

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

(WT/DS399)

**RESPONSES BY THE UNITED STATES  
TO THE PANEL'S QUESTIONS TO THE PARTIES  
FOLLOWING THE FIRST PANEL MEETING**

June 18, 2010

### Exhibit List

Exhibit US-	Title
23	Draft Protocol of Accession circulated on 6 March 1997
24	Draft Protocol of Accession circulated on 20 December 1994
25	Text of Product-Specific Safeguard from U.S.-China Bilateral Agreement
26	19 U.S.C. §2436
27	<i>Honey from China</i> , Investigation No. TA-406-13, USITC Pub. 2715 (January 1994) (excerpts)
28	<i>Ammonium Paratungstate and Tungstic Acid from the People's Republic of China</i> , Investigation No. TA-406-11, USITC Pub. 1982 (June 1987) (excerpts)
29	Modern Tire Dealer, "No Smoke or Mirrors," January 2009 (excerpts)
30	Transcript of ITC Hearing, June 2, 2009, <i>Certain Passenger Vehicle and Light Truck Tires from China</i> , USITC Inv. No. TA-421-7 (excerpts)
31	"Partial Equilibrium Modeling" by Francois, Joseph F., and H. Keith Hall, in <i>Applied Methods for Trade Policy Analysis: A Handbook</i> , edited by Joseph F. Francois and Kenneth A. Reinert, 122-55. Cambridge: Cambridge University Press, 1997

## Table of Reports Cited

Short Form	Full Citation
<i>Argentina – Footwear (Panel)</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R
<i>Argentina – Footwear (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998
<i>EC – DRAMS</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4
<i>Japan – Alcohol (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Korea – Alcohol (AB)</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – DRAMS CVD (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – German Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Lamb Meat (AB)</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001

<i>US – Line Pipe (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<i>US – Steel Safeguards (Panel)</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R and Corr.1
<i>US – Steel Safeguards (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , 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, and Corr.1, adopted 10 December 2003
<i>US – Wheat Gluten (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001

**A. QUESTIONS TO BOTH PARTIES**

**1. Interpretation**

**Q1. In addressing the relationship between Paragraph 16 of the Protocol and the Safeguards Agreement, might one treat Paragraph 16 as *lex specialis*? If so, how would this affect the relationship between the Safeguards Agreement and the Protocol?**

1. As the United States explained in its first written submission, paragraph 16 of China's Protocol of Accession exists separate and apart from the Safeguards Agreement.<sup>1</sup> The provisions of paragraph 16 provide a remedy to the United States (and other WTO Members) with respect to imports from China under certain circumstances. Safeguards Agreement and its provisions provide a different remedy, and those provision are simply inapplicable in this dispute.<sup>2</sup> Consequently, paragraph 16 and the Safeguards Agreement are not *lex specialis* with respect to one another, and therefore that principle does not affect the relationship between them.<sup>3</sup>

2. For this reason, the Panel need not embark on an analysis of the meaning of *lex specialis* , as the issue is not presented in this dispute.

**Q2. At para. 46 of its oral statement, China notes that the French and Spanish versions of Paragraph 16.1 of the Protocol refer to "in such increased quantities *and* under such conditions", as opposed to "*or* under such conditions". Bearing in mind Article XVI:6 of the WTO Agreement (providing for the equal authenticity of the different language versions of that treaty), how should the Panel treat differences in the text of different language versions of the same treaty?**

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<sup>1</sup>See e.g., U.S. First Written Submission, paras. 73 - 77.

<sup>2</sup>In this connection, the United States recalls that during the first meeting with the parties, China's delegation explained that China was not arguing that the provisions of the Safeguards Agreement were incorporated into the Protocol.

<sup>3</sup>We note in this connection the comments of the *Indonesia – Autos* panel: "The *lex specialis derogat legi generali* principle "which [is] inseparably linked with the question of conflict" between two treaties or between two provisions (one arguably being more specific than the other), does not apply if the two treaties "... deal with the same subject from different point of view or [is] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other". For in such a case it is possible for a state which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary. Para. 14.28, n. 649 (citations omitted). Here, paragraph 16 and the Safeguards Agreement deal with different subjects and are not inconsistent with one another.

