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

Report of the Panel

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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
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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
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Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
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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
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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
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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.

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[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 not 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

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[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

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[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

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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]

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[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]

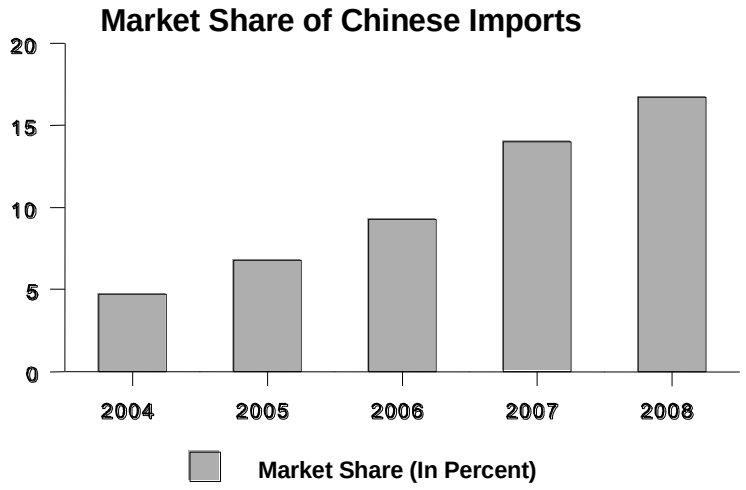
7.66 The United States argues that China's discussion of the *US – Steel Safeguards* case is misleading. The United States argues that the panel's decision in that case was based on a sharp decline in absolute and relative terms at the end of the period and trends in absolute imports that differ significantly 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]

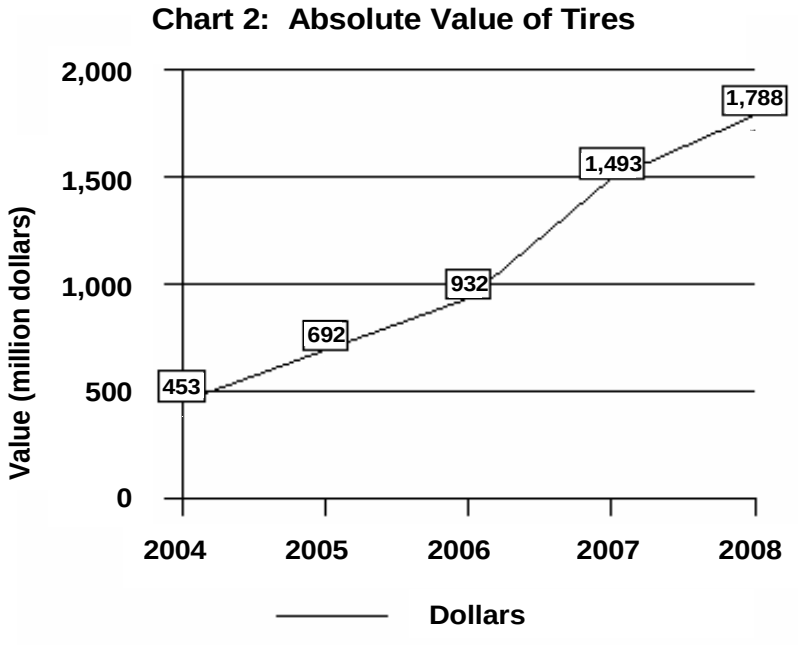
7.71 The United States argues that the USITC did not merely recite that there was a growth in imports between the first and last years of the period. Rather, the United States argues that the USITC specifically considered the growth in absolute and relative quantities for the subject imports during each 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

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[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]

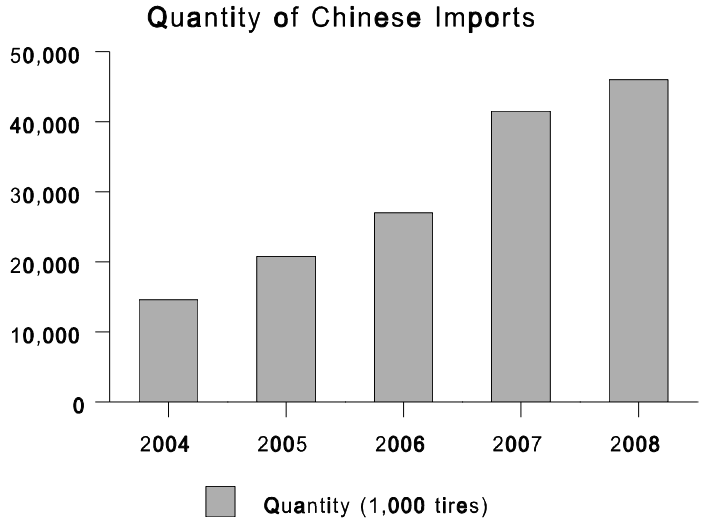
Year	2004	2005	2006	2007	2008
Quantity of subject imports (1,000 tyres)	**14,575**	**20,790**	**27,005**	**41,503**	**45,975**

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]

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[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]

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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.

