese tyres by 38.2 to 58.4 per cent. This was clearly a remedy aimed at the disruptive increase, and not at Chinese imports as a whole. The ITC explained why the limitation on Chinese imports would reduce shipments and therefore have an effect on domestic and non-subject imports, on their prices, and on the domestic industry's revenue. In other words, how the limitation on Chinese imports would remedy the market disruption.

49. China is wrong as a matter of fact when it asserts that the ITC improperly focused on the benefits to the domestic industry instead of the "specific market disruption found to exist." As a legal matter, China's argument simply makes no sense. The Protocol defines market disruption in terms of material injury to the domestic industry of which rapidly increasing imports from China are a significant cause. It requires Members to examine objective factors, including the volume of imports, the effect of imports on prices for like products, and the effect of imports on the domestic industry. It is hard to imagine how any Member could properly address the specific market disruption found to exist without examining the benefits to the industry of the limitation on Chinese imports. Indeed, the Protocol seems to require such an examination.

50. China has failed to meet its burden of proof to demonstrate that the ITC's recommended remedy is inconsistent with paragraph 16.3. Of course, the remedy ultimately imposed by the United States is 20 percentage points less in the first year than the remedy recommended by the ITC. In addition, although not required by the Protocol, the remedy imposed reduced the additional duties by five percentage points for the second and third years. This demonstrates that the focus was on remedying the market disruption caused by increased Chinese imports.

## B. ADDITIONAL DUTIES ARE ONLY FOR SUCH PERIOD OF TIME AS MAY BE NECESSARY

51. With respect to the obligation under paragraph 16.6, we agree that a measure taken under the transitional mechanism must be limited to the period of time necessary to remedy the market disruption. However, we disagree with China's efforts to seek an impossible level of exactitude and with China's attempt to read out of the text the remaining elements of paragraph 16.6, which provide key context for interpreting the first sentence.

52. China argues that a remedy measure may remain in place "only for the exact amount of time" or "for that period of time specifically found" to address the market disruption. That level of precision is neither possible nor required.

53. The first sentence of paragraph 16.6 must be read in context with the second and third sentences of that paragraph, which indicate the negotiators' expectation about how long a measure may last depending on whether the increase in imports was absolute or relative. China attempts to dismiss these two sentences as defining only rights that China has, and not the flexibility available to the Members using the transitional mechanism. However, the context of these two sentences of paragraph 16.6 does provide guidance as to the permissible length of a measure under the transitional mechanism.

54. In the *Tires* investigation, the ITC found that imports from China had increased in both absolute and relative terms. The United States applied a three-year measure.

## V. CHINA'S CLAIMS UNDER ARTICLES I:1 AND II:1(B) OF THE GATT 1994 MUST ALSO FAIL

55. Finally, as China has failed to demonstrate that the United States has acted inconsistently with its obligations under the transitional mechanism, China's claims under Articles I:1 and II:1(b) of the GATT 1994 must also fail.

# ANNEX D

## ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

# ANNEX D-1

## ORAL STATEMENT OF THE EUROPEAN UNION

Mr Chairman, members of the Panel,

1. The European Union would like to thank the Panel for this opportunity to submit orally its views in this dispute.

2. As already stated in its written observations, the European Union does not wish to take a position on the consistency of the measure in dispute with the requirements of the *Transitional Product-specific Safeguard Mechanism* (the "TPSSM") laid down in Article 16 of the *Protocol of Accession of the People's Republic of China*.

3. The European Union has intervened in this dispute because of its interest in the correct interpretation of the TPSSM. More specifically, the European Union is concerned to ensure that the specific nature of the TPSSM is duly recognised and that no confusion arises between the requirements of that mechanism and those of the extraordinary remedy against injurious imports provided in Article XIX of the *General Agreement on Tariffs and Trade 1994* (the "GATT") and the *Agreement on Safeguards* (the "AS").

4. Contrary to the suggestions made by the complaining party, the TPSSM is not an elaboration of the remedy provided in GATT Article XIX and the AS. The TPSSM lays down a separate and distinct remedy, with its own specific purpose, to be invoked in different circumstances and subject to different conditions.

5. Nor is it correct that the TPSSM seeks to impose "more stringent" requirements than GATT Article XIX and the AS. First, the TPSSM does not provide that the increase of imports must be the result of "unforeseen developments". Second, the TPSSM lays down a lower standard of injury, by requiring that increased imports be such as to cause "material injury", rather than "serious injury". Third, while the requirement of "increased imports" is worded in similar terms, it must be construed differently, having regard to the different context in which those terms appear and, in particular, to the two crucial differences which I have just mentioned.

6. These differences, as well as the other textual differences discussed in the EU written observations, show that the drafters of the TPSSM did not seek to make the adoption of measures under that instrument more difficult, but rather the opposite.

7. Given the specific nature of the TPSSM, and the different requirements stipulated in that mechanism, the Panel should reject any attempt to extrapolate to the TPSSM the case law of the Appellate Body on GATT Article XIX and the AS. For the same reasons, the Panel should be careful to ensure that, whatever interpretation of the TPSSM is reached in the framework of the present dispute, it remains circumscribed to that instrument and does not prejudge in any manner the interpretation of GATT Article XIX and the AS.

8. Thank you for your time and attention.

# ANNEX D-2

## ORAL STATEMENT OF JAPAN

### INTRODUCTION

1. Mr. Chairman, and distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for this opportunity to present Japan's views on this dispute. In this oral statement, Japan would like to address three important systemic issues in this dispute. The first is Reasoned and Adequate Explanation of Importing Members. The second is Implication of the Agreement on Safeguards and Article XIX of the GATT to the Protocol. The third is Paragraph 16.3 and 16.6 of the Protocol.

### DISCUSSION

#### Reasoned and Adequate Explanation of the Importing Member

2. To consider claims, a WTO panel is required to make "an objective assessment" under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Dispute*, *DSU*. Where the importing Member's examination of facts is in dispute, the Appellate Body in *US – Lamb* clarified this obligation in the context of the *Agreement on Safeguards*: "By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*".[1]

3. The rationale under the *Agreement on Safeguards* would provide a good framework for this Panel to consider its standard of review and the importing Member's obligations derived from Article 11 of the *DSU* and specific obligations under Section 16 of the *Protocol*. Paragraph 16.1 sets forth that the importing Member may impose a transitional safeguard measure when the Member found that Chinese products are imported in such state that causes market disruption. Paragraph 16.4 requires the Member to determine that these imports are a significant cause of the material injury to find the existence of the market disruption. Paragraphs 16.3 and 16.6 set the permissible maximum extent and duration of the transitional safeguard measure. In addition to these substantive obligations, Paragraph 16.5 sets forth the importing Member's procedural obligation to provide an explanation of the basis for the decision and the scope and duration of the measure in the written notice under paragraph 16.5, as elaborated in Paragraph 246(e) of the *Working Party Report*.

4. These substantive and procedural requirements under Section 16 of the *Protocol* appear to be analogous to the conditions to apply to a safeguard measure under the *Agreement on Safeguards*, as discussed in more detail in Japan's submission. Article 11 of the *DSU* would require this Panel to examine whether the importing Member satisfied the substantive obligations under Section 16 of the *Protocol* upon reviewing whether the explanation in the written notice was reasoned and adequate.

[1] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051, para. 105.

**Implication of the *Agreement on Safeguards* and Article XIX of the *GATT* to the *Protocol***

5. Findings by the Appellate Body in the context of Article XIX of the *GATT* and the *Agreement on Safeguards* also would provide a useful guidance to consider the substantive obligations of the importing Member under Section 16 of the *Protocol* because the texts of these Agreements are similar. However, they are not identical. Further, the provisions of the *Protocol* are not subordinated to these Agreements, as provided in Paragraph 1.2 of the *Protocol*. In addition, Section 16 of the *Protocol* does not make any reference to these Agreements with respect to substantive obligations. These aspects indicate that the substantive rules to impose a transitional safeguard measure under Section 16 are separate and independent from the provisions of Article XIX of the *GATT* and the *Agreement on Safeguards*. In this light, in referring to the rationale as clarified by the Appellate Body on substantive and procedural obligations under the provisions of these Agreements, this Panel should be careful so as not to incorporate rights and obligations under these WTO Agreements that do not exist in Section 16 of the *Protocol* into the *Protocol*, and at the same time not to diminish rights and obligations provided in the *Protocol*.

**Paragraphs 16.3 and 16.6 of the *Protocol***

6. Paragraphs 16.3 and 16.6 of the *Protocol* set forth that a transitional safeguard measure must be limited to the extent and the duration necessary to prevent or remedy such market disruption. The market disruption is defined in paragraph 16.4 as existing only when there are: (i) imports of Chinese products, which are increasing rapidly; (ii) material injury to the domestic industry; and (iii) a causal link between these imports and the injury. Accordingly, the measure must address these factors, and it may not be taken beyond the extent and duration to make such factors cease to exist or be prevented from recurrence.

7. The importing Member's obligation to limit the period of time to impose a transitional safeguard measure under the first sentence of paragraph 16.6 of the *Protocol* would not be diminished or otherwise modified by its subsequent sentences. The second and third sentences address the right of China when the measure has been imposed for more than two or three years. These provisions do not refer to the importing Member's right or obligation in its imposition of a transitional safeguard measure even after the two or three year period. The Member may continue imposing the measure even after the two or three year period so long as the measure is necessary to prevent or remedy the market disruption. The second and third sentences do not release the importing Member from observing its obligation not to impose the safeguard measure when the measure is no longer necessary to prevent or remedy the market disruption, even though the measure has not yet imposed for two years.

**CONCLUSION**

8. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments as discussed in its submission and above to ensure the fair and objective application of the provisions of the *Protocol* and would be pleased to respond to any questions that the Panel may have.

# ANNEX E

## EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

# ANNEX E-1

## EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

### I. THE FACTUAL BACKGROUND OF THE MEASURES IN THIS DISPUTE PROVIDES RELEVANT CONTEXT FOR THIS PANEL AND SHOULD BE CONSIDERED

1. The factual background surrounding the measures in this dispute is highly relevant to this dispute, yet the United States attempts to shift the focus away from these determinations. The United States highlights the size of the Chinese capacity and other factors relating to threat of future injury, even though the USITC based its decision solely on present injury. This is inappropriate because the condition of the Chinese tyre industry is wholly irrelevant to this dispute as it is a consideration only for issues of "threat." While focusing on such irrelevant facts, the United States ignores that the USITC investigation was initiated solely by a labour union, the USW, and lacked the support of the U.S. tyre industry. The USITC's failure to collect critical information about recent trends in imports, which showed that they were in decline, rendered the U.S. injury and remedy findings further incomplete. The USITC determination is also incomplete without consideration of the views of the dissenting Commissioners, thus the U.S. attempt to limit the Panel's inquiry to solely the majority determination is inappropriate. The United States ignores the unique and highly politicized process in which the quasi-judicial decision-making of the USITC actually took place in this specific case. Properly understood, however, the factual background of these measures supports China's contention that they are inconsistent with U.S. obligations under the WTO.

### II. THE PROPER ANALYTIC FRAMEWORK SHIFTS THE BURDEN OF PROOF TO THE UNITED STATES AND REQUIRES THE PANEL TO CONDUCT A SEARCHING, "OBJECTIVE" ASSESSMENT

2. China has met its burden of establishing a *prima facie* case that the U.S. measures are inconsistent with Article 16 by demonstrating that the United States neither evaluated all relevant factors nor provided a reasoned and adequate explanation for its decision consistent with the requirements for imposing measures under Article 16. Because China has made a *prima facie* case, the burden of proof has shifted to the United States to establish the elements of its defense of its actions in imposing measures under Article 16.

3. Both parties agree that the relevant standard of review is the standard provided in Article 11 DSU, that a panel should make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The jurisprudence on this standard, as it has been developed under the *Agreement on Safeguards*, is applicable. The "objective assessment" required under DSU Article 11 is a searching inquiry in which it is inappropriate to simply defer to the findings of an investigating authority. In conducting a proper "objective assessment" a panel should inquire whether the investigating authority examined all the relevant facts before it and explained how the facts supported the determination made, as well as inquire whether the determination was consistent with the Member's obligations under the WTO.

4. The U.S. attempt to strip away the applicable WTO jurisprudence is untenable. Article 16, alone, does not govern the type of "objective assessment" required. There is no legitimate basis by which the United States can assert that the requirements, and related jurisprudence, for an "objective assessment" of measures under the *Agreement on Safeguards* should be ignored in the case of an

"objective assessment" under Article 16. Measures under both Article 16 and the *Agreement on Safeguards* involve reviews of determinations of increased imports and causation, albeit based on sometimes differing substantive standards. Appellate Body jurisprudence – across various WTO agreements – makes clear that investigating authorities must examine and address alternative explanations of the evidence for that determination to be deemed reasoned or adequate.

5. The U.S. attempt to ignore striking parallels between the *Agreement on Safeguards* and Article 16 is impermissible. The parallel language in the *Agreement on Safeguards* provides highly relevant context for understanding Article 16, namely the necessity of demonstrating that imports are increasing and that the increasing imports are causing injury to an industry in the importing country. Although there are differences, the basic concepts are the same. Both the similarities and differences between the texts serve to inform the Panel of the meaning of these terms. The U.S. attempt to isolate the Protocol from the rest of the WTO Agreement is misplaced, and similar attempts have been rejected by panels in the past. The certain parentage of Article 16 from the *Agreement on Safeguards*, including references to the Committee on Safeguards, cannot be ignored. The Protocol must be interpreted in context. U.S. arguments that it should not be, are incorrect and inconsistent.

## III. IMPORTS FROM CHINA WERE NOT "INCREASING RAPIDLY" WITHIN THE MEANING OF ARTICLE 16 OF THE PROTOCOL

### A. THE PROTOCOL IMPOSES A SPECIFIC AND STRICT STANDARD THAT MUST BE MET TO FIND PROPERLY THAT IMPORTS ARE "INCREASING RAPIDLY"

6. The text of Article 16 sets forth a specific and narrow set of circumstances under which imports from China that are "increasing rapidly" may permissibly be subject to transitional product-specific safeguards. Investigating authorities must make an adequate finding that imports from China "are being imported…in such increased quantities" as well "increasing rapidly." These two requirements, found in Article 16.1 and 16.4 respectively, ensure that a finding of a simple increase over the entire period of investigation cannot meet the standard required for measures to be imposed. Article 16 demands much more.

7. The use of the present continuous tense – "are being imported" and "increasing" – in Articles 16.1 and 16.4 requires investigating authorities to focus on the more recent period of time when assessing increasing imports. The Appellate Body has recognized the distinction between the use of "increasing" and "increased" and how "increasing" is a requirement for imports at the time of the determination, i.e. in the most recent past. Contrary to the U.S. argument, reviewing this standard in the context of the *Agreement on Safeguards* confirms this interpretation. The use of the word "rapidly," which is intrinsically linked to "steep," raises the standard and is used to distinguish imports which are "increasing rapidly" from imports which are merely "increasing." The U.S. attempt to limit "rapidly" to strictly a temporal interpretation is unavailing under its ordinary meaning and internally inconsistent.