3. In principle, the rules of customary interpretation reflected Article 33(3) of the Vienna Convention on the Law of Treaties, provides that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.” Article 33(4) provides that “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.” However, in the circumstances of this dispute, the Panel need not seek to “reconcile” the text, for the following reasons.

4. The translation difference that China has identified arises in paragraph 16.1 of the Protocol. However, the substantive issue raised by China arises with respect to paragraph 16.4 (not 16.1) of the Protocol, which China argues requires a “conditions of competition” analysis.<sup>4</sup> While China’s argument is that the “conditions of competition” analysis which the ITC did in fact conduct is flawed,<sup>5</sup> the textual difference in 16.1 has no bearing on an analysis of that issue.

5. Paragraph 16.1 sets out the conditions under which a WTO Member may seek consultations with China under the Protocol. It is paragraph 16.4, which defines “market disruption” and describes the factors a competent authority should examine when assessing whether market disruption exists, that establishes the standard that must be satisfied by a WTO Member in order to apply a measure under the transitional mechanism. Paragraph 16.4 does not set out a requirement that a Member must conduct a specific type of “conditions of competition” analysis. Nor, for that matter, does paragraph 16.1. Likewise, the Working Party Report does not make reference to a “conditions of competition” analysis. Whether or not the basis for consultations set out in paragraph 16.1 is the same as, or something different from, the definition of “market disruption” set out in paragraph 16.4 does not affect the analysis of the requirements of paragraph 16.4.

6. The United States would add that, in *Argentina – Footwear (EC)*, the panel explained that the language “under such conditions” contained in the Safeguards Agreement did not itself require any specific “conditions of competition” analysis other than that specifically set forth in other section of the Agreement. In that report, the panel noted that “the phrase ‘under such conditions’ does not constitute a specific legal requirement for a price analysis, in the sense of an analysis separate and apart from the increased import, injury and causation analyses provided for in Article 4.2.”<sup>6</sup> The panel added that “Article 2.1 [ of the Safeguards Agreement] sets forth the fundamental legal requirements (i.e., the conditions) for application of a safeguard measure, and that Article 4.2 [of the Safeguards Agreement] then further develops the operational aspects of

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<sup>4</sup>According to China, the use of the conjunctive term in the French and Spanish versions “confirm[s] this.” China Oral Statement, para. 46.

<sup>5</sup>See China First Submission, paras. 211 - 238.

<sup>6</sup>*Argentina – Footwear (Panel)*, para. 8.249. In that dispute, the EC was arguing for a particular price analysis.

these requirements.”<sup>7</sup> The panel found that it was the requirements in Article 4.2(a) and (b) of the Safeguards Agreement that gave meaning to the phrase “under such conditions” and that referred to “the *substance* of the causation analysis that must be performed under Article 4.2(a) and (b).”<sup>8</sup> Similarly, the panel in *US – Steel Safeguards* explained that a “conditions of competition” analysis is only one of the analytical tools that come into play in a causation analysis in the context of the Safeguards Agreement, pointing to the specific requirements of Article 4.2(a) and (b).<sup>9</sup>

7. The United States notes that China has not pointed to any text of the Protocol identifying a specific “conditions of competition” analysis that should be performed under the Protocol. Instead, China is simply arguing that the ITC’s analysis is factually in error, while pointing to reports applying the Safeguards Agreement. However, as we have just explained, the reasoning in those reports indicate that the standards for the causation analysis in the Safeguards Agreement context must be driven by the text of the Agreement. Whether or not paragraph 16.1 should be understood to contain an “and” (and thereby limit the opportunity for Members to consult), the standards for when a Member can find that there is market disruption are those found in paragraph 16.4. As we have noted before, the requirements of Article 4.2(a) and (b) of the Safeguards Agreement are neither incorporated nor reproduced in the Protocol.<sup>10</sup>

**Q3. Is there any negotiating history regarding the drafting of Paragraph 16 of the Protocol?**

8. Under the customary rules of interpretation of public international law, recourse to the negotiating history of a treaty (or provision thereof) is a supplementary means of interpretation to be used to determine the meaning of treaty text when the interpretation according to the rules reflected in article 31 of the Vienna Convention on the Law of Treaties leaves the meaning ambiguous or leads to a manifestly absurd or unreasonable result.<sup>11</sup> In this case, the meaning of paragraph 16 is clear from the text, read in conjunction with the context provided by the Working

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, para. 8.250. We would note that in the Appellate Body Report cited by China in its oral statement (para. 145), the Appellate Body agreed with the panel’s analysis, even though it noted that the panel did not need to reach the issue.

