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.