8. The U.S. attempt to equate the lack of an explicit quantitative standard in the text of Article 16 with the lack of any standard at all is inappropriate. Rather, the text and applicable context of Article 16 require investigating authorities to consider three qualitative factors in determining adequately whether imports from China are "increasing rapidly." Authorities should focus on the most recent full year of data and any available interim data, consider and give the most weight to the most recent import trends, and analyze the most recent year in more detail when initial analyses show that imports are slowing. The USITC, however, failed to comply with any of these factors. Additionally, the fact that Article 16 requires a showing of "material injury" and not "serious injury" does not lower the causation standard. The "increasing rapidly" standard is discrete from the "material injury" standard. "Increasing rapidly" is the first element listed in Article 16 and thus the threshold consideration. Only after a proper finding of "increasing rapidly" may an investigating authority independently begin to determine whether such imports were a "significant cause" of

"material injury." The U.S. attempt to conflate the two discrete issues through a quick glossing over of the full context of Article 16 and false analogies to Appellate Body jurisprudence is improper. Furthermore, the "increasing rapidly" standard is also discrete from the "increased quantities" standard, making a finding of imports to be "increasing rapidly" all the more exacting.

## B. THE USITC IMPROPERLY FOUND IMPORTS FROM CHINA TO BE "INCREASING RAPIDLY"

9. The USITC's analysis of increasing imports fails to comply with specific and strict standard of Article 16. Aware of this, the United States attempts to establish that the USITC had near blanket discretion to assess increasing imports and that the Panel should defer to this discretion. Yet such discretion as the USITC has is limited to the extent that its analysis must still comply with the standards of the Protocol. The USITC had no discretion to focus on an end-point-to-end-point increase over the period because this does not comply with the "increasing rapidly" requirement of Article 16.4. The USITC's over-reliance on this approach rendered its analysis inconsistent with Article 16. It must have explained adequately why imports were found to be "increasing rapidly" during the more recent part of the period. In contrast, the USITC never even stated what it understood "rapidly" to mean. The U.S. attempt to equate what the USITC said with what the USITC did cannot be accepted.

10. The USITC's finding that increases had not abated in 2008 impermissibly ignores recent trends, misinterprets the data, and is premised on the improper approach of combining and analyzing 2007 and 2008 together. The largest increase in imports was from 2006 to 2007, which can hardly be considered the most recent period. But by employing a simple "end-point-to-end-point" analysis, the USITC masked the fact that imports from China were dramatically slowing during the end of the period. Imports could not properly be determined to be still "increasingly rapidly" at the end of the period when the increase from 2007 to 2008 was only 10.8 per cent, a fraction of any of the prior years' increases. Despite these essential facts, the USITC did not focus on the difference between the increase in 2008 and 2007, or the difference between the increase in 2008 compared to the overall 2004 to 2007 period. Instead of properly focusing analysis on the more recent period, the USITC obscured it.

11. China's alternative quarterly analysis, presented in its First Written Submission, is directly applicable and relevant. Due to the dramatic slowing of imports from China, it was highly probative on whether imports were still "increasing rapidly" and consistent with the requirement of analyzing the most recent period and the trends within that period. The analysis revealed that the largest increase in imports from China occurred in Q2 2007 – more than two years prior to the USITC determination. Imports peaked in Q2 2008 and then proceeded to decline, with the quarter-to-quarter comparisons showing a mixture of increases and decreases. The U.S. response that this analysis is flawed because it does not assess 2004 to 2006 demonstrates the U.S. failure to understand that the point of the quarterly analysis was to highlight the trends over the *most recent* period.

12. Similarly, the USITC should have – but refused to – collect and analyze import data for the first quarter of 2009. Although the USITC acknowledged that imports from China declined during the first quarter of 2009, it failed to gather or assess this data and its impact on the USITC's overall analysis. The excuses offered for not collecting the full data for this interim period are unavailing. There is no reason the data "would not have been available" if the USITC had asked for it. The USITC has a well-settled practice of gathering such data, and in many cases has gathered interim data for a first quarter during a tighter time frame. The U.S. claims that such a collection would have been too burdensome and that the USITC makes its decisions on a case-by-case basis are unpersuasive and dangerous.

## IV. THE U.S. DEFINITION OF "SIGNIFICANT CAUSE" IS INCONSISTENT AS SUCH WITH THE REQUIREMENTS OF ARTICLE 16 OF THE PROTOCOL

13. The U.S. statutory definition of "significant cause" that was applied by the USITC is inconsistent "as such" with the requirements of the Protocol. The text of the Protocol adds the word "significant" to the causation analysis under Article 16. The ordinary meaning embedded in "significant cause" is one that requires subject imports to "produce" or "bring about" the injury in a significant way. The rapidly increasing imports need not "produce" or "bring about" the injury in and of themselves, but the ordinary meaning of the words used in the Protocol requires something much more than a mere contribution. In contrast, Section 421 defines "significant cause" as merely a cause that "contributes significantly" and "need not be greater than or equal to any other cause." This binding definition impermissibly lowers the required causation standard of Article 16 and is thus inconsistent as such with the Protocol. It is simply untenable, and contrary to the ordinary meaning of the language, to argue that the use of "significant cause" in Article 16 of the Protocol can actually lower the corresponding standard in global safeguards that does not contain the modifier "significant."

14. The U.S. responses to this claim lack force. The United States argues that it is free to adopt whatever "methodologies or standards" that it wishes to determine whether imports are a significant cause of material injury. WTO members, however, do not have discretion to adopt whatever "standard" they wish – the standard is "significant cause," and that standard has been set by the text of Article 16. The U.S. argument that the definition simply serves to provide "guidance" is unpersuasive as no guidance is provided and the definition serves explicitly – in light of both the plain meaning of the words used as well as their history and application – to lower the causal standard and reduce the meaning of "significant." The U.S. claim that the statute really means "a direct and significant causal link" is irrelevant because that is not the language used by the statute itself. The statute redefines "significant cause" as a "cause that contributes significantly," not as a "direct and significant causal link."

15. The United States cannot shift focus away from the words of the statute itself to the legislative history of Section 406, a different statute. The legislative history of a different statute cannot trump the actual language of Section 421, especially in the noncommittal way in which it has been cited by the USITC. U.S. arguments misperceive the potential relevance of these materials as this dispute arose due to the USITC's faulty application of Section 421 – not Section 406. The U.S. claims that the USITC understood its obligations under Section 421 in light of the legislative history of Section 406, or that China should have been "well aware" – due to prior Section 406 investigations – that "significant cause" in Article 16 actually meant "contributes significantly" demonstrate a fundamental misunderstanding of the situation. The legislative history of Section 406 cannot justify the impermissible redefinition of "significant cause" in the U.S. implementing statute. It is not the negotiating history of Article 16 and thus it cannot justify a low causation standard.

16. The additional language of "need not be equal to or greater than any other cause" in the U.S. statute impermissibly allows an investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be considered as "a significant cause." This is not a reasonable interpretation of the words "a significant cause." The U.S. argument that the USITC has interpreted the statute in a way consistent with the Protocol is improper. The United States must defend the statute itself in an "as such" claim, not the language of the USITC determination which differs from the statute.

17. The United States claims that, even if this definition does impermissibly lower the causal standard, the statute is still not inconsistent "as such" unless it "mandates" WTO-inconsistent action. Panels, however, have repeatedly noted that the mandatory/discretionary distinction is not an issue that needs to be decided as a threshold matter by a panel in an "as such" claim. Rather, the issue is simply whether the legislation on its face is inconsistent with the relevant WTO provision. The "contributes significantly" redefinition has been demonstrated to be precisely that. Regarding the

mandatory/discretionary distinction, however, as in previous disputes, the U.S. agency in this case lacks the necessary discretion. Furthermore, the U.S. statute does require the USITC to apply a fundamentally flawed definition which the USITC had no discretion to disregard.

## V. IMPORTS FROM CHINA WERE NOT A "SIGNIFICANT CAUSE" OF INJURY WITHIN THE MEANING OF ARTICLE 16 OF THE PROTOCOL

18. Imports from China were not a "significant cause" of material injury within the meaning of Article 16. The USITC failed to conduct a reasoned and adequate analysis of the conditions of competition, failed to establish any temporal "coincidence" between rapidly increasing Chinese imports and various alleged injury factors, and failed to address adequately alternative causes that undermine any suggestion that imports from China were causing "material injury." These failures render the USITC's causation analysis wholly incomplete and inconsistent with the requirements of the Protocol.

19. To fill this analytical void, the United States claims that the Panel should grant it extreme deference and discretion regarding causation. The United States argues that it is unnecessary to conduct a conditions of competition analysis, a coincidence analysis, or a weighing of alternative causes. The United States seeks to ignore all prior efforts to provide meaning to the core concept of "cause" in the context of WTO trade remedies. This would render all prior WTO jurisprudence on these issues meaningless. But the Protocol was not drafted – and does not exist – in a vacuum. It cannot be interpreted in isolation from other WTO agreements. The Panel should reject these U.S. arguments. Likewise, the Panel should also reject the U.S. claim that the limited analysis it did undertake was somehow sufficient to meet the demanding causation standard imposed by Article 16. This is an untenable attempt to have it both ways. If the USITC did engage in analysis of the conditions of competition, coincidence, and alternative causes – then it must have done so adequately. The cursory causation analysis provided by the USITC, however, falls well short of that standard.

### A. THE USITC FAILED TO ASSESS ADEQUATELY CONDITIONS OF COMPETITION

20. An analysis of the conditions of competition is required under the Protocol. The U.S. claim that Article 16 "does *not* require the investigating authority to examine conditions of competition" is incorrect. This claim hinges on the use of the phrase "or under such conditions of competition" in the English text of Article 16.1. Yet the French and Spanish texts of Article 16.1 use the terms "et" and "y" respectively. This conjunctive use is also consistent with Article 2.1 of the *Agreement on Safeguards*, which uses "and under such conditions of competition" in all three languages. The only way to reconcile the equally authentic texts, as is required, is to apply the conjunctive interpretation of the term "or" in the English text of Article 16. The U.S. argument that Article 16.1 does nothing but define the conditions under which consultation may be requested is an impermissibly strained reading of the text. In contrast, China's reading reconciles the texts and puts forth the logical claim that any reasonable analysis of causation must assess the condition of competition in which that analysis takes place. The competitive relationship cannot be viewed in isolation.

21. The USITC's failure to assess adequately conditions of competition is not affected by the finding that products are "like" products because this does not preclude finding attenuated competition based on market segmentation. The segmentation of the tyre market in this case led to attenuated competition. Despite the fact that the USITC considered all tyres to be the same "like" product, this condition of competition – attenuated competition – continues to exist. The concept "like or directly competitive product" serves simply to delineate which domestic producers make the product and are to be included in the domestic industry. This has been confirmed by the Appellate Body and is consistent with the approach of the USITC in this case and in general as the USITC routinely finds that there is a single "like" product, but then assesses market segments under a conditions of competition analysis.

22. Regardless, the USITC purported to analyze the conditions of competition in its report – implicitly acknowledging that such an analysis was required and that failing to do so would produce an incomplete and invalid analysis of causation. Despite having undertaken such an analysis, the USITC failed to do so in a reasoned and adequate manner. The USITC equated minimal competition between subject imports and domestic tyres as significant competition and ignored the implications of attenuated competition and its impact on causation. In doing so, the USITC relied too heavily on subjective questionnaires, and too little on the actual evidence of a highly segmented market. The USITC tried to dismiss the highly segmented market by finding isolated portions of competitive overlap, rather than the substantive degree of overlap that would establish and support its findings. Such an approach is impermissible.

23. There was attenuated competition in this case as imports from China were virtually absent from an estimated 74 per cent of the U.S. market. Despite this, the USITC asserted that there was "significant competition" between imports and domestic tyres. To critique China's data on this issue, the United States claims that the data is "belied by the very article China cites" – yet China cited no article for this data, just the USITC Determination's reporting on U.S. producers. Furthermore, the point of the data estimate was to convey the order of magnitude to which competition was attenuated and critique the USITC's improper willingness to equate any competition with "significant" competition. If China's estimate is inhibited by the limited public record, China urges the Panel to ask the United States to provide the actual information necessary for the Panel to make its own assessment.

24. The unsupported and unexplained inferential leaps made by the USITC in finding competition can be seen in the OEM market, where the USITC states there was competition despite imports from China making up 4.8 per cent of the market and U.S. tyres making up 51.6 per cent of the market in 2008. With imports from China ranging from just 0.2 per cent to 4.8 per cent of the OEM market, and non-subject imports being nine times the quantity of subject tyres in the OEM segment, it is simply fanciful that subject tyres could be in significant competition with U.S. tyres in this market or a significant cause of injury. The U.S. claim that the Protocol does not require the USITC "to ignore the impact" of subject imports when they are just 5 per cent of the market improperly avoids the thrust of the requirement. Where imports occupy a negligible proportion of the market in question, the investigating authority must provide a reasoned and adequate explanation of why there is significant competition between imports and domestic tyres, much less a significant causal relationship between those imports and injury.

25. Similarly, there was no basis for inferring significant competition between tyres from China and domestic tyres in the replacement market. The U.S. claim that "the record showed that tyres from China and tyres from the United States compete in all segments of the market" ignores impermissibly the fact that the USITC majority itself conceded that sales in the aftermarket could be placed in three tiers of which "the largest share of U.S. producers' shipments fall into category 1, and that the largest share of subject import shipments fall into category three." The U.S. attempt to blur the lines between tiers to support its finding of significant competition belies the record and is indicative of bias. The fact that the distinction between tiers may not be absolute does not mean that the distinction does not exist at all, or that the distinction does not produce highly attenuated competition.

## B. THE USITC FAILED TO ASSESS ADEQUATELY WHETHER THERE WAS TEMPORAL COINCIDENCE BETWEEN IMPORTS FROM CHINA AND THE ALLEGED INJURY

26. The USITC failed to establish any meaningful temporal coincidence between imports and injury. When the ten factors assessed by the USITC are examined properly, the lack of coincidence between rapidly increasing imports and injury to the domestic industry is certain. During the most recent period of time, the domestic industry experienced it best year of the entire period of investigation when imports from China increased at the highest rate. The United States argues that

such an obvious lack of correlation is but an "anomaly" and does not speak to "overall correlation." A proper analysis of "overall correlation," however, reveals that that this "anomaly" is in fact consistent with all the data. There is no meaningful correlation for the more recent half of the period and many of the factors show purely positive correlation throughout the period. In short, during the period of time most relevant for drawing the link to imports from China that are "increasing rapidly," the USITC has demonstrated no temporal coincidence.

27. The United States fails to rebut China's showing of a lack of coincidence. Instead, the United States asserts, incorrectly, that a coincidence analysis was not required. The U.S. attempt to justify what little coincidence analysis the USITC actually undertook is improper as it adds new, *ex post* arguments in support of a coincidence finding. All of this is unpersuasive and inadequate. Just as "coincidence" analysis plays a "central" role in determining whether or not a causal link exists in the context of global safeguards, such an analysis is equally important when evaluating the application of a product-specific safeguard under the Protocol. Under Article 16.4, the correlation must exist during the period of time when imports were increasing rapidly, and correlate with the adverse trends at issue. Moreover, this correlation must also be sufficient to constitute a "significant" causal link.

28. It is not true that, absent express direction, the investigating authority is "free to choose and use any appropriate methodology it wishes." Guidance must be taken from the *Agreement on Safeguards* jurisprudence, and such guidance was created in the absence of any "express" correlation language requirement. The U.S. attempt to limit the guidance to the specific text of the *Agreement on Safeguards* also fails as the correlation requirement is intrinsically linked to the causation analysis that investigating authorities must conduct – namely whether increased imports are causing injury. Because Article 16 of the Protocol involves the same causal analysis of whether rapidly increasing imports are causing injury, the same embedded analysis is necessary. In any event, the United States asserts that the USITC "did, in fact, use a 'coincidence of trends' analysis." Accordingly, having engaged in such an analysis, the USITC was obliged to do so properly.