<sup>9</sup> *US – Steel Safeguards (Panel)*, para. 10. 313 - 10.316.

<sup>10</sup>In its first written submission, para. 215, China states that “Article 16.4 calls for analysis of several factors regarding the situation of the industry, echoing the multi-factor analysis prescribed in Article 4.2(a) of the [Safeguards Agreement].” We note that at the first panel meeting China clarified that it is not arguing that the Safeguards Agreement standards are incorporated in the Protocol. Whether the three factors set out in paragraph 16.4 “echo” the multi-factor analysis required by Article 4.2(a) is irrelevant, as clearly paragraph 16.4 does not contain the detailed requirements of Article 4.2(a) and (b) of the Safeguards Agreement.

<sup>11</sup>Article 32 of the Vienna Convention on the Law of Treaties.

Party Report, and there is no need for recourse to supplementary means of interpretation. However, to the extent the Panel wishes to confirm this interpretation, we believe that the negotiating history of paragraph 16 confirms our reading of the Protocol.<sup>12</sup>

9. The United States notes that to the extent the Panel asked this question because of China's arguments in its first written submission regarding the relationship between the Protocol and the Safeguards Agreement, China clarified during the first panel meeting that it was not arguing that the Safeguards Agreement, or the standards of the Safeguards Agreement, were incorporated or should be read into the Protocol.

10. The road to China's accession to the WTO began in March of 1987, when a Working Party was established to examine China's request for resumption as a GATT contracting party. On December 7, 1995, China applied for accession to the WTO, and the Working Party on China's Status as a GATT 1947 Contracting Party was transformed into a WTO Accession Working Party. The terms of reference and the membership of the Working Party can be found in document WT/ACC/CHN/2/Rev.6.

11. Like all other accessions, China's accession involved bilateral negotiations between China and various interested WTO Members as well as multilateral negotiations. Over the years (the negotiation took 15 years to complete), there were many draft documents exchanged, both at the bilateral and multilateral levels. Records of bilateral negotiations are presumably kept by each Member involved. At the multilateral level, documents related to China's accession were circulated at least under two documents series - WT/ACC/CHN (this series seems to contain informational exchanges and general documents related to the accession) and WT/ACC/SPEC/CHN (this series seems to contain drafts of the Protocol and the Working Party Report). However, documents were also circulated without any official WTO document number.<sup>13</sup>

12. From the earliest stages of negotiation, the draft Protocol contained draft text for a transitional product-specific safeguard.<sup>14</sup> In general, some members of the Working Party believed that there was a need during a transitional period for a special safeguard mechanism to guard against imports from China in such increased quantities or under such conditions as to

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<sup>12</sup>Note that under Article 32 of the Vienna Convention on the Law of Treaties, supplementary means of interpretation can also be used to confirm the meaning resulting from application of article 31.

<sup>13</sup>See *e.g.* draft document circulated by the Chairman of the Working Party on March 6, 1997. Exhibit US-23.

<sup>14</sup>See, draft document circulated by the Chairman of the Working Party on China's Status as a Contracting Party, dated December 20, 1994. Exhibit US- 24.

cause or threaten injury to domestic producers.<sup>15</sup> On the other hand, China opposed the creation of such a mechanism, considering that the provisions of the GATT and the Safeguards Agreement should apply.<sup>16</sup>

13. For the United States, inclusion of a transitional mechanism was an essential part of the accession negotiations. The U.S.-China Bilateral Trade Agreement, which was concluded in Beijing on November 15, 1999, contained such a product-specific safeguard. The text of the product-specific safeguard provided as follows<sup>17</sup>:

1. 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 Member should pursue application of a measure under the WTO Agreement on Safeguards. Any such request shall be notified to the WTO Committee on Safeguards.
2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified to the WTO Committee on Safeguards.
3. 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 to the Committee on Safeguards.
4. 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

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<sup>15</sup>See *e.g.*, para. 119 of WT/ACC/SPEC/CHN/1. We note that this document was circulated in English only - the French and Spanish versions of the document did not contain translations of the text.