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[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]

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[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]

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[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

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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.

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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".

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[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

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[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.

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[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

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[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".

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[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

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[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.

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[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

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[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

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[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

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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:

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[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

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[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.

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[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]

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[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

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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.

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[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]

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[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:

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[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]

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[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.

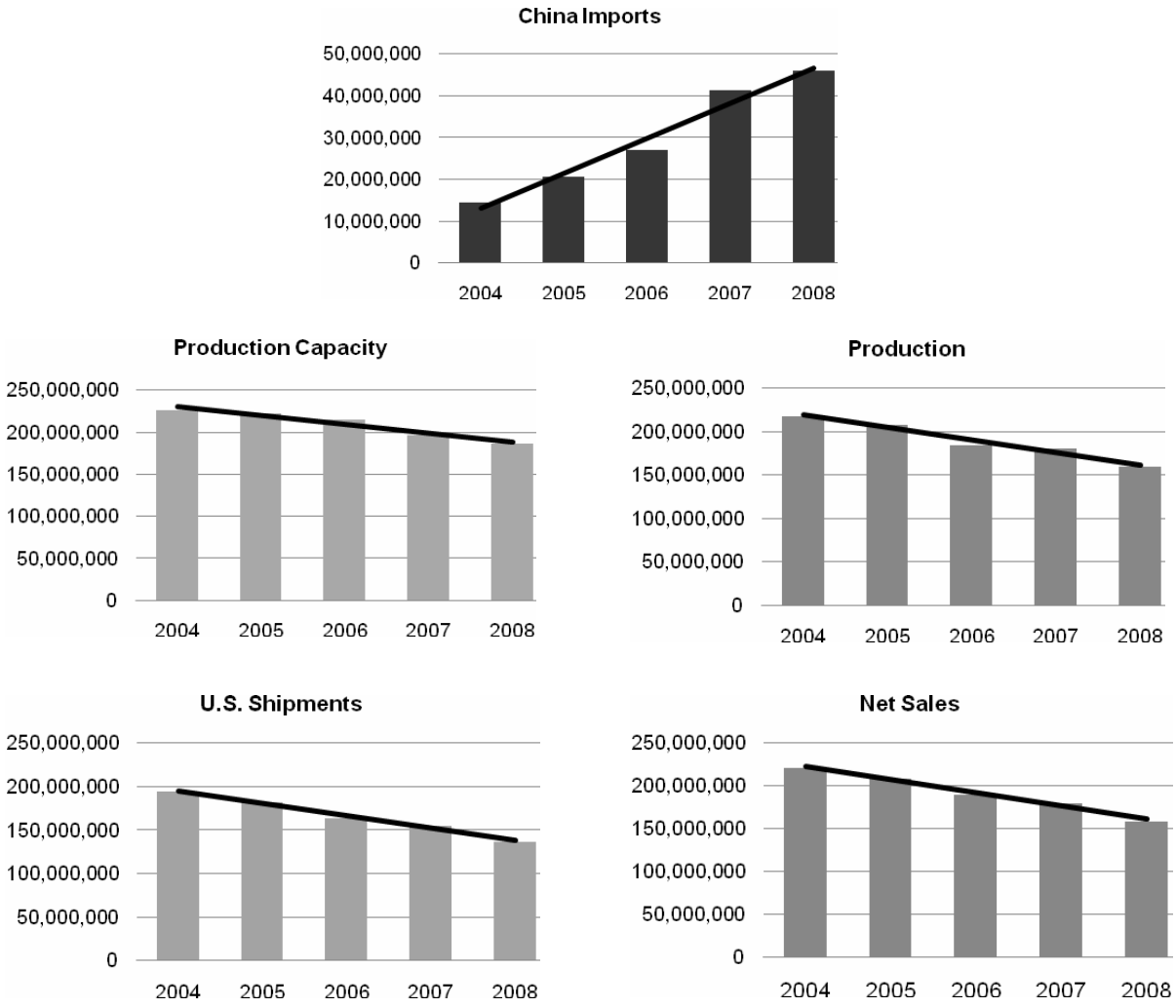
7.235 Furthermore, the U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008, when subject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

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[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

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[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]
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> ** In a footnote, the USITC noted that:
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> > 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.

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[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,

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[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

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[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

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[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.

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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

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[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.

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[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.

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[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]

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[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]

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[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.

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[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

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[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.

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[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).