29. In the face of such a requirement, the USITC's coincidence analysis is wholly inadequate. The USITC's report devotes little attention to coincidence analysis, relying primarily on sweeping generalizations. The USITC majority failed to compare year-to-year movements in imports and injury factors, or assess in any serious way whether those movements reveal meaningful coincidence or correlation. This failure is particularly apparent with respect to the more recent period (i.e., changes in 2006-2007 and 2007-2008). The USITC ignores that imports from China grew at their fastest rate in 2006-2007, but grew at their slowest rate (10.8 per cent) in the period from 2007-2008. Likewise, the USITC ignores the fact that various injury factors showed a substantial improvement in 2006-2007, when imports from China were at their highest level in the period, and experienced their greatest declines of the period in 2008, when Chinese imports grew at the slowest rate in the period. And finally, the USITC ignores that certain the injury factors, such as price, R&D expenditures, and capital improvements, show positive trends throughout the period.

30. Regarding the U.S. theory of causation, two concrete tests present themselves in the more recent period. Given the U.S. argument that imports from China were fungible, that the product is price sensitive, and that different market segments do not matter, one would expect the large increase in imports over the 2006-2007 period to have the largest adverse impact on injury indicators and one would expect that the small increase in imports over the 2007-2008 period would have the smallest adverse impact on injury indicators. That the facts in the record completely belie the U.S. theory strongly points to a lack of correlation.

31. To refute this, the United States posits new, *ex post* rationales for this absence of correlation, such as dismissing 2006-2007 as an "anomaly" and speculating that there may have been a temporal lag between imports and injury. Both arguments are inadmissible, as the USITC never made findings on either point in its report and *ex post* assertions cannot substitute for findings in the USITC's report. The U.S. attempt to bolster the theory of "underselling" is also unavailing as these comparisons do not

take into account the differences in brands nor do they account for the significant degree to which U.S. prices rose and outpaced prices for subject imports. The U.S. claim that industry profits in 2007 were "small" is a strained reading of the record as operating profits were $507 million. On several factors, such as production and net sales, the United States chose to avoid addressing their bearing on correlation, further reinforcing the fact that not much can be said to buttress the USITC Determination's analysis of coincidence.

32. U.S. claims that the lack of correlation between the individual injury factors does not speak to "overall coincidence" should be dismissed. There can be no "overall correlation" in this case because there is essentially no correlation for 50 per cent of the period, and several factors (sales value, price, R&D, and capital investments) showed purely positive correlation throughout the period. There was essentially a complete lack of coincidence across the factors during the most recent – most relevant – period. The lack of correlation was not just "one or two variations in trends" as posited by the United States. Rather there was a complete temporal lack of "overall coincidence" when the data is viewed on an individual factor basis or as a whole. Despite this, the USITC has provided no "*very* compelling" explanation to rebut this lack of coincidence as in necessary if causation is still to be found.

C. THE USITC FAILED TO CONSIDER ADEQUATELY ALTERNATIVE CAUSES

33. The USITC also failed to consider adequately alternative causes. Causal factors such as changing demand and business strategy were put aside as the USITC invoked the low U.S. statutory standard that it need not engage in any "weighing of causes." This failure renders the USITC's analysis incomplete and makes it nearly impossible for the USITC to determine whether or not subject imports were actually a "significant" cause of injury. Declines in demand and a shift in business strategy had a considerable effect on the U.S. tyre industry, yet the USITC chose to ignore these implications. These failures reveal the striking degree to which the USITC's causation analysis was inconsistent with the requirements of Article 16.

34. The U.S. argument that the USITC was under no obligation to examine alternative causes is misplaced, relying too heavily on the absence of express non-attribution language in the text of Article 16. Although there is no formal non-attribution requirement expressly provided in Article 16 of the Protocol, such an assessment was still necessary. The fact that the USITC stated that it did consider alternative factors reinforces this requirement and, as the United States acknowledges, a proper analysis of a causal link requires the authority to "consider such other factors." Such consideration is necessary if a causation analysis is to be conducted in good faith and in accordance with the Protocol.

35. The U.S. attempt to isolate Article 16 from any applicable WTO jurisprudence by claiming the relevant Appellate Body jurisprudence on the nature of the causation analysis is limited strictly to the text of the *Agreement on Safeguards* is unfounded. An "assumption" that other factors are not causing the alleged injury cannot be made consistently with the obligation to find a "causal link" – a "genuine and substantial" relationship of cause and effect. Appellate Body jurisprudence teaches that an authority cannot properly conclude that a "causal link" exists without having first assessed whether other factors were actually responsible. This is true whether there is an express non-attribution requirement or not. Likewise, the U.S. argument focuses exclusively on the omission of an express non-attribution clause while ignoring impermissibly the key addition of the modifier "significant" to the causation standard. Because "significant" is best understood in relation to other causes, the addition reinforces the need for a consideration of other causes.

36. Thus the USITC's failure to consider adequately other causes rendered its analysis inconsistent with the Protocol. The mere mentioning of such factors, without any real analysis, is insufficient and cannot constitute a reasoned explanation. The U.S. assertion that the USITC adequately considered declining demand is unsupported by the record. The USITC gave only passing

attention to changes in demand, failing to account for the essentially 1:1 correlation between declining demand in 2008 and the fall in U.S. shipments. The juxtaposition of statistics upon which the U.S. argument rests is inadequate. For the analysis to be complete, an explanation was required for the prolonged decline in demand. The U.S. claim that the USITC "examined in detail and rejected" the role of producers' changing business strategy is misleading as the USITC devoted one paragraph to that issue. In the face of testimony and evidence concerning the long-standing industry restructuring – which predated the arrival of imports from China – cursory treatment is inadequate. Viewed cumulatively, these causes and other causes, have an even greater impact which should have been considered. The U.S. failure to do so by claiming that it is not "always" necessary is insufficient as the "specific factual circumstances" of this case should have been addressed.

## VI. THE UNITED STATES APPLIED A REMEDY THAT WAS INCONSISTENT WITH THE REQUIREMENTS OF ARTICLE 16 OF THE PROTOCOL

37. Despite the fact that the basic requirements for applying a transitional product-specific safeguard under Article 16 had not been met, the United States imposed a remedy. Because the USITC failed to establish that rapidly increasing imports from China were a "significant cause" of market disruption, no remedy was appropriate. Even if the United States had complied with the requirements of Article 16 and thus had the theoretical right to apply measures, the remedy applied was inconsistent with the Protocol. Articles 16.3 and 16.6 require that any remedies imposed must be "only to the extent necessary" and only for "such period of time" as may be necessary to prevent or remedy market disruption. Despite this, however, the United States chose to impose a blanket remedy – never taking into account what "extent" was necessary to remedy the alleged market disruption. This failure by the USITC to properly limit the remedy rendered it excessive in extent and duration.

38. Asserting broad discretion, the U.S. argument claims that the imposition of remedies cannot be a matter of "scientific precision." The United States makes this claim because the USITC never determined to what extent imports from China were allegedly causing market disruption – and without knowing this, no remedy could be limited properly. The Panel inquired as to how the USITC determined that its calculated reduction of subject imports addressed the alleged market disruption, but the United States avoided answering this question and instead simply quoted the output of its economic modeling. These quotations in no way address why the results calculated were in fact determined to be necessary to address the extent of the market disruption. Article 16.3 requires an explicit and reasoned explanation of how the remedy imposed addresses, and is limited to, the extent of the market disruption caused by imports from China. And Article 16.6 requires the remedies imposed to be only "for such period of time" as necessary. The U.S. failure to provide any such explanation renders its actions inconsistent with its obligations under the Protocol.

39. The U.S. deficiencies in explaining why the remedy has been set for three years are even more glaring. The economic modeling was done for only one year, not for all three years. Neither the USITC nor President Obama provided any meaningful explanation of why the three years duration was necessary. The focus of a permissible remedy must be on the effect of the allegedly injurious imports. The remedy imposed by the United States, however, is not limited to the effect of these imports. Imports cannot be held responsible for the entire downturn, and the remedy cannot seek to address that entire downturn.

## VII. THE ADDITIONAL DUTIES IMPOSED BY THE UNITED STATES ARE ALSO INCONSISTENT WITH OBLIGATIONS UNDER GATT 1994

40. Because the imposed tariffs were not justified as emergency action under relevant WTO rules, they are inconsistent with both Article I:1 and Article II:1(b) of the GATT 1994. The United States does not accord the same treatment that it grants to passenger and light truck tyres originating in other countries to like products originating in China and has imposed higher tariffs, which are unjustified modifications of U.S. concessions on passenger and light truck tyres under the GATT 1994.

# ANNEX E-2

## EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

### I. INTRODUCTION

1. The United States has demonstrated, in its first written submission, oral statement, and answers to the Panel's questions, that China's basic thesis – that the standards of the transitional mechanism are so high and the analysis by the ITC so deficient – is completely unfounded and based on mischaracterizations of the text of the Protocol and the very detailed analysis conducted by the ITC. A few new issues raised by China at the panel meeting – the language difference in paragraph 16.1 and the relationship between section 421 and section 406, as examples – are distractions that do nothing to support China's arguments. Even while China conceded that the obligations of the Safeguards Agreement have not been incorporated into the Protocol, it continues its attempt to draw the Panel to a comparison with the Safeguards Agreement text. This temptation must be resisted.

### II. INTERPRETIVE ISSUES

#### A. TRANSITIONAL MECHANISM AND SAFEGUARDS AGREEMENT

2. The question of what, if any, relationship there is between the transitional mechanism contained in paragraph 16 of China's Protocol of Accession and the Safeguards Agreement has been a focus of attention in this dispute. As the United States has noted before, this is not a useful framework for analysis.

3. The United States recalls that during the first meeting of the Panel with the parties, China clarified that it was not arguing that the provisions of the Safeguards Agreement had been incorporated into the Protocol. Therefore, we seem to have agreement on this issue.

4. With respect to whether the Protocol is *lex specialis*, in its answers to the Panel's questions, China states that paragraph 16 "provide[s] a more specific set of rules to address the application of safeguard measures to import from China under certain particular circumstances" and that the Safeguards Agreement provides "the more general principles." This is simply wrong. The Safeguards Agreement and the transitional mechanism apply in different circumstances. They are separate remedies available to a WTO Member under different circumstances. Indeed, China's own answer acknowledges that the Protocol and the Safeguards Agreement apply in different circumstances. Therefore, China seems to concede – as it must – that the transitional mechanism is distinct from the Safeguards Agreement - that is, it exists separate and apart from the Safeguards Agreement, as the United States has explained.

5. The United States simply disagrees with China's assertion that there is "substantial overlap in structure and language" between the transitional mechanism and the Safeguards Agreement. Even a quick reading of both reveals that there are substantial portions and concepts from the Safeguards Agreement that are simply not present in the transitional mechanism. Any analysis that starts from the premise that terms have been "added" to the Safeguards Agreement text is flawed.

6. Under the interpretive approach required by Article 3.2 of the DSU, the Panel must consider the text of the Protocol, in its context and in light of the object and purpose of the agreement. China appears to advance a different approach, under which the Panel should examine the Safeguards Agreement instead, and then add the Protocol to that agreement. Nothing in the text of the Protocol, or in the customary rules of treaty interpretation, countenance that approach. Furthermore, the most relevant context for the Panel's consideration is the context provided by the other provisions of the transitional mechanism and the context provided by the relevant passages of the Working Party Report. To the extent that there is a need to seek broader contextual guidance, the Panel may also look to prior interpretations of similar terms or provisions of the Safeguards Agreement or any of the other WTO agreements as appropriate. Where relevant, the Panel may also consider the reasoning of other panels and the Appellate Body interpreting such provisions. However, care must be exercised to avoid importing words or obligations from one agreement that are not found in the other.

## B. THE UNITED STATES IS NOT ARGUING THAT THERE ARE NO STANDARDS TO BE APPLIED

7. The United States has not argued that "there is no standard and that the authorities are always correct." A Member invoking the transitional mechanism must meet the standards contained in the text of paragraph 16 of the Protocol, read in conjunction with the context provided by the Working Party Report. It is evident that the text of the transitional mechanism contains different, and in some cases fewer, prescriptions than the text of the Safeguards Agreement. This is not an "extreme interpretation," but an interpretation consistent with the customary rules of interpretation of public international law, as required by DSU Article 3.2.

## C. LANGUAGE DIFFERENCES IN PARAGRAPH 16.1 HAVE NO IMPACT ON ANALYSIS

8. The textual difference identified by China has no bearing on the analysis of China's argument on the ITC's analysis of the conditions of competition. China argues that the conditions of competition analysis that the ITC did conduct as part of its causation analysis is flawed. An analysis of that issue requires the Panel to look at paragraph 16.4, not paragraph 16.1. Paragraph 16.1 sets out the conditions under which a Member may seek consultations with China under the Protocol. Whether or not the basis for consultations is the same as the standard for a finding of market disruption set out in paragraph 16.4 need not be addressed by this Panel. In any event, it does not affect the analysis of the requirements of paragraph 16.4, which is where "market disruption" is defined, and paragraph 16.4 does not require a "conditions of competition" analysis. (Nor, for that matter, does paragraph 16.1.)

## D. STANDARD OF REVIEW

9. China's answers regarding this issue (to questions 9 and 18), do not address the issue of what is the proper standard of review which the Panel must use to evaluate whether the United States met its obligations. China instead confuses the standard of review with what is required by the particular obligation. In discussing what it views as the differences in "application" of the standard of review, China merely restates particular terms from the provisions of the Safeguards Agreement and the Protocol, but the terms of these provisions are not a "standard of review."

10. Throughout its submission and statements, China has tried to argue that the ITC did not conduct a thorough analysis of the facts and did not provide sufficient and adequate explanations for its market disruption determination. The ITC Report is before this Panel, and the Panel should review it to determine whether the ITC has provided reasoned explanations as to how the evidence before it supported its conclusion that there was market disruption. For the reasons we have given, the answer is yes. It should be clear from reading the Report, that the issues raised by China in this dispute are the very issues that the ITC had before it, that the ITC evaluated the evidence appropriately, and

provided reasoned conclusions. With respect to the remedy, we note that China's arguments are likewise centered on criticizing the ITC analysis. We have explained why China's arguments are likewise invalid.

## III. IMPORTS OF TYRES FROM CHINA INCREASED RAPIDLY OVER THE PERIOD

11. As the ITC found, the record showed clearly that imports of tyres from China increased rapidly. Imports increased by significant amounts in each year of the period of investigation, growing by 42.7 per cent in 2004, 29.9 per cent in 2005, 53.7 per cent in 2007, and 10.8 per cent in 2008, the final year of the period of investigation. On a relative basis, Chinese imports gained approximately 12 percentage points of market share during the period of investigation, which correlated with similar declines in the U.S. industry's market share. The largest portion of these increases occurred during the final two years of the period. As the ITC concluded, the record showed that import "increases were large, rapid, and continuing at the end of the period – and from an increasingly large base."

12. China's challenges to this finding are flawed. First, China's assertion that imports "abated" is misleading. It is only through use of a chart that is limited to changes in the rate of growth of import increases that China can provide any support for its claim that there was a "declining" or "lessening" trend in import volumes during 2008. **The Protocol provides that competent authorities should establish that imports were "increasing rapidly", on an absolute or relative basis – it does not require that subject imports be growing at an increasingly rapid rate at the end of the period, or that imports be increasing at a rate that is higher than the rate of growth of imports in any earlier point of the period.** Even if the rate of growth in absolute terms lessened somewhat in 2008 when compared to the extremely rapid rate of growth seen in 2007, the quantities of Chinese imports continued to grow rapidly in 2008.