<sup>16</sup>*Id.* See *e.g.* also, paras. 233 - 235 of WT/ACC/SPEC/CHN1/Rev.3

<sup>17</sup>Exhibit US-25. The attached document is the final version of the product specific safeguard included in the U.S.-China Bilateral Trade Agreement, with the final changes agreed to included in handwriting on the margins, and initialed by officials of the U.S. and Chinese governments. The text of the product-specific safeguard is reproduced above in its entirety.

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.

5. Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest. The WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.
6. 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. If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under GATT 1994 to the trade of the Member applying the measure, if such measure remains in effect more than 2 years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under GATT 1994 to the trade of the Member applying the measure, if such measure remains in effect more than 3 years. Any such action by China shall be notified to the Committee on Safeguards.
7. In critical circumstances, where delay would cause damage which it would be difficult to repair, the WTO Member so affected may take a provisional safeguard measure pursuant to a preliminary determination that imports have caused or threatened to cause market disruption. In this case, notification of the measures taken to the WTO Committee on Safeguards and a request for bilateral consultations shall be effected immediately thereafter. The duration of the provisional measure shall not exceed 200 days during which the pertinent requirements of paragraphs 1, 2 and 5 shall be met. The duration of any provisional measure shall be counted toward the period provided under paragraph 6.
8. If a WTO Member considers that an action taken under paragraph 2, 3, or 7 causes or threatens to cause significant diversions of trade into its market, it may request consultations with China and/or the WTO Member concerned. Such consultations shall be held within 30 days after the request is notified to the WTO Committee on Safeguards. If such consultations fail to lead to an agreement between China and the WTO Member or Members concerned within 60 days after the notification, the requesting WTO Member shall be free, in respect of such

product, to withdraw concessions or otherwise limit imports, to the extent necessary to prevent or remedy such diversions. Such action shall be notified to the WTO Committee on Safeguards.

9. Application of this Section shall be terminated twelve years after entry into force of this Protocol.

14. The text of the product-specific safeguard as agreed between the United States and China became the basis for the final negotiation at the multilateral level of what became paragraph 16 of the Protocol. A comparison of the U.S. bilateral safeguard text and the final text of paragraph 16 reveals minor textual differences and only two changes of any consequence. First, in paragraphs 16.1, 16.2, 16.3, 16.6, and 16.8, the transitional mechanism clarifies that the required notifications to the Committee on Safeguards shall be made “immediately.” Second, in paragraph 16.8, the second sentence clarifies that trade diversion measures apply to imports “from China.” In addition, it is clear from the text of the product-specific safeguard contained in the bilateral agreement and the text of paragraph 16, that proposals from earlier versions that made reference to the Safeguards Agreement or, for example, the serious injury standard, were not included in the final text.<sup>18</sup>

15. Finally, as the United States will explain in its response to Panel Question 6, the “market disruption” standard contained in the U.S. bilateral was modeled after the “market disruption” standard under Section 406 of the Trade Act of 1974 (19 U.S.C. 2436)<sup>19</sup>, which had applied to imports from China to the United States until China’s accession to the WTO.

## **2. Statutory causation standard**

### **Q4. If the causation standard set forth in Section 421 were inconsistent with Paragraph 16 of the Protocol, would the application of that standard necessarily be similarly inconsistent? Please explain.**

16. No. If the Panel concluded that the causation standard set forth in section 421 were inconsistent with paragraph 16 of the Protocol because it mandated WTO inconsistent findings in at least some instances, this would not mean that the findings would be WTO inconsistent in all instances. In particular, the ITC’s particular application of that standard in the *Tires* investigation would not necessarily be inconsistent with the Protocol. The ITC’s causation analysis, as applied, might be based on clear evidence of a significant causal link between rapidly increasing imports from China and material injury such that the Panel could reasonably conclude that the ITC’s analysis nonetheless satisfied any higher causation standard that the Panel found was required by the Protocol. Of course, as we have explained in our first written submission

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<sup>18</sup>Compare *e.g.* the March 1997 version with the U.S. bilateral or the text of paragraph 16.

<sup>19</sup>Exhibit US-26.

and at the first panel meeting, the United States’ statutory causation standard is consistent with the text of the Protocol.

**Q5. Could a "significant cause" ever have less causal effect than a "genuine and substantial" cause?**

17. Yes, because the extent of the “causal effect” contemplated by any WTO agreement is dependent upon the level of injury to which that “causal effect” is linked. For example, an authority might reasonably conclude that a particular factor constitutes a “significant cause” of material injury to an industry, but still reasonably find that the overall level of injurious effect caused by that factor was not sufficient to make the factor a “genuine and substantial cause” of serious injury to the industry. This conclusion flows from the fact that the term “material injury” connotes a lower degree of injury than the term “serious injury.”<sup>20</sup>

18. To the extent that this question is asking whether the term “significant cause” always has the same meaning as the phrase “genuine and substantial” cause, the United States submits that the two terms are different enough that it is difficult to establish with precision whether the two terms are equivalent to each other, or whether one contains a less strict causal link standard. In this regard, the United States notes that the dictionary definitions of the words “significant” and “substantial” are not exactly the same. On the one hand, the *New Shorter Oxford English Dictionary* defines the word “significant,” for example, to mean “important, notable, {or} consequential,” while the word “substantial” is defined as “having solid worth or value, of real significance, solid, weighty; important, worthwhile.”<sup>21</sup> Given that both words can be defined as meaning “important,” one could conclude that the two terms share similar meanings. On the other hand, however, the *New Shorter Oxford English Dictionary* also defines the word “substantial” as meaning of “real significance.”<sup>22</sup> Since the word “real” is used as an intensifier of the word “significance,” this aspect of the definition could suggest that the word “substantial” actually connotes that a “substantial” factor needs to have somewhat more significance than one that is merely “significant.”<sup>23</sup>

19. Ultimately, the United States believes that there are sufficient distinctions between the two words that it is difficult for the Panel to conclude that the term “significant cause” is equivalent in meaning to “genuine and substantial” cause, or that the “significant cause” standard requires a somewhat lower degree of causal effect than “genuine and substantial” cause.

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<sup>20</sup>*US - Lamb Meat (AB)*, para. 124.

<sup>21</sup>New Shorter Oxford English Dictionary (Sixth Edition), pp. 2833 and 3088.

<sup>22</sup>New Shorter Oxford English Dictionary (Sixth Edition), p. 3088.

<sup>23</sup>The United States believes that a comparison of the two words makes only one thing clear: there is nothing in the definition of the word “significant” that indicates that it is intended to require a more “rigorous” or “stringent” causal link showing than the “genuine and substantial” causal link requirement, as China mistakenly argues.

20. Therefore, in the view of the United States, the Panel need not engage in this sort of comparative analysis. Instead, it should approach this issue by giving the word “significant” its ordinary meaning of “notable” or “important,” and should apply that meaning in the context of the overall requirements of the Protocol. Thus, the United States believes that the Panel should assess whether the ITC reasonably concluded that rapidly increasing imports from China were a “significant cause” of material injury to the domestic industry because they were, in fact, a “notable” or “important” cause of material injury. Put another way, when assessing whether imports from China were a significant cause of material injury, the Panel should ask whether the ITC established that the Chinese imports were more than an “unimportant or inconsequential” cause of material injury to the industry.<sup>24</sup>

**Q6. China indicated at the Panel's first meeting with the parties that the "contributes significantly" test was derived from Section 406. Could either party provide any additional details on this issue?**

21. Prior to China’s accession to the WTO, U.S. law subjected imports from China, and certain other countries, to a special safeguard mechanism set forth in section 406 of the Trade Act of 1974.<sup>25</sup> Section 406 authorizes the President to take remedial action against “imports of an article which is the product of a Communist country”<sup>26</sup> when those imports cause “market disruption” with respect to an article produced by a domestic industry.”<sup>27</sup> Section 406 provides that “market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.”<sup>28</sup> Moreover, section 406 defines the term “significant cause” as referring to “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.”<sup>29</sup>

22. Because of the still transitional nature of China’s economy, maintaining the ability to address instances of market disruption was an important goal for the United States during China’s accession negotiations. As noted in reply to Q3, the United States sought, and achieved,

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<sup>24</sup>*EC – DRAMS*, para. 7.307; *Korea – Commercial Vessels*, para. 7.570-7.571.

<sup>25</sup> 19 U.S.C. §2436. Exhibit US-26. Section 406 was enacted in 1975 and last amended in 1999.