13. Moreover, China's use of quarterly data also is misleading. China's comparison of changes in the quarterly volumes of Chinese imports in 2008 involves a comparison of quarterly data for successive quarters. This type of comparison can be inherently distortive, however, because changes in import shipment data between quarters can be affected by variations in production schedules, seasonal demand, and weather developments.

14. Further, China's increasing imports arguments ignore the textual link in the Protocol between increased imports and material injury. The United States did not "conflate two distinct issues," as China claims. The concept of increased imports does not stand alone. The language of the Protocol links the issue of rapidly increasing imports to material injury. Accordingly, when considering the meaning and scope of the term "rapidly," the Panel must take into account the "context" in which that term is used. The Protocol's language, which links "rapid increases" of imports to material injury or threat of material injury, establishes that the import increases required by the Protocol are less significant than those required in the context of the Safeguards Agreement.

15. Finally, China's assertion that the Appellate Body requires a competent authority to obtain data only for the "most recent past" is unsupported by the relevant Appellate Body reports. In *Argentina – Footwear* and *US – Lamb Meat* the Appellate Body found that the examination of data for at least two years was appropriate. Moreover, **the Appellate Body has stated that "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period."**

## IV. THE U.S. STATUTE IS CONSISTENT, AS SUCH, WITH THE PROTOCOL

16. China has failed to carry its burden of establishing that the U.S. statute is inconsistent, as such, with the Protocol. Despite China's claims, section 421's definition of a "significant cause" of

material injury as a cause that "contributes significantly to the material injury of the domestic industry" is consistent with the language of the Protocol itself, the ordinary meaning of the words "cause" and "contribute," and the Appellate Body's own definitions of the words "cause" and "causal link" under the Safeguards Agreement. Simply put, section 421 does not "impermissibly lower" the causation standard of the Protocol, as China claims.

17. China's claims on this score appears to be premised on the mistaken notion that the Protocol requires that imports from China be the sole cause of material injury to an industry. This concept is not consistent with the Protocol. The Protocol provides that "market disruption shall exist" if Chinese imports constitute "**a** significant cause of material injury" to the industry. By providing that Chinese imports may constitute "a significant cause" of injury, the Protocol explicitly contemplates that there may be multiple significant causes of material injury or threat to an industry, a point which China ignores.

18. China's argument is also not consistent with the ordinary meaning of the word "cause." While the Shorter Oxford English Dictionary defines the word "cause" as meaning a factor that "produces an effect or consequence" or "that brings about an effect or result," there is no question that the word "cause" can be used to describe a situation where more than one factor brings about or produces a particular effect or result. Given this, it is clear that "cause" can be used with respect to situations where multiple factors contribute to "bringing about" or "producing" an effect or result.

19. Finally, China's argument is inconsistent with the Appellate Body's explanation of the terms "cause" and "causal link" in the Safeguards Agreement context. In *US – Wheat Gluten*, the Appellate Body explained that "the term 'causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about, "producing," or "inducing" the serious injury." Given this reasoning, the ITC can reasonably conclude that imports that significantly "contribute" to the industry's injury are a significant cause of that injury.

20. China is also mistaken in claiming that the U.S. statute "allows the U.S. investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be considered as 'a significant cause.'" Under the U.S. statute, rapidly increasing imports from China must "contribute significantly" to material injury to be considered a significant cause of injury to the industry. Moreover, the ITC has consistently stated that the statute requires a finding that Chinese imports have a "direct and significant causal link" to the industry's material injury. Indeed, the ITC has rejected the idea that imports from China can be a "significant cause" of material injury if they constitute a "minimal" or "unimportant" cause of such injury. The statute does not allow the ITC to find imports to be a significant cause of injury if they contribute minimally to that injury.

21. Furthermore, China has now raised, for the first time, the claim that the legislative history of section 406, the U.S. statute on which the Protocol was modeled, indicates that the "significant cause" standard of section 406 "was intended to be an easier standard to satisfy than" the "substantial cause" standard of section 201, the U.S. global safeguards statute. China's statements seriously misconstrue the legislative history of section 406 and the relationship of the causation standards set forth in sections 406 and 201.

22. In making this claim, China fails to point out to the Panel that the "substantial cause" standard of section 201 contains an additional element that makes the statutory "substantial cause" standard a higher one than section 406's "significant cause" standard. In section 201, the Congress defines "substantial cause" to mean "a cause which is important and not less than any other cause" of serious injury to an industry. As the ITC has consistently explained in its global safeguards determinations, section 201 therefore requires that "increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause." In contrast, section 406 does not require the ITC to conclude that the injury caused by the subject imports is greater than or

equal to the injury caused by any other factor injuring the industry. Thus, the standard of section 201 is higher because it requires a finding that global imports be as important as any other cause of serious injury to the domestic industry during the period of investigation. In its argument, China has entirely failed to point out this important distinction between the two statutes to the Panel.

23. Accordingly, it should be clear, then, why China is mistaken when it asserts that section 421 permits the ITC to find that imports are a significant cause of material injury even if they are a minimal cause of such injury, simply because section 421 provides that those imports "need not be equal to or greater than any other cause" of injury to the industry. This phrase does not mean that imports can be considered a "significant cause" if they are "less than any other cause," including a minimal cause of injury, as China asserts. Instead, this language establishes imports from China need not be the most important cause, or equal in effect to the most important cause, of material injury to the industry, a concept that is consistent with the requirements of the Protocol.

## V. THE ITC'S CAUSATION ANALYSIS, AS APPLIED, WAS CONSISTENT WITH THE PROTOCOL

### A. THE ITC REASONABLY FOUND THERE WAS A CAUSAL LINK BETWEEN CHINESE IMPORTS AND INJURY

24. **As the United States has established, the ITC's analysis of the causal link between rapidly increasing imports from China and the industry's declining condition is fully consistent with paragraph 16.4 of the Protocol. The ITC objectively and thoroughly analyzed the record evidence on these issues and established, clearly and unambiguously, that rapidly increasing imports from China were a significant cause of material injury to the domestic industry.**

25. In its oral statement, China continues to claim that the ITC misinterpreted and distorted the conditions of competition in the U.S. market. The ITC did nothing of the sort. Rather, the ITC provided a detailed and reasoned explanation of the pertinent conditions of competition in the U.S. tyre market. The ITC reasonably analyzed issues argued by the parties, such as declining demand, the industry's business strategy and allegedly attenuated competition, and found that the record evidence did not establish that these issues broke the requisite causal link under the Protocol.

26. In its oral statement, China also mistakenly claims there was "no correlation between imports and injury." As detailed in the U.S. first written submission and its oral statement, this statement shows China's fundamental misunderstanding of the extensive record that was before the ITC in the *Tires* investigation. That evidence established a clear overall coincidence between rapidly increasing subject imports volumes and the deterioration in the condition of the domestic industry. China's bold claim of no correlation in light of this record, calls into doubt the validity of China's other arguments in this proceeding.

27. At the outset, China continues to claim that a coincidence analysis is required under the Protocol by referring to the requirements under the Safeguards Agreement. As a legal matter, China is seeking to impose obligations on the United States not found in the language of the Protocol. China asserts that Article 16 of the Protocol involves the same causal analysis as in the Safeguards Agreement, which means that a "'coincidence' analysis is logically required under the Protocol." **As the United States has explained, China's argument ignores the fact that there is different language in the Safeguards Agreement and the Protocol.** Moreover, **China's argument also ignores the fact that the Appellate Body and WTO panels had made clear that investigating authorities are not required to perform a correlation analysis even under the Agreement on Safeguards.**

28. China's arguments on the lack of coincidence are also misplaced as a factual matter. **As the ITC stated there was a clear overall "coincidence" in trends between the rapidly increasing imports and their effects on the domestic industry.** This finding was reasoned, fully supported by the record, and met the requirements under the Protocol. As the United States noted in both its first written submission and in its oral statement, as Chinese import volumes increased rapidly in every year of the period, the record showed that the large majority of the domestic industry's performance indicators declined in every year of the period as well. **As the ITC explained in its determination, the underselling by large and rapidly increasing subject Chinese tyres eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment.**

29. The evidence showed that all of these indicators were at their lowest levels in 2008 when subject imports were at their highest. Even though some factors, such as profitability and productivity, improved somewhat in a single year - 2007 - when imports continued to increase, numerous other injury factors including capacity, shipments, net sales quantities, market share, and employment-related factors all continued to decline in that year. Moreover, even the improvement in profitability and productivity was temporary. The record showed that both factors declined in 2008 to levels below the start of the period, at the same time subject imports rose to their highest levels both in terms of absolute volume and market share.

30. In sum, the ITC found that the significant increase in the volume of subject imports throughout the period coincided with significant and pervasive underselling of the domestic like product by the subject imports. The rising volume of subject imports also coincided with the decline in the domestic industry's performance indicators as subject imports from China displaced domestic sales, and this displacement led to declining domestic production, shipments, capacity utilization, employment, and profitability. As a result, the record clearly supported the ITC's finding that the subject imports were a significant cause of material injury to the domestic industry.

B. OTHER FACTORS DID NOT SEVER THE CAUSAL LINK

31. China also claims the ITC "ignored" or decided to "forgo any analysis of other causal factors." Again, this is incorrect. As discussed in the U.S. First Written Submission**, the ITC did investigate, consider, and analyze all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury. Indeed, the ITC directly considered and addressed the two other factors primarily relied on by China in its oral statement, i.e., the industry's alleged "business strategy" of shifting its U.S. production away from low-end tyres to high-end products, and declines in demand in the U.S. tyres market over the period. The ITC examined these issues and reasonably concluded that they did not indicate that subject imports were not a significant cause of material injury to the industry.**

32. China continues to argue that a Member cannot determine whether subject imports are "a significant cause" of injury as required by the Protocol without examining whether other factors were responsible. **China ignores the fact that** the Protocol, **unlike the Safeguards Agreement, does <u>not</u> specifically require a Member to consider the possible effects of other factors causing material injury or threat of material injury as part of its causation analysis. Instead, the Protocol requires a Member, when assessing whether rapidly increasing imports are a significant cause of material injury or threat of material injury to the industry, to consider the "volume of imports," their "effect . . . on prices for like or directly competitive articles, and the effect of such imports on the domestic industry" producing such articles.**

33. Contrary to China's argument, the United States is not asking for the Panel to conclude that the United States has unfettered discretion to make such a determination. Instead, the United States is simply pointing out that Members are only required to perform the specific obligations that are set

forth in the relevant legal text. Since China has not, and cannot, demonstrate that the Protocol imposes on the United States any obligation to address the injurious effects of other factors as part of its causation analysis, China's claim in this regard must fail. Moreover, even if such an obligation were found to exist, the ITC did consider all of the other factors that could reasonably be claimed to be injuring the domestic industry in a significant manner.

34. For example, China continues to claim the ITC "largely ignored the U.S. tire market's prolonged contraction in demand," and failed to acknowledge that changes in demand might have been a cause of injury to the industry. As discussed in the U.S. First Written Submission, however, the ITC fully addressed demand trends in the market, including those in the OEM market, and found that demand trends did not break the causal link between the subject imports and injury. The ITC found that, even though apparent U.S. consumption fell in 2008, shipments of low-priced subject imports not only remained strong but continued to grow during the market contraction in that year. The fact that low-priced subject imports were able to increase both absolutely and relatively in the face of a contracting market in 2008, even as the quantities of domestically produced tyres and non-subject imports both declined, contradicts China's argument that the domestic industry was injured solely by demand declines in 2008.

35. China also claims the ITC "chose to attribute plant closings to imports from China, when the record does not support such a conclusion." Again, this is mistaken. As the United States previously explained, the ITC cited ample record evidence to support its finding. The ITC explained that imports of tyres from China were rapidly increasing before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006 and 2008. **As the producers stated, the decision to close those facilities was not a voluntary decision that was made independently of imports. It was, instead, a direct response to the growing presence in the market of low-cost Chinese imports, that had already had a "profound" effect on the U.S. market at the very beginning of the period according to contemporaneous press reports. The ITC's analysis had a strong evidentiary foundation.**

## VI. CHINA HAS NOT MET ITS BURDEN OF PROOF ON REMEDY

36. In its answers to the Panel questions, China acknowledges that paragraph 16.3 of the Protocol does not require a Member to "separate and distinguish other causes" and that there "is no specific obligation to quantify." Despite these admissions, China asserts that "the less compelling the authorities' explanation of how it distinguished the role of imports from other causes, the greater the likelihood the authorities improperly imposed a remedy that goes too far." However, China fails to provide any explanation why an alleged failure to quantify, where quantification is not required, requires a "compelling explanation", and why the explanations provided by the United States are not adequate.

37. China's argument on remedy seems to be that it is not satisfied with the explanations provided. In the U.S. First Written Submission and in the U.S. reply to Panel question 30, the United States has pointed to the detailed explanations provided by the ITC in its report in which it explains how its proposed remedy addresses the market disruption of which imports from China are a significant cause. In addition, the United States has explained that the remedy actually imposed by the United States is less stringent than the remedy recommended by the ITC. This was as a result of additional information gathered during the remedy phase and additional fact-finding conducted by the Office of the U.S. Trade Representative and other agencies during this phase. An explanation of this was provided at the time the measure was imposed and was even included by China as one of its exhibits. Finally, as the United States has also explained, the remedy imposed is reduced by five percentage points in the second and third years. China has failed to establish how the measure fails to meet the requirements of paragraphs 16.3 and 16.6.

## VII. CONCLUSION

38. For the reasons set forth above, and in our first written submission and answers to questions from the Panel, the United States requests that the Panel reject China's claims in their entirety.

# ANNEX F

## ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

# ANNEX F-1

## EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

### I. INTRODUCTION AND INTERPRETATIVE ISSUES

1. This dispute is not an abstract exercise. It has real-world implications, as the imposition of tariffs continues to block market access and impose costs. This is not due to any unfair trade, but rather to the application of a country-specific safeguard measure that has no grounding in the Protocol of Accession or the facts. The facts at issue – what the USITC majority actually stated in its report, as opposed to arguments raised by the United States – are important, and a proper resolution cannot be undertaken without examining them thoroughly. A Panel must "review whether the competent authorities' explanation fully addresses the nature, and especially, the complexities of the data and responds to other plausible interpretations of the data."

2. The United States tries to hide the shortcomings of the USITC determination behind arguments for broad deference. It argues that investigating authorities are free to make any determination – and apply any standards – that they wish so long as the determination passes only minimal scrutiny. In attempting to isolate the Protocol and limit the Panel's review, it is unclear what standards, if any, the United States believes should be applied. The United States is adamant that Article 16 "contains different, and in some cases fewer, prescriptions" than the *Agreement on Safeguards*, yet it fails to articulate what these alleged lower standards are.

3. The United States accuses China of confusing the standard of review with substantive obligations. China is arguing for the same standard of review that applies in all WTO cases – the careful and searching "objective assessment." A review must take shape based on the underlying obligations at hand. If the underlying obligations make it explicit that the panel must consider whether an increase is "rapid" or a causal relationship is "significant," then the standard of review – and the review itself – must allow for an "objective assessment" of these key concepts.

4. The United States seems finally to acknowledge that Article 16 must be read in the context of the *Agreement on Safeguards*. The United States has downplayed this context because the relevant WTO jurisprudence on analogous issues reveals the inadequacies of the USITC determination. This context provides important guidance. Both textual additions and deletions have interpretative relevance, but on balance these differences support the interpretation that Article 16 imposes more demanding standards – with respect to increasing imports and causal link – than those under the *Agreement on Safeguards*. The United States argues that it did not have to undertake any of the analyses that it has stated it in fact did undertake. But the United States has repeatedly affirmed that the USITC engaged in analyses of conditions of competition, coincidence, and alternative causes – thus it must apply that methodology adequately.

### II. INCREASING IMPORTS

#### A. THE SPECIFIC STANDARD FOR "INCREASING RAPIDLY"

5. Under Article 16, investigating authorities must find both that imports from China "are being imported … in such increased quantities" and that they are "increasing rapidly." A finding of a simple increase in imports over the period of investigation, therefore, is not enough. The United States, however, has relied heavily on such a finding. The US confusion on this issue can be seen in its

statement that: "The issue for this Panel is whether the ITC reasonably found that the data showed that the subject imports *increased* rapidly *over the period*, especially at the end."

6. This formulation – stressing a past-tense increase that has taken place over the entire period – is at odds with the standard in Article 16 for finding that imports have been "increasing rapidly." The use of "increasing" instead of "increased" creates the need to find recent and ongoing increases, not past increases. Both Article 16.1 and 16.4 use the present continuous tense formulation. This specific language requires investigating authorities to focus on the most recent period and determine properly that imports from China are still "increasing rapidly" at the end of it. The Panel must give meaning to the term "rapidly." Because "rapidly" has been used in the text of Article 16, but not in other trade remedies addressing the issue of increasing imports, it must be given meaning. The use of this distinctive term modifies the basic idea of increasing imports under other trade remedies. It demands something more.

7. Quantitatively, the ordinary meaning of "rapidly" suggests a surge in imports, intrinsically linked to the rate at which imports are increasing. "Rapidly" requires for imports to be "increasing rapidly," they must be distinguished from imports that are merely "increasing." US attempts to limit "rapidly" to a temporal sense ignore the ordinary meaning of the term and are internally inconsistent. The US attempt to equate the lack of an express quantitative standard for "rapidly" in Article 16 to the lack of any standard whatsoever is impermissible and reads "rapidly" out of the text.

8. Qualitatively, China suggests that three elements should be considered. At a minimum, investigating authorities should: focus on the most recent full year of data and any available interim data; consider and give the most weight to the most recent import trends; and analyze the most recent year in more detail when initial analyses show that imports are slowing. In the absence of an explicit quantitative standard, these three qualitative factors allow the Panel to evaluate the USITC determination and give meaning to the term "rapidly."

9. The fact that Article 16 requires a showing of "material injury" and not "serious injury" does not lower the standard for finding that imports are "increasingly rapidly." The "increasing rapidly" standard is a distinct requirement. As the first requirement in Article 16, "increasing rapidly" is the threshold consideration. Only after a proper finding of "increasing rapidly" may an authority then begin properly to determine whether such imports were a "significant cause" of "material injury." Contrary to the US assertion, the words "so as to be" do not change this analytic process. The US attempt to conflate the two discrete issues is improper.

## B. THE USITC'S ANALYSIS OF "INCREASING RAPIDLY"

10. Investigating authorities should consider at least three qualitative factors when assessing whether imports are increasing rapidly. The USITC, however, did not. The failure to use these certain analytic approaches does not necessarily create WTO-inconsistency. There may be other approaches, but the USITC neither developed nor applied a methodology that would explain how imports from China were "increasing" (not just having "increased") and how those "increasing" imports were still doing so "rapidly." These analytic approaches, when applied, demonstrate that imports were not still "increasingly rapidly," thus they call into question the approach of the USITC. The USITC should have explained why, even though the trends in 2008 showed substantial declines from the earlier trends, the USITC still found imports from China to be "increasingly rapidly." The USITC did not do so. Essentially, the USITC simply applied its traditional approach without any effort to consider the requirements of this different standard or to interpret the meaning of "rapidly."

11. The USITC relied too heavily on a finding of a simple increase in imports over the entire investigation via its typical "end-point-to-end-point" analysis. Such an approach, however, has been rejected by the Appellate Body and is inconsistent with the need under Article 16 to focus on the most recent period of time when determining whether imports are in fact still "increasing rapidly." The fact

that the USITC may not have relied exclusively on such an approach is irrelevant. The considerable weight the USITC attached to the overall increase skewed its analysis.

12. US efforts to limit the Appellate Body's guidance on this issue are unpersuasive. The United States cites *US – Lamb*, which deals with future threat of injury and states that in such cases there is a need to consider injury factors, not increasing imports, over a longer period of time. This is inapplicable to an analysis of whether imports are "increasingly rapidly." Cases involving threat of injury require predictions of future injury, thus the most recent period must be put in context with the rest of the period to show why, although there is no present injury, there is still likely to be future injury. In contrast, cases of current injury can be evaluated based on existing facts. Here, the key is the most recent period and whether or not imports are still "increasing rapidly" at the end of it. The earlier period can be context for evaluating whether imports are in fact still "increasing rapidly," but past increases cannot lead to a conclusion that imports are still "increasing rapidly."

13. The more recent period in the context of the overall period highlights the fact that any continuing increase dropped dramatically. At most, the USITC has shown that imports from China were still "increasing" in 2008. That is not enough. The USITC has not shown, and cannot show, that imports from China were "increasingly rapidly" in 2008 and beyond. The USITC's finding that increases had not abated in 2008 ignores recent trends and misinterprets the data. The USITC sidestepped the data concerning 2008 in favour of analyzing 2007 and 2008 as a single unit. This was improper. That the United States continues do so reveals its efforts to mask the most recent period and its recognition that 2008 considered alone cannot support a finding that imports from China were still "increasingly rapidly" as required by Article 16.

14. Likewise, the United States wrongly suggests that the increase in 2008 was "rapid" because China "conceded the Chinese imports were growing rapidly" in 2007, from which 2008 saw an 11 per cent increase. The United States distorts China's argument. China acknowledged that the increase in 2007 might possibly be interpreted as "increasing rapidly" in the past because it was a 50 per cent increase over the prior year. In contrast, the increase in 2007 highlights the very different situation in 2008, which saw just an 11 per cent increase. This stark difference underscores that the modest increase in 2008 was simply not sufficient.

15. The US claim that a comparison of changes in "successive quarters" is inappropriate is incorrect. If an authority is to determine properly that imports are "increasing rapidly," it must do so looking at the data over the entire period, with emphasis on the most recent period. If imports are declining from quarter-to-quarter in the most recent year, as they were here, such declines counsel against a finding of "increasing rapidly." Even when one compares quarterly imports as posited by the United States, imports from China are still not "increasing rapidly." The United States claims successive comparison increases of 23 per cent to 14 per cent to 9 per cent to zero show that imports are "increasing rapidly." The pattern is not one of rapidly increasing imports, but rather one of slowing and abating imports. Because the increases abated, the USITC could not find that imports were "increasing rapidly."

16. The USITC should have obtained and analyzed data for the first quarter of 2009. The US claims that such a collection would have been too burdensome and that the USITC makes its decisions on a case-by-case basis are unpersuasive.

## III. CAUSATION – AS SUCH

17. The US statute wrongly redefines "significant cause," stating that a "significant cause" can be a cause that merely "contributes significantly" and "need not be greater than or equal to any other cause." Contrary to the US assertion, China's claim on this issue is not "premised on the mistaken notion" that imports must be the "sole" cause of injury. China has never made such an argument.

18. When WTO members redefine legal standards, they bear the responsibility of ensuring the standards remain WTO-consistent. The United States argues that it defined "significant cause" so as to somehow provide "guidance" but the redefinition does not provide guidance. Rather, the definition impermissibly redefines and lowers the standard for "significant cause." "Cause" does not mean "contributes," and "significant" does not mean "need not be greater than or equal to any other cause." WTO members do not have discretion to adopt whatever "standard" they wish. The standard in this case is "significant cause," and that standard has been set by the text of Article 16. The United States has no discretion to change it. Nor can the legislative history of Section 406 justify the redefinition of "significant cause." The legislative history of the US statute is not the negotiating history of Article 16, and no negotiating history can justify changing the standard set forth in the treaty text.

19. Article 16 adds the term "significant" to the causation standard. The unilateral US decision to set forth a lower causation standard when defining this term and its added modifier is wholly impermissible. Whatever the need under US law to distinguish global safeguards from China-specific remedies with respect to whether imports need to be the most important cause, the US explanation of this need does not apply to the redefinition of "significant cause" as a cause that only "contributes significantly," and is irrelevant to determining the nature of the US obligations under Article 16 and the WTO Agreement. The causal connotations of "contribute" are less than those of "cause." This is reinforced by the instruction that the necessary causal contribution "need not be equal to or greater than any other cause." The Panel should reject the US claim that the statute really means "a direct and significant causal link." That is not the language used in the statute itself. The noncommittal way in which the USITC references this quote from Section 406's legislative history does not justify overriding the "contributes significantly" language used in Section 421.

20. In an "as such" claim, the inquiry must focus on the text of the statute itself. US assertions that the USITC interpreted the statute in a way that is consistent with the Protocol, and that this interpretation somehow trumps the statute, are misleading. The US argument that in an "as such" claim "it is necessary to refer both to the language of the statute and to evidence of how that language has been applied" is incorrect. Appellate Body jurisprudence makes clear that a proper "as such" assessment may focus solely on the text of the statute. It is not necessary to look to domestic application of the statute, but when the WTO-consistency of text of the statute by itself is unclear, the evidence of the text "may be supported, as appropriate" by the "consistent application" of the statute. In this case, such a step is unnecessary as the words of the statute reveal the WTO-inconsistency.

21. *US - Wheat Gluten* cannot support the claim that Section 421's definition of "significant cause" is in accordance with the Protocol's causation standard. The fact that the Appellate Body used the word "contribute" in part of its definition of "causal link" does not make "contributes significantly" the equivalent of "significant cause." Additionally, the Appellate Body went on to state that "causal link" requires "a genuine and substantial relationship" whereas the US statute states that "contributes significantly" merely "need not be equal to or greater than any other cause."

## IV. CAUSATION – AS APPLIED

### A. AN IN-DEPTH ANALYSIS IS REQUIRED FOR "SIGNIFICANT CAUSE"

22. The USITC's causation finding was WTO-inconsistent and failed to link the condition of the industry to imports from China. The overall thrust of Article 16 is to establish a clear nexus between imports from China and the condition of the industry. A remedy cannot be imposed against fairly traded imports from China when the conditions of the industry are not caused by those imports. Despite this, the USITC failed to conduct a reasoned and adequate conditions of competition analysis; failed to establish a temporal "coincidence" between rapidly increasing imports from China and various alleged injury factors; and failed to address adequately alternative causes that undermine any suggestion that imports from China are causing "material injury." The United States has not explained what analysis it believes was necessary and has tried to avoid all responsibility for the

analysis the USITC did conduct, arguing that the USITC was not required to engage in any of the above analyses. Regardless of the methodology the USITC chose, it must apply that methodology reasonably and adequately. Because the USITC did engage in analyses of conditions of competition, coincidence, and alternative causes, it was required to do so adequately.

## B. THE USITC'S ANALYSIS

23. The US claim that there is "overall coincidence" is misplaced. This claim rests on two broad generalizations: imports from China increased over the period and domestic industry injury factors generally declined. The United States views these two overarching trends as proof that the increases in imports caused injury to the domestic industry. This is incorrect as a factual matter – there is no "overall coincidence." This claim is simply part of the US attempt to focus on the overall period to obscure any assessment of the more specific year-to-year changes and the magnitude of those changes that would answer the question whether a causal link actually exists between rapidly increasing imports and alleged injury. The purpose of the causal analyses developed over time by WTO jurisprudence is to assess whether increases in imports actually caused injury. Although these analytic tools were developed under other trade remedies, they apply with equal force here.

### 1. The USITC failed to assess adequately conditions of competition

24. An analysis of the conditions of competition is required under Article 16. Going against the jurisprudence of the Appellate Body, the US argument hinges on the use of the word "or" in "or under such conditions of competition" in the English version of Article 16.1. The French and Spanish texts of Article 16.1, however, use the terms "et" and "y." This conjunctive use is also consistent with Article 2.1 of the *Agreement on Safeguards*, which uses "and" in all three languages. The best way to reconcile the texts is to apply the conjunctive interpretation of the term "or" in the English text of Article 16. The United States has completely reinvented its argument on this issue. In the US First Written Submission, the United States wholly relied on the language of Article 16.1 when arguing that a conditions of competition analysis was not required. Faced with the linguistic differences in the different texts, however, the United States has abandoned this argument entirely, and now tries to relegate Article 16.1 to an irrelevant status, dealing only with "consultations."

25. The United States attacks the attenuated nature of competition between imports from China and domestic tyres. Its arguments are misplaced. The bulk of the US efforts are spent on criticizing China's claim that subject imports are absent in approximately 74 per cent of the US tyre market. China stands by this figure, especially in light of the weak evidence offered by the United States to rebut it. The United States claims that the data is "belied by the very article China cites" – yet China cited no article for this data, but rather relied on the reporting on US producers discussed in the USITC Determination. The point of the estimate was to convey the order of magnitude to which competition was attenuated. Even based on the numbers offered by the United States and the article it now relies upon, there is still no competition in roughly half of the US market. Attenuated competition for about half of the market dramatically reduces the likelihood of imports from China being a "significant cause" of material injury to the domestic industry. If it is important to understand precisely how much overlap actually occurred based on the data before the USITC, the Panel should ask the United States for this information.

26. The USITC made unsupported inferential leaps in finding competition and equating this with a significant causal relationship. The USITC stated there was competition in the OEM market despite the fact that in 2008 imports from China made up just 5 per cent of the market, US tyres made up over 50 per cent, and imports other than China made up the remaining 45 per cent of the market. The United States continues to maintain that such a finding is "consistent with the record." Even if these facts are consistent with the record, the Protocol requires investigating authorities to provide a reasoned and adequate explanation of why subject imports are a "significant cause" of injury. When imports occupy such a negligible portion of a market – such as the 5 per cent here – the authority must

then explain adequately how the imports could nonetheless be a "significant cause" of injury, or how they could be having a significant competitive effect. This USITC did not do so.

27. The US argument on the significance of the "interchangeability" of imports from China and domestic tyres is incorrect. There was highly attenuated competition in this case, driven by market segmentation. The bulk of US tyres were in tier 1 of the replacement market, while the bulk of imports from China were in tier 3. The fact that, in response to a generic question, some market participants reported that imports from China and domestic tyres were "interchangeable," presumably within a segment, does not mean that they were "interchangeable" across segments. Indeed, as US Exhibit-29 itself states, "Most of the flagship brands held their own because they *don't compete* against low-cost radials." Market divisions remain an important condition of competition and competition remains attenuated.

**2. The USITC failed to assess adequately whether there was temporal coincidence between imports and injury**

28. When examined properly, the ten factors assessed by the USITC demonstrate the lack of coincidence between rapidly increasing imports and injury. The US assertion that the "evidence established a clear overall coincidence" is incorrect. The Appellate Body has explained that "coincidence" analysis plays a "central" role in determining whether or not a causal link exists between imports and injury. The United States claims that such a requirement is linked solely to the specific text of the *Agreement on Safeguards*. This attempt to ignore the logic that motivated the Appellate Body's findings ultimately fails. The Appellate Body stated such an analysis was necessary because movements in imports should correspond with movements in injury factors when assessing whether imports caused injury. This logic applies whether imports are required to be "increased" or "increasing." Whether or not such an analysis is ultimately required under the Protocol, it is the analysis that the USITC conducted. The United States claims the USITC made a "finding" of "clear overall 'coincidence.'" This finding must be reasoned and adequate. It is not.