<sup>26</sup>The statute defines a “communist country” as meaning any “country dominated or controlled by communism.” 19 U.S.C. §2436(e)(1). The section applied to China because it qualified under this definition. Exhibit US-26.

<sup>27</sup>19 U.S.C. §2436(a)(1). Exhibit US-26.

<sup>28</sup>19 U.S.C. §2436(e)(2)(A). Exhibit US-26.

<sup>29</sup>19 U.S.C. §2436(e)(2)(B)(ii). Exhibit US-26.

the negotiation of the product-specific safeguard in its bilateral negotiations with China. The language of the product-specific safeguard was modeled on section 406 and included the same definition of “market disruption” as in section 406. The bilaterally negotiated safeguard, as we have already noted, became the basis for paragraph 16. A comparison of the market disruption standard of section 406 and paragraph 16 reveals the similarities.

23. As of the time when the Bilateral Trade Agreement was negotiated, China had been subject to several investigations under section 406. In cases such as *Honey from China*<sup>30</sup> and *Ammonium Paratungstate and Tungstic Acid from the People’s Republic of China*,<sup>31</sup> the ITC conducted investigations into the injurious effects of rapidly increasing imports of these products from China on the industry and concluded that these imports were a cause of market disruption under section 406. As a result of these investigations, China was well aware that the “significant contribution” standard was part of the United States’ understanding of what constituted a “significant cause” of material injury to the industry in a market disruption case at the time that the Bilateral Trade Agreement was negotiated, and at the time the Protocol of Accession was finalized.

24. When the United States implemented the product-specific safeguard into U.S. law, it tracked the text of what became paragraphs 16.1 and 16.4 of the Protocol. In addition, although the product-specific safeguard did not define “significant cause,” the United States defined it to provide appropriate guidance to the ITC. The definition of “significant cause” in Section 421 is the same as the definition used in Section 406.

25. Because of the similarity of the causation standards contained in section 421 and section 406, the ITC has emphasized in its section 421 determinations that both statutes contain the same causation test.<sup>32</sup> As the ITC stated in its determination in the tires investigation, “[t]he 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.’ Section 406 uses the same causation test and definition.”<sup>33</sup>

26. Moreover, given the similarity in the causation standards of section 421 and section 406, the ITC has given significant weight to the legislative history of section 406 in its section 421 determinations. In particular, when explaining the causation standard of section 421, the ITC

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<sup>30</sup>*Honey from China*, Investigation No. TA-406-13, USITC Pub. 2715 (January 1994). Exhibit US-27.

<sup>31</sup>*Ammonium Paratungstate and Tungstic Acid from the People’s Republic of China*, Investigation No. TA-406-11, USITC Pub. 1982 (June 1987). Exhibit US-28.

<sup>32</sup>ITC Report, p. 18. Exhibit US-1.

<sup>33</sup>ITC Report, p. 18. Exhibit US-1.

cites to the legislative history of section 406, which states that:

Under the {significant cause} 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. . . .<sup>34</sup>

27. In light of this language, it is clear that the ITC is not applying a less strict causation standard than that set forth in the Protocol in its section 421 determinations. Instead, the ITC has recognized that, like section 406, section 421 requires it to determine that rapidly increasing imports had a “direct and significant” – and not a “subsidiary” or “unimportant” – causal link to material injury. And, as we have previously explained, this standard is fully consistent with the requirements of the Protocol, as China knew when it accepted it.

### 3. Causation

**Q7. Regarding China's argument that competition between subject imports and domestic tyres was attenuated, we note WTO case law to the effect that the universe of directly competing products is broader than the universe of like products (see, for example, page 25 of the Appellate Body report in *Japan – Alcohol (DS8/AB/R)*). Since there is no dispute between the parties that subject imports and domestic tyres were "like", doesn't this suggest that subject imports and domestic tyres were necessarily competing? Please comment. Does segmentation within the market for tyres make any difference? Please explain.**

28. As the Panel’s question correctly notes, the Appellate Body has stated that “‘like’ products are a subset of directly competitive or substitutable products” and that “all like products are, by definition, directly competitive or substitutable products.”<sup>35</sup> In explaining this statement, the Appellate Body has stated that:

The word “competitive” means “characterized by competition.” The context of the competitive relationship is necessarily the marketplace, since that is the forum where consumers choose different products that offer alternative ways of satisfying a particular need or taste. As competition in the marketplace is a dynamic and evolving process, the

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<sup>34</sup>ITC Report, p. 18. Exhibit US-1.