29. An adequate coincidence analysis would compare year-over-year changes in injury factors to year-over-year changes in subject import levels to assess whether coincidence in fact exists. In contrast, the US argument focuses on two simple facts. The fact that imports from China increased in "every year of the period" and the fact that several of the injury factors had "overall declines" for the five-year period. The United States treats this combination as somehow establishing coincidence. This is not a coincidence analysis but rather a simplistic juxtaposition of two sets of data. A proper coincidence analysis requires an assessment of the "relationship between the movements" of imports and the movements of injury factors. The fact that, in general, imports increased over the period and that, in general, injury factors declined over the five-year period is not a coincidence analysis, much less an adequate one.

30. The United States stresses that imports increased "in every year of the period" and certain injury factors "declined in every year of the period." The only way for these statements to be significant in a proper coincidence analysis, however, is for the degree of the respective annual increases to correspond generally with the degree of the respective declines in injury factors. The orders of magnitude are key. If correlation exists between imports and injury, the varying degrees in annual import increases should be reflected in varying degrees of annual declining injury indicators. Yet the US coincidence analysis never addresses the relationship between the magnitude of import increases and the magnitude of injury indicator decreases. This failure renders its coincidence analysis inadequate.

31. Because of this failure, China offered an overall assessment of factors for the critical 2006 to 2007 and 2007 to 2008 periods. The analysis presented allows the Panel to test the US theory over the most recent period. These results demonstrate a complete lack of coincidence over the critical

2006 to 2008 period. An assessment of the ten injury factors over that period clearly reveals this lack of coincidence:

- *Prices*: Prices rose significantly across the period, and indeed rose at their highest rate during the 2006-2007 period when imports from China grew at their fastest rate of the period.

- *Production*: Production fell by its lowest rate of the period when imports grew at their fastest rate in 2006-2007, and subsequently fell by its highest rate of the period when imports grew at their lowest rate in 2007-2008.

- *Net Sales*: Net sales in volume decreased during the large increase in imports in 2006-2007 but this decrease more than doubled, at its fastest rate of the period, when imports only slightly increased in 2007-2008.

- *Market Share*: Market share in value decreased by less than 2 per cent during the large increase in imports in 2006-2007 but then decreased by over 2 per cent when imports only slightly increased in 2007-2008.

- *Operating Profits*: Operating profits increased by the highest rate of the period during the large increase in imports in 2006-2007 whereas they decreased by the highest rate of the period when imports only slightly increased in 2007-2008.

- *Productivity*: Productivity saw an increase during the large increase in imports in 2006-2007, but experienced a decrease when imports only slightly increased in 2007-2008.

- *Capacity Utilization*: Capacity utilization significantly increased during the large increase in imports in 2006-2007, yet significantly decreased when imports only slightly increased in 2007-2008.

- *Employment*: Employment experienced a modest decrease during the large increase in imports in 2006-2007, yet decreased much more so when imports only slightly increased in 2007-2008.

- *Capital Expenditures*: Capital expenditures rose across the period, experiencing an increase both during the large increase in imports in 2006-2007 and when imports only slightly increased in 2007-2008.

- *Research and Development*: Research and development trended upward over the entire period, and increased strongly during the large increase in imports in 2006-2007 but decreased when imports only slightly increased in 2007-2008.

32. These ten factors reveal a complete lack of coincidence. The largest increases in imports from China occurred from 2006 to 2007. Therefore, under the US theory – and a proper coincidence analysis – one would expect the largest adverse impact on injury factors. Yet the record shows that many factors, such as prices, net sales values, and operating profits, went up. Subsequently, because there was only a small increase in imports from China from 2007 to 2008, one would expect there to be the smallest adverse impact on injury factors. Again, the opposite of the US theory is true. Production fell by more than four times the rate from the prior year, and net sales dropped by over double. Thus, over both of these periods, the record strongly contradicts the USITC finding and US argument of "overall coincidence." There is no meaningful correlation in this case.

### 3. The USITC failed to consider adequately alternative causes or engage in a weighing of causes to determine whether increasing imports were a "significant cause"

33. Due to the conditions of competition in the US tyre market and the lack of correlation, it was particularly important for the USITC to assess the alternative causes in this case. It did not do so adequately. The US argument that the Protocol does not require a "non-attribution" analysis is inconsistent with the repeated US attempts to isolate Article 16 from the *Agreement on Safeguards*. Declines in demand and a shift in business strategy had a considerable effect on the US tyre industry over the period investigated. Yet the USITC chose to dismiss these factors, invoking the low US statutory standard that it need not engage in any "weighing of causes." The USITC cannot determine whether or not imports from China were a "significant" cause of injury without seriously assessing other causes.

34. The United States asserts that the "ITC did investigate, consider, and analyze all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury." There are two problems with this statement. First, the USITC never made a finding that other causes did not "break the causal link between imports and material injury." Second, whether or not alternative causes "break the causal link" is not the only issue. Even if other factors do not completely sever the causal link, the issue remains whether – in light of the degree of impact of other causes – subject imports can still be considered a "significant cause" of material injury. The US argument reads "significant" out of Article 16.

35. The analysis employed by the USITC regarding alternative causes is inadequate. In assessing changing demand, the United States claims the USITC "found that demand trends did not break the causal link." Such a finding was never made expressly. The USITC gave only passing attention to changes in demand and failed to account for the essentially 1:1 correlation between declining demand in 2008 and the fall in US shipments. There was a broader trend of declining consumption over the entire period. US production was logically hurt more by declines in demand than imports from China due to contractions in the OEM market.

36. In assessing US producers' new business strategy, the US failure to note that imports from China were increasing before plant closures, or that US producers imported nearly one out of every four of the tyres from China, renders this assessment incomplete. This strategy was a positive factor for domestic manufacturers. In the face of testimony and evidence concerning industry restructuring which predated the arrival of imports from China, cursory treatment of this issue is insufficient. The defects of the USITC analyses of conditions of competition, coincidence, and alternative causes reinforce each other. The defects in one of these analyses might be less problematic if the USITC had provided a very compelling analysis of the other two analytic tools but the USITC provided insufficient analyses under all three.

## V. THE WTO-INCONSISTENT US TARIFF REMEDIES

37. The requirements for applying a transitional product-specific safeguard under Article 16 have not been met in this case and thus no remedy was appropriate. Even if the United States had complied with the other requirements of Article 16, the tariffs imposed were still overbroad and inconsistent with the Protocol. Articles 16.3 and 16.6 require that any remedies imposed must be "only to the extent necessary" and only for "such period of time" as may be necessary to prevent or remedy market disruption. Imports cannot be held responsible for the entire downturn experienced by the domestic industry, and the remedy cannot seek to address that entire downturn.

38. The United States never took into account what "extent" was necessary to remedy the alleged market disruption. Without determining the amount of injury that imports from China allegedly caused, the remedy could not be tailored to address only that harm being caused by those imports. After China's *prima facie* showing of this, the US defence has been insufficient. The Panel has asked

the United States how it determined the calculated reduction in imports from China "would address the market disruption found to exist." The US response avoids the question and simply provides quotations from the USITC remedy recommendation. This does not explain how reductions address the extent of the market disruption. The only elaboration provided in the Presidential Determination, now cited by the United States, is that: "The President's determination is a response to a *surge* of tire imports from China that has disrupted the domestic market." It is odd that now the United States opposes references to "surges" and insists that the use of "rapidly" does not imply one. Stating that there is a reduction is not an explanation of why the reduction is taking place, much less why the tariff rates were imposed. Quotes from the USITC determination and copies of staff economic models are not adequate. Overbroad and unexplained remedies are not permissible under Article 16 of the Protocol.

## VI. CONCLUSION

39. The circumstances of this dispute are unique as it does not involve allegations of unfair trade. Article 16 provides a limited fair trade remedy to safeguard the interests of the "domestic producers" in the face of import surges. Yet here, the USITC Determination applied a remedy where the domestic producers did not support the petition, stated that they were not injured by Chinese imports, and said that they had no plans to change their operations if a remedy was imposed. The United States gave the domestic producers a remedy not justified in Article 16, which they never asked for and did not need.

# ANNEX F-2

## EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

### I. PANEL MUST REJECT CHINA'S INTERPRETIVE APPROACHES

1. China accuses the United States of "hiding" behind an "extreme interpretation" of paragraph 16 so as to "forestall" any evaluation of the ITC's determination. However, our interpretation is simply one that asks the Panel to interpret the plain meaning of the Protocol in a manner consistent with the customary rules of treaty interpretation, as required by DSU Article 3.2. There is nothing extreme or extraordinary about this approach.

2. Rather than focusing on the text, China seeks to convince the Panel that the transitional mechanism can only be understood in relation to the Safeguards Agreement and that the Panel must exercise a higher level of scrutiny. China's basic theory seems to be that anything called a "safeguard" measure must by necessity have the Safeguards Agreement as the "default mode." China argues that anything that is not expressly set out in the Protocol must by necessity be "filled in" by reference to the disciplines of the Safeguards Agreement. Nothing in the text of the Protocol, the DSU, or the customary rules of treaty interpretation support this approach.

3. China argues that the Safeguards Agreement is the "parent" of a transitional measure under the Protocol, because the Safeguards Agreement is the only other place in the WTO agreements where the term "safeguard" is used. However, other WTO agreements contain safeguard provisions. There may well be a general concept of "safeguards" in the framework of international trade rules, but this does not mean that there is a necessary link between the Safeguards Agreement and the transitional mechanism of the Protocol. Such a link would have had to be established in the text of the Protocol itself. It was not. References in the Protocol to the Committee on Safeguards and the fact that paragraph 16.1 of the Protocol sets out that China and the affected WTO Member may discuss whether the affected Member should pursue application of a measure under the Safeguards Agreement do not support China's theory either.

4. China argues that our position regarding the Safeguards Agreement is internally inconsistent because we reference panel and Appellate Body reports regarding that Agreement. It should be clear that China's own argumentation has led us down this path. While it is axiomatic that panel and Appellate Body reports create legitimate expectations among WTO Members, those reports are not binding, *except with respect to resolving the particular dispute between the parties to that dispute*. While the reasoning contained in reports may create legitimate expectations, it does not create binding interpretations even with respect to the agreement at issue in the particular dispute. There is nothing that requires the Panel to consider panel and Appellate Body reports regarding the Safeguards Agreement.

5. According to China, the negotiating history of the Protocol provides no meaningful interpretive guidance, but confirms the relationship between the Safeguards Agreement and the transitional mechanism. On the contrary, a quick review of the documents in the WT/ACC/SPEC/CHN series confirms our reading of the Protocol. China alleges that these documents only demonstrate that the result was a "hybrid" or compromise. Those documents show

China sought, but failed, to have the Safeguards Agreement apply to the Protocol, except as otherwise provided in the Draft Protocol. To achieve what China hoped for, the negotiators would have had to include language to that effect in the Protocol, as they did with respect to other WTO disciplines, for example, in paragraph 15 of the Protocol. The lack of any similar language in paragraph 16 demonstrates China did not prevail.

## II. THE PANEL SHOULD APPLY THE STANDARDS CONTAINED IN THE PROTOCOL

6. Unlike China's attempt to unilaterally create standards unsupported by the plain text of the Protocol, the standards are clear from the plain meaning of the text at issue. Paragraph 16.1 sets forth the general conditions under which a Member is authorized to seek consultations with China. The obligations regarding the ITC's market disruption determination are found in paragraph 16.4. While paragraph 16.1 provides context for interpreting paragraph 16.4, it does not set out a general obligation with respect to the market disruption determination. Since China is not arguing that the United States acted inconsistently with respect to consultations, there is no basis to find any inconsistency with paragraph 16.1.

7. Paragraph 16.5 of the Protocol provides important context for interpreting the substantive obligations. Paragraph 16.5 provides that the Member imposing a measure must provide written notice of the decision, "including the reasons for such measure." This can be properly interpreted to mean that a Member must provide a reasoned explanation for its market disruption findings. China did not raise a claim under paragraph 16.5, so any specific findings under paragraph 16.5 would be beyond the Panel's terms of reference. However, it would be equally improper to impose a higher procedural standard than is provided in paragraph 16.5. This is precisely what China has tried to persuade the Panel to do by arguing that the same "standard of review" used in the Safeguards Agreement must be used here.

8. Paragraph 16.4 sets out the standards that must be satisfied to make a finding that market disruption exists. The first sentence of paragraph 16.4 explains that the Member must find: (1) that imports are increasing rapidly, either absolutely or relatively; (2) so as to be a significant cause; (3) of material injury or threat thereof. The Panel is expected to assess whether the ITC reasonably found that imports from China were "increasing rapidly, either absolutely or relatively" over the period of investigation. "Rapid" is defined as "progressing quickly; developed or completed within a short time." Thus, the Panel should assess whether the ITC reasonably concluded that the growth in Chinese imports had "progressed quickly" over the period of investigation." The ITC's finding was fully consistent with this standard.

9. The Protocol also requires the ITC to determine that Chinese imports are "a significant cause" of material injury to the industry. Since the word "significant" is defined as meaning something that is "important," "notable" or "consequential," the Panel should assess whether the ITC reasonably concluded that imports from China were a "notable" or "important" cause of material injury. Since the ITC has consistently stated that it must assess whether there is a "direct and significant causal link" between the Chinese imports and material injury, the ITC's analysis is again consistent with the requirements of the Protocol.

10. The second sentence of paragraph 16.4 directs a Member to evaluate "objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products." The Protocol does not otherwise provide specific guidance on how the Member should conduct this analysis. Accordingly, a Member has the discretion to adopt and utilize reasonable analytical approaches to perform its analysis. Thus, the Panel should assess whether the ITC's analytical approach in its investigation is consistent with the Protocol and whether the ITC reasonably

addressed the three factors specified in paragraph 16.4. The ITC's analytical approach in this investigation satisfies this standard.

11. The charts in our submissions make it abundantly clear that imports of tyres from China increased rapidly on both an absolute and a relative basis. The increases were rapid and sustained, and occurred in every year of the ITC's five-year period of investigation. Moreover, the largest increases, in relative terms, occurred in the last two years of the period.

12. China contends that imports showed the "smallest rate [of increase] of the period" in 2008. This is incorrect. Measured relative to consumption or to production, the increase in imports in 2008 was the second highest annual increase of the period. China attempts to obscure this fact by comparing the increase in 2008 to the average annual increase for the preceding four years, which includes the large increase in 2007. Of course, the average increases cited by China are skewed significantly upwards by the enormous increase in imports that occurred in 2007.

13. China's argument that the Protocol contains a stricter "increased imports" standard than the Safeguards Agreement is untenable. Among other things, the language of the Protocol links the issue of rapidly increasing imports to material injury, which is a lower standard of injury than the serious injury standard under the Safeguards Agreement. Paragraph 16.4 provides the increase in imports must be rapid enough "so as to be a significant cause of material injury, or threat of material injury" to the industry. The Appellate Body's report in *US – Steel Safeguards* provides support for recognizing this linkage. A lesser injury standard means that a smaller increase in imports may be sufficient to cause material injury than to cause serious injury.

14. China attempts to deny this linkage. It claims that, in *US – Steel Safeguards*, the Appellate Body was linking increased imports only to causation and not to serious injury. However, the Appellate Body explained that "whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten to cause serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., the consideration of serious injury/threat and causation)." China, citing only to paragraph 16.1, also claims that "the Protocol does not link "increasingly rapidly" to "material injury," but rather to "market disruption." China overlooks the fact that the linkage between increasing imports and injury is clear in paragraph 16.4, which states that imports must be rapid enough "so as to be a significant cause of material injury."

15. China argues that the "increasing rapidly" standard in paragraph 16.4 is distinct from the "in such increased quantities" standard in paragraph 16.1 and that paragraph 16.4 imposes an additional and different requirement. The "increased imports" language of paragraph 16.1 and the "rapidly increasing" imports language of paragraph 16.4 relate to the very same issue, that is, the issue of whether increased imports from China have caused market disruption. The only reasonable way to interpret the two phrases is to do so in a manner that reconciles their meaning.

16. The need to seek interim period data depends on the nature and complexities of an investigation, including the length of time between the filing of the petition and the end of the interim quarter, and the number of parties from whom data must be sought. In this case, only 20 days had elapsed since the end of that quarter when the petition was filed, and information would have had to have been collected from approximately 80 US producers, importers and foreign producers. The ITC reasonably concluded that "a relatively complete data series for that period would not have been available in time for use in this investigation."

17. China continues to portray the ITC's decision not to collect interim data as inconsistent with its practice. Aside from the fact that the issue here is consistency with a Member's obligations under paragraph 16 rather than consistency with a Member's domestic practice, we have shown that there was no merit to China's argument. In *almost all* of the cases cited by China in which interim data was

collected, the period of time that elapsed since the end of the quarter was longer than 20 days. China also claims that seeking interim data cannot be burdensome on responding firms because businesses commonly collect quarterly data. While this may be true, the question is how soon after the close of a quarter all of this data has been compiled by all of the firms involved. Nothing in paragraph 16 imposes the standard that China seeks, and we wonder if the obligation China would like to read into the Protocol is one that could be met by all Members.

## III. CHINA HAS NOT CARRIED ITS BURDEN ON ITS "AS SUCH" CLAIM

18. China remains unable to explain exactly why the ordinary meaning of the words "cause" and "contribute" show that the US statute's causation standard supposedly "weakens" the "significant cause" standard of the Protocol. China has failed to address the language in the Protocol providing that Chinese imports may be "**a** significant cause" of material injury, which is language establishing that Chinese imports can be one of several factors "contributing significantly" to material injury. Finally, China has not seriously explained why the Appellate Body's statement in *US – Wheat Gluten* that a factor can be a "cause" of injury if it "contribute[s] to "bringing about, "producing," or "inducing" that degree of injury does not provide helpful guidance here. China has failed to carry its burden on this issue.

19. China claims the US arguments "rest fundamentally on the assertion that, because Article 16 of the Protocol does not define [the phrase 'significant cause,'] the United States may adopt its own 'methodologies or standards' to determine whether imports from China are a significant cause of material injury." However, the US "fundamental" point is that the terms "a significant cause" and "contribute significantly," as used in the Protocol and the US statute, have the same meaning and scope.

20. China asserts that the United States has argued that the "significant cause" standard is clearly lower than the "genuine and substantial" standard under the Safeguards Agreement and the causation standard of the Antidumping and Subsidies Agreements. However, the United States has taken no position with respect to the relationship of the "significant cause" standard of the Protocol to the "causal link" standard of the Antidumping and Subsidies Agreements. The United States has consistently explained that it would not be useful for the Panel to try to determine whether the "significant cause" standard of the Protocol is the same as, or lower than, the "genuine and substantial" standard under the Safeguards Agreement.

21. Finally, China continues to argue that the United States believes a Member may find Chinese imports to be a cause of material injury if they make a "mere" or "minimal" contribution to injury. The United States has never indicated this. Instead, the US statute specifically requires the ITC to determine that Chinese imports "contribute significantly" to the material injury being suffered by the industry. The ITC itself has consistently stated the US statute requires a "direct and significant causal link" between Chinese imports and material injury, and that a "minimal" or "unimportant" contribution to injury does not satisfy the "significant cause" standard of the statute. China's arguments are unfounded.

22. China also continues to argue that the language of the US statute which provides that Chinese imports "need not be equal to or greater than any other cause" "allows an investigating authority to determine that even a minimal cause .. could still be considered as a 'significant cause.'" This is not the meaning of this statutory phrase. This language makes clear that imports from China need not be the most important cause, or equal in effect to the most important cause, of material injury to the industry. This is consistent with the Protocol, which does not require that imports be the sole, primary, or most important cause of injury.

23. China also asserts that the legislative history of section 406 – which was the model for the causation standards included in the Protocol and section 421 – indicates that the US statute weakens the causation standard of the Protocol, because it states that the "term 'significant cause' is intended to be an easier standard to satisfy than that of the 'substantial cause,'" standard of section 201, the US global safeguards statute. China has neglected to mention that the "substantial cause" standard of section 201 contains an additional element that necessarily makes it higher than section 406's "significant cause" standard. In section 201, the Congress defines "substantial cause" to mean "a cause which is important and not less than any other cause" of serious injury to an industry. As the ITC has consistently explained in its global safeguards determinations, this standard means that, under section 201, "increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause." Under section 201, the ITC must determine that imports are both an important cause of injury to the industry and are a cause of serious injury greater than, or equal to, any other single factor injuring the industry in an important way.

24. Section 406's "significant cause" standard is not considered lower than the section 201 standard because the term "significant cause" somehow has an inherent meaning that connotes a lower causal link standard than "substantial cause." Section 406's standard is lower than section 201's standard because section 406 does not require the ITC to conclude that the injury caused by the subject imports is greater than or equal to the injury caused by any other factor injuring the industry. Instead, section 406 requires the ITC to find only that the subject imports are a significant cause of material injury or threat to the industry. It should be very clear now why China would now like to disavow its statement at the first Panel meeting that the causation standard of section 421 was "derived from" the standard contained in section 406.

25. Finally, China now asserts that it "strongly doubts" that, in *US – Wheat Gluten*, "the Appellate Body was focused [in that statement] on the particular meaning of the word "contribute" and how this might relate to other formulations in relation to causation." In that report, of course, the Appellate Body stated that the words "cause" and "causal link" indicate that a factor can be a "cause" of the requisite level of injury if it "contribute[s] to "bringing about, "producing," or "inducing" that degree of injury. China's reading of this language is mistaken. The Appellate Body's analysis focused precisely on whether the word "cause" meant that a factor could "contribute" to the requisite level of injury under the Safeguards Agreement.

## IV. THE ITC'S CAUSATION ANALYSIS, AS APPLIED, WAS CONSISTENT WITH THE PROTOCOL

26. China continues to challenge the ITC's finding that Chinese and US tyres were competing significantly in the market. China contends the replacement market consisted of three separate tyre categories where there was little competition between the US and Chinese tyres, claiming that imports from China were allegedly absent from 74 per cent of the market.

27. The record showed that, while most market participants agree the replacement market could be divided into three general categories, there was no consensus among producers, importers, and purchasers on how to define the three categories or on the tyre brands that were included in the three categories. The record showed there was competition between the Chinese and US tyres within the three tiers of the US tyres market. In 2008, at least 18.6 per cent of the US industry's shipments of tyres were made in category 3 of the replacement market, the category where the largest percentage of the Chinese tyres were sold. Moreover, in category 2, the quantity of Chinese shipments was 64.3 per cent of the quantity of China's shipments in category 3. The record also showed Chinese imports held five per cent of the OEM segment by the end of the period and were sold in category 1 of the market as well. There clearly was competition between US and Chinese tyres in all segments of the market. The dissenting Commissioners agreed with the majority that there was significant competition within

the tier 2 and 3 categories of the market. The record showed that the large majority of market participants reported that Chinese imports and US tyres were always or frequently interchangeable.

28. China continues to make the claim that there was no coincidence whatsoever between increasing Chinese import volumes and declines in the industry's condition. However, the record shows a direct correlation between the consistent growth in Chinese imports over the period and significant declines in the industry's market share, capacity, production, shipment quantities, net sales quantities, profitability, capacity utilization, productivity, and employment levels.

29. It is possible that China continues to believe there was no coincidence in trends because of its mistaken understanding of the record. China continues to make the incorrect claim that "the various injury factors typically showed a substantial improvement in 2006-2007, when imports from China were at their highest level of the period ....". China's argument is incorrect. First, and perhaps most important, Chinese imports were not at their highest level in 2007. They were at their highest level in 2008, which is when the US industry experienced very significant declines in its condition. Second, it is not true that the industry's overall condition improved substantially in 2007. The industry may have experienced improvements in its profitability and capacity utilization levels in that year, but it also experienced significant declines in its market share, capacity, production, sales, shipments, and employment levels in that year as well.

30. China also claims incorrectly that there was no coincidence in trends between increasing import volumes and industry declines in 2008, because "industry conditions were at their worst while the rate of increase in imports was the lowest of the period." Again, this claim is mistaken. First, the increase in Chinese imports in 2008 was not the lowest of the period. The increase in Chinese imports in 2008 was actually the second highest of the period in relative terms, and was only lower than the increase in 2007, which is when Chinese imports grew at a very rapid rate. Moreover, Chinese imports were at their absolute highest levels of the entire period in 2008, and were 10 per cent higher than 2007. The increase in 2008 was, indeed, significant in that year. Second, in 2008, as subject imports increased by more than 10 per cent over the already high levels of 2007, virtually every injury indicator for the industry fell.

31. China argues that the United States is required to use a "coincidence of trends" analysis to establish the necessary causal link between imports and material injury. A "coincidence of trends" analysis is not required by the specific text of the Protocol. It is also not the only causation approach permitted under the Safeguards Agreement, the source of China's reasoning. Under the Safeguards Agreement, even if there is no "coincidence of trends" between imports and declines in the industry's condition, a Member can establish that there is a causal link between imports and injury by providing a compelling explanation of why a causal link exists.

32. China has failed to carry its burden of establishing that several of the other factors allegedly causing injury actually caused such injury during the period of investigation. China has offered no evidence to establish its claim that factors like "automation for increased productivity," "higher gasoline prices resulting in less driving," "strikes and labor actions," "U.S. tire producers' high legacy costs," or "equipment restraints" actually injured the industry .

33. China's assertions that the ITC failed to adequately address the impact of demand on the industry's condition in 2008, or the impact of demand changes during the rest of the period do not withstand scrutiny. Specifically, the ITC considered whether declines in the industry's condition in 2008 were caused by the demand declines that occurred in the second half of 2008 due to the economic recession in that period. The ITC acknowledged that apparent US consumption fell in 2008 but also pointed out that the shipments of Chinese continued to grow during that market contraction. In contrast, non-subject imports declined in 2008 by 6.1 per cent, roughly equivalent to the decline in apparent consumption, and that the industry's production levels fell by 11 per cent in that year. This

meant that the industry "absorbed virtually all the decline in US apparent consumption in that year." It was not reasonable for the industry to absorb all of the demand decline in that year while China's imports continued to grow.

34. China also claims demand declines caused the declines in the industry's production, shipment and sales volumes in other years of the period. Again, China misstates the record. Between 2006 and 2007, for example, the industry's production, shipment and sales quantities all declined significantly, even though apparent consumption increased by 1.6 per cent in that year. Similarly, when demand declined in 2005 and 2006, the declines in apparent consumption were considerably smaller than the overall declines in the industry's production, shipments and sales quantities in each of those years. Thus, the record shows that, throughout the period, Chinese imports entered the market in increasingly significant volumes and took market share from the industry, causing significant declines in the industry's production, shipment and sales levels, whether or not demand was increasing or declining.

35. China asserts that the declines in the industry's market share, production, shipment, and sales quantities over the period had nothing to do with the growing influence of Chinese imports but were the result of the industry's decision to voluntarily abandon the lower-end tyre market. The ITC addressed this issue in detail in its determination and concluded this theory was not particularly persuasive. The record showed that Chinese imports were increasing considerably before Bridgestone, Continental, and Goodyear announced the significant plant closings in 2006 and 2008. By 2006, Chinese imports had increased their market share by 4.6 percentage points over the market share levels seen in 2004, and occupied 9.3 per cent of the market by the end of 2006. Indeed, in March 2006, an industry publication reported that "the overall effect [of Chinese imports] on domestic supply [had been] 'profound'" and predicted that the impact of China on the market was "likely to remain so as imports increase."

36. China points to the Appellate Body's statements in *US – Cotton* to claim that the ITC is required to address in detail the injurious effects of other factors. We would like to make several points. First, in *US – Cotton*, both the Appellate Body and the Panel acknowledged that the "serious prejudice" provisions of the Subsidies Agreement, do not "'contain the more elaborate and precise 'causation' and non-attribution language' found in the trade remedy provisions of the [Subsidies] Agreement," the Antidumping Agreement and the Safeguards Agreement. As the Panel indicated, the "absence of such detailed language, which exists elsewhere in the covered agreements, ... may be taken as a demonstration that the drafters knew how to craft a precise causation standard when they deemed it appropriate." Moreover, the Appellate Body stated, the absence of non-attribution language "suggests that a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect of a subsidy is significant price suppression under Article 6.3(c)" of the Subsidies Agreement. This is exactly what the United States has argued here. The Protocol does not contain the same non-attribution language as that set forth in the Subsidies Agreement, the Antidumping Agreement, or the Safeguards Agreement. As a result, a Member is not required to perform the specific and detailed "non-attribution" analysis the Appellate Body has found under those Agreements. Instead, a Member has discretion to adopt an appropriate and reasonable analysis to assess the effects of other factors, which will depend on the facts and circumstances of the particular case. The *US – Cotton* findings are not inconsistent with the US position on this issue.

37. Second, we would note the Appellate Body affirmed the Panel's consideration of four significant other injury factors in *US – Cotton*. In its analysis, the Panel addressed each of four factors and concluded that none of the factors "attenuate the genuine and substantial link that we have found between" the US subsidies and significant price suppression. On review, the Appellate Body confirmed that the Panel adequately addressed the possible effects of these factors and reasonably concluded that they did not sever the causal link between the subsidies and price suppression. The ITC's analysis of demand and alleged business strategy was at least as detailed as the Panel's

consideration of other factors in *US – Cotton*. China has little basis for claiming that the ITC's analysis of these issues was inadequate under the Protocol.

## V. CHINA'S REMEDY CLAIMS ARE UNFOUNDED

38. Aside from China's argument that the remedy imposed is inconsistent with paragraphs 16.3 and 16.6 because the United States did not have the right to impose a measure in the first place, China's main argument seems to be that the United States did not explain or justify how it met the requirements of paragraphs 16.3 and 16.6 at the time the measure was imposed. China's first arguments fails once the United States demonstrates that its market disruption determination meets the requirements of the Protocol. China has not made a *prima facie case* of why the US measure is inconsistent with paragraphs 16.3 and 16.6. China's alternative argument is nothing more than an improper attempt to shift the burden of proof and must be rejected.

39. Neither paragraph 16.3 nor paragraph 16.6 require that the Member provide a justification at the time the measure is imposed. Paragraph 16.5 provides context confirming that no such obligation to explain exists. According to paragraph 16.5, a Member has to provide written notice, including the reasons for the measure and the measure's scope and duration. Paragraph 16.5 does not require that the Member explain how the scope and duration meet the requirements of paragraphs 16.3 and 16.6 at the time the measure is imposed. Even, if it did, China did not raise a claim under paragraph 16.5. Therefore, to the extent that China's claims under paragraphs 16.3 and 16.6 are that the ITC did not sufficiently explain, China's claims must fail. For the same reason, China's arguments that the United States is limited in its explanations to what is in the ITC report, is without basis.

40. China has conceded that paragraph 16.3 does not require the investigating authority to "separate and distinguish causes" and that there "is no specific obligation to quantify" injury. The United States agrees. Given China's acknowledgment that paragraph 16.3 does not require a quantification of injury, it is puzzling that it argues that the obligation "limits the extent of any such safeguard measures to 'such' market disruption, which is limited to that disruption properly attributed as having been significantly caused by rapidly increasing imports from China." It appears that China is arguing that the word "such" implies some form of quantification. However, the plain meaning is that "such market disruption" merely refers to the fact that an investigating authority must have found there to be market disruption. Nor can a quantification requirement be found in the phrase "to the extent necessary." We note that the word "necessary" is linked to "prevent or remedy". The need for relief is what makes the measure necessary. A measure under the transitional mechanism is permissible if it remedies the material injury caused by rapidly increasing imports from China.

41. A Member that has determined there is market disruption will seek to determine the range of effects from various remedy options. The Member will want to know at which level relief would be ineffective because it would not limit imports enough to remedy the market disruption found to exist. On the other hand, to the extent that there may have been other causes at play, the remedy should not aim to prohibit all imports from China. A Member is likely to end up with a range of remedy options.

42. China has not argued - because it can not - that the additional tariffs are prohibitive. The ITC, in its remedy analysis and recommendation, rejected petitioner's proposed remedy because its effect would be higher than necessary to remedy the market disruption. In addition, the measure actually imposed by the United States was 20 percentage points lower than the ITC's recommended measure for the first year, to be reduced by five percentage points on the second and third years. Therefore, the expected effect should be less and lessen over the duration of the remedy. China has not provided any evidence of how the measure is inconsistent with paragraph 16.3. To the extent China's argument is that the United States did not explain how its measure met the requirements of paragraph 16.3, there is no such requirement. Therefore, China's claim under paragraph 16.3 must fail.

43. China argues that because the ITC did not quantify the effect Chinese imports were having it is "virtually impossible for a remedy to comply with Article 16.6's requirement." China has conceded that there is no requirement to quantify with respect to paragraph 16.3, and we understand this to apply with respect to paragraph 16.6 as well. Therefore, it is not clear why a failure to quantify could mean there has been a violation of paragraph 16.6.

44. The first sentence of paragraph 16.6 is drafted in terms of how long a Member "shall apply a measure." This confirms an interpretation that this first sentence is not intended to require precision at the time the measure is imposed, but that there has to be a limit and that at such time as the measure may no longer be necessary, it will be removed. This is further reinforced by the next two sentences of paragraph 16.6. These sentences allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. These indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tyres. Indeed, they could remain in place even longer, except that the Member imposing the measure would be subject to retaliation by China. China has tried to dismiss these provisions as "rights that China has under certain circumstances," but that does not diminish their utility as context for the first sentence of paragraph 16.6 or as an indication of the expectations of the negotiators of the Protocol.

45. China has not made any arguments or provided any evidence that the measure has been in place for longer than necessary. Therefore, China's claim under paragraph 16.6 must be rejected.

# ANNEX F-3

## CLOSING STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

1. Good afternoon. The People's Republic of China would like to express its continued appreciation to the Panelists and the Secretariat for their insightful questions and comments at the hearing, and for their careful attention to the facts and issues throughout this dispute.

2. Amid the numerous submissions and argument adduced in this case, one thing is clear: there is no basis in the Protocol or the factual record for the United States' decision to impose punitive tariffs on imports from China. The USITC Determination was a results-oriented exercise, taken within a distinctive political and economic context. The USITC process yielded a determination and remedy that none of the "domestic producers" sought or supported.

3. Much has been said in this case about the interpretation of Article 16. However, in conducting its interpretation, the Panel will not be writing on a blank slate. At the end of the day, both sides agree that the language of Article 16 is dispositive, but that the Panel can and should draw where appropriate on guidance from other provisions of the WTO Agreement – in particular, the *Agreement on Safeguards* – and jurisprudence interpreting and applying those provisions. If one cuts through all of the bluster and rhetoric from the US side concerning how Article 16 is "outside and apart from" the *Agreement on Safeguards*[1], the United States has conceded this key point[2], rendering this entire discussion moot.

4. A key textual addition in Article 16 is the term "increasing rapidly" – which sets a standard that is indisputably more demanding than the "increased quantities" standard in the global safeguards context. Here, when one looks at the most recent period, it is clear that imports from China were not "increasing rapidly," absolutely or relatively. A drop of 39 percentage points in the rate of increase between 2006 to 2007 and 2007 to 2008 confirms that growth in imports was slowing and abating, as does the significant drop in the rate of increase in market share in the same period. These trends are further confirmed by analysis of quarterly data (including interim comparisons) and data from the first quarter of 2009, which show substantial declines in growth rates turning to absolute declines in volume. Far from demonstrating a "rapid" increase, this data indicates a rapid deceleration in imports. Suffice it to say, the USITC addressed none of this in its report, relying heavily on endpoint-to-endpoint statistics that WTO jurisprudence confirms is inadequate.

5. The USITC's causation finding was equally deficient. Both in terms of what it did and did not say, the USITC Determination was inadequate, and on multiple levels. With respect to conditions of competition, the USITC majority attempted to cobble together a causation finding by glossing over the segmentation of the tyre market, which showed that domestic tyres and Chinese imports were largely operating in different segments. Although the United States now attempts to invoke the USITC dissent in support of its arguments, the dissent observed that "*U.S. production is focused on the higher-value, premium branded products and the OEM market, segments in which the subject*

[1] US Oral Statement at the Second Panel Meeting, para. 9.
[2] *See, e.g.,* US Oral Statement at the Second Panel Meeting, para. 11.

*imports are not competing in any meaningful manner*."[3] The presence of imports in tiers 2 and 3 in no way creates a meaningful competitive overlap.

6. The USITC's coincidence analysis was even more inadequate. The USITC majority devoted only a few sentences to this issue, and improperly relied on the mere juxtaposition of endpoint-to-endpoint data. Critically, the USITC majority completely failed to address (even implicitly) the absence of coincidence for the second half of the period. For this crucial period, the USITC did not address the fact that changes in the rate of Chinese imports did not coincide with changes in the ten injury factors under examination. This omission is particularly remarkable when one considers that the absence of coincidence in this period was emphasized by both the dissent and respondents, and compels a finding of WTO inconsistency. Simply put, there can be no "overall coincidence" on this record, and the USITC's finding was neither reasoned or adequate.

7. The USITC also dismissed important causal factors, such as declining demand and changing business strategy, that were plainly driving industry conditions and performance. At a minimum, these and other causal factors were "alternative explanations" of the data that warranted reasoned and adequate analysis by the USITC.[4] It is disappointing that the USITC chose to scapegoat Chinese imports amid these conditions and causal factors, which it essentially dismissed with little or no discussion.

8. Taken either separately or together, the preceding errors rendered the USITC's Determination inconsistent with both Article 16 and the WTO Agreement. The fact that imports were not "increasing rapidly" at the end of the period is itself fatal to the USITC majority's determination. Indeed, past increases in imports cannot establish that imports are either "increasing rapidly" or causing injury in the recent period. Moreover, there was no link between rapidly increasing Chinese imports and the condition of the domestic industry. Again, when imports rose at their highest rate in the period (i.e., 2006 to 2007), the domestic industry had its best performance in the period. When imports rose at their slowest rate and saw a significant decline from the preceding year (i.e., 2007 to 2008), the industry had its worst performance of the period. All of this is at odds with the USITC majority's theory, and none of it was addressed in its report.

9. Accordingly, we respectfully request that the Panel find that the US tariff measures are inconsistent with Article 16 of the Protocol, as well as Articles I:1 and II:1(b) of GATT 1994. Thank you for your time and attention.

[3] USITC Determination, p. 52 (dissenting Commissioners) (emphasis supplied).
[4] Appellate Body Report, *US – Lamb*, para. 106.

# ANNEX G

## REQUEST FOR CONSULTATIONS AND REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA

# ANNEX G-1

REQUEST FOR CONSULTATIONS BY CHINA

**WORLD TRADE ORGANIZATION**

**WT/DS399/1**
**G/L/893**
**G/SG/D36/1**
16 September 2009
(09-4361)

Original: English

**UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA**

Request for Consultations by China

The following communication, dated 14 September 2009, from the delegation of China to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

---

My authorities have instructed me to request consultations with the Government of the United States ("US") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade* ("GATT 1994"), and Article 14 of the *Agreement on Safeguards* with regard to certain measures taken by the US affecting the import of certain passenger vehicle and light truck tires from the People's Republic of China ("China").

This request concerns the restrictions recently announced by the US on imports of certain passenger vehicle and light truck tires from China. These restrictions take the form of substantially higher tariffs over the next three years well in excess of the tariff rates permitted under US international obligations to China. These restrictions were announced on 11 September 2009 by the US authorities following an investigation pursuant to section 421 of the Trade Act of 1974, 19 U.S.C. 2451 et seq. The report by the International Trade Commission issued as part of this investigation can be found at *Certain Passenger Vehicle and Light Truck Tires from China*, Inv. No. TA-421-7, USITC Pub. No. 4085 (July 2009). The decision by the President can be found in the Proclamation issued by President Barack Obama on 11 September 2009. Under this proclamation, these measures are to take effect on 26 September 2009. This request includes both these higher tariffs that have been announced, and any other measures the US may announce to implement this decision.

China considers that these higher tariffs, not having been justified as emergency action under relevant WTO rules, are inconsistent with Article I:1 of the GATT 1994 because the US does not

accord the same treatment it grants to passenger and light truck tires originating in other countries to the like products originating in China.

Nor can the US justify these measures as properly applied exceptions to this fundamental WTO principle. These measures have not been properly justified pursuant to Article XIX of GATT 1994 and the *Agreement on Safeguards*. Nor have these measures been properly justified as China-specific restrictions under the *Protocol on the Accession of the People's Republic of China* (the Protocol of Accession). There are several problems with the US statute and the way in which the US applies its statute.

The US statute authorizing these China-specific restrictions is inconsistent on its face with Article 16 of the Protocol of Accession in that the US statute impermissibly defines "significant cause" more narrowly than required by the ordinary meaning of that phrase as used in Article 16.4 of the Protocol of Accession.

Each of these measures is also inconsistent, as applied, with US obligations under the Protocol of Accession, and the US has therefore not justified invocation of the Protocol in the following respects:

Articles 16.1 and 16.4 of the Protocol of Accession because imports from China were not "in such increased quantities" and were not "increasingly rapidly."

Articles 16.1 and 16.4 of the Protocol of Accession because imports from China were not a "significant cause" of material injury or threat of material injury.

Articles 16.1 and 16.4 of the Protocol of Accession because the domestic tire producers were not experiencing "market disruption" or "material injury," and in fact opposed the investigation and these measures, and stated that the requested relief would not change their plans.

Article 16.3 of the Protocol of Accession because the restrictions are not necessary at all, and are being imposed beyond the "extent necessary to prevent or remedy" any alleged market disruption.

Article 16.6 of the Protocol of Accession because the restrictions are being imposed for a period of time longer than "necessary to prevent or remedy" any alleged market disruption.

China reserves its right to raise further factual issues and legal claims during the course of the consultations, and in any future request for the establishment of a panel.

I look forward to receiving the reaction of your authorities to this request so that we can arrange a mutually acceptable date and location for consultations.

# ANNEX G-2

REQUEST FOR THE ESTABLISHMENT OF
A PANEL BY CHINA

**WORLD TRADE ORGANIZATION**

**WT/DS399/2**
11 December 2009

(09-6454)

Original: English

**UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA**

Request for the Establishment of a Panel by China

The following communication, dated 9 December 2009, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

---

On 14 September 2009, China requested consultations with the United States ("US") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade* ("GATT 1994"), and Article 14 of the *Agreement on Safeguards* with regard to certain measures taken by the US affecting the import of certain passenger vehicle and light truck tires from the People's Republic of China ("China"). This request for consultations was circulated as document WT/DS399/1 – G/L/893 – G/SG/DS36/1 dated 16 September 2009.

Consultations were held on 9 November 2009 in Geneva, pursuant to each of the above-referenced provisions and agreements, with a view toward reaching a mutually satisfactory solution. Although these consultations clarified a few issues relating to this matter, the consultations failed to settle the dispute.

Therefore, China respectfully requests pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, and Article 14 of the *Agreement on Safeguards* that the Dispute Settlement Body ("DSB") establish a Panel to examine this matter.

This request concerns the restrictions announced by the US on imports of certain passenger vehicle and light truck tires from China, and the legal basis for those restrictions. These restrictions take the form of substantially higher tariffs over the next three years well in excess of the tariff rates permitted under US international obligations to China. These restrictions were announced on 11 September 2009 as a presidential decision following an investigation pursuant to section 421 of the

Trade Act of 1974, 19 U.S.C. 2451 et seq. The report by the International Trade Commission issued as part of this investigation can be found at *Certain Passenger Vehicle and Light Truck Tires from China*, Inv. No. TA-421-7, USITC Pub. No. 4085 (July 2009). The decision by the President can be found in two documents: first, *Presidential Determination 2009-28,* which was published at 74 Fed. Reg. 47433 (16 September 2009); and second, *Proclamation 8414,* which was published at 74 Fed. Reg. 47861 (17 September 2009). Pursuant to this decision by President Obama, these measures took effect on 26 September 2009, and continue in effect today. This request includes both the higher tariffs that have been announced, and any other measures the US has announced or may announce to implement this decision.

China considers that these higher tariffs, not having been justified as emergency action under relevant WTO rules, are inconsistent with Article I:1 of the GATT 1994, because the US does not accord the same treatment it grants to passenger and light truck tires originating in other countries to the like products originating in China, and Article II of GATT 1994, since these higher tariffs consist of unjustified modifications of US concessions thereunder.

The US has not even attempted to justify these restrictions as a general safeguard action pursuant to Article XIX of GATT 1994 and the *Agreement on Safeguards*. The only justification offered was that these measures have been imposed under the *Protocol on the Accession of the People's Republic of China* (the "Protocol of Accession"). China believes these restrictions, and the basis under US law for imposing these restrictions, are inconsistent with US obligations under the Protocol of Accession, in particular:

(a) The US statute authorizing these restrictions, 19 U.S.C. 2451, is inconsistent on its face with Article 16 of the Protocol of Accession in that the US statute impermissibly weakens the standard of "significant cause" by imposing a definition of the term that contradicts Article 16.4 of the Protocol of Accession.

(b) The restrictions imposed pursuant to 19 U.S.C. 2451 in this particular case are inconsistent with the following provisions of the Protocol of Accession:

(i) Articles 16.1 and 16.4, because imports from China in this case were not "in such increased quantities" and were not "increasing rapidly," and instead had begun to decline in response to changing US demand conditions.

(ii) Articles 16.1 and 16.4, because imports from China in this case were not a "significant cause" of material injury or threat of material injury, and are being improperly blamed by the US for the condition of the industry that, in fact, reflected other factors in the market.

(iii) Article 16.3, because the restrictions in this case are not necessary, and are being imposed beyond the "extent necessary to prevent or remedy" any alleged market disruption, and should not have been set at the high tariff levels being imposed.

(iv) Article 16.6, because the restrictions in this case are being imposed for a period of time longer than "necessary to prevent or remedy" any alleged market disruption, and need not have been imposed for three years.

China requests that the Panel be established with the standard terms of reference, in accordance with Article 7.1 of the DSU.

China asks that this request for the establishment of a panel be placed on the agenda for the next meeting of the DSB, which is scheduled to take place on 21 December 2009.