<sup>35</sup>*US - Cotton Yarn (AB)*, para. 91; see also *Korea - Alcohol (AB)*, paras. 108-124; *Japan - Alcohol (AB)*, at paras. 117-118.

competitive relationship between products is not to be analyzed exclusively by current consumer preferences; the competitive relationship extends as well to potential competition . . . .<sup>36</sup>

29. Given these statements, and given that a “like” product is a subset of the category of “directly competitive” products, the ITC’s finding that the Chinese tires are “like” U.S. tires does indicate that there was “direct competition” between Chinese and U.S. tires in the U.S. tire market. Moreover, since China has conceded that Chinese tires are “like” the U.S. tires, China has also implicitly conceded that Chinese tires are “directly competitive” with U.S. tires in the market place.

30. Nonetheless, for the sake of completeness, the United States would like to note that, depending on the particular circumstances presented by an investigation, “segmentation” within a particular market might have an impact on its causation analysis and findings. For example, if the record of an investigation showed that all Chinese imports of a particular product were being sold into one region or sector of the U.S. market while all of the U.S. production of those same products were being sold into an entirely different region or sector of the U.S. market, the ITC could reasonably conclude that there was no competition between the imported and U.S. products in the market, and therefore find that imports were not a significant cause of material injury to the domestic industry.<sup>37</sup> In the case of the *Tires* investigation, however, the record showed that Chinese and U.S. tires were competing in all categories and sectors of the U.S. market, including the OEM and all sectors of the replacement tire market.<sup>38</sup> Indeed, in its analysis, the ITC directly addressed and rejected the claim that competition between the Chinese imports and U.S. tires was so attenuated that the Chinese imports could not have been a significant cause of injury to the industry, and found that U.S. and Chinese tires both had “a significant presence in the Tier 2 and Tier 3 . . . segments of the replacement market” and that both were sold in the Tier 1 and OEM sectors of the market.<sup>39</sup> In other words, the record did show that Chinese and U.S. tires were directly competitive with one another in the U.S. market.

31. Finally, the United States notes that, in the ITC’s “like” product analysis, the ITC specifically addressed this issue and concluded that the record did not support a finding that there

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<sup>36</sup>*US - Cotton Yarn (AB)*, para. 91; see also *Korea - Alcohol (AB)*, paras. 108-124; *Japan - Alcohol (AB)*, at paras. 117-118.

<sup>37</sup>See, e.g., *Certain Brake Drums and Rotors from China*, Inv. No. TA-42-3, USITC Pub. 3622 (August 2003) (finding that U.S. brake drums and rotors were sold exclusively as premium products while Chinese products were sold as economy line products). Exhibit US-17.

<sup>38</sup>ITC Report, pp. 9, n. 41 and 27-28. Exhibit US-1.

<sup>39</sup>ITC Report at p. 27. Exhibit US-1.

was a clear dividing line between the products sold in various sectors of the market.<sup>40</sup> After noting that all domestic tires were part of a “continuum of products” in the market, the ITC explained that this finding was consistent with the responses to the ITC’s questionnaires on segmentation in the replacement market.<sup>41</sup> The ITC noted that, “[a]lthough the responses [to these questionnaires] provide some evidence that the replacement market can be divided into three categories/segments (or tiers), the responses identified brand and price as the primary bases for the differentiation, not physical characteristics, uses, manufacturing process, customs treatment, or marketing channels.”<sup>42</sup> As a result, the ITC concluded, the record did not establish that there were “clear dividing lines among sizes and types of domestic passenger vehicle and light truck tire products...”<sup>43</sup> Given this, within the context of the *Tires* investigation, the ITC’s like product finding does, in fact, establish that the U.S. and Chinese tires were directly competitive in the U.S. market, as contemplated by the Appellate Body’s statements cited above.

**Q8. What weight, if any, should the Panel give to the fact that there were two dissenting opinions within the USITC on causation?**

32. The Panel should give no weight to the fact that there were two dissenting Commissioners on the issue of causation. The separate views of any dissenting Commissioner are not part of the determination of the ITC majority that market disruption exists. It is the determination of the majority of Commissioners that forms the legally operative determination of the ITC, and the determination in front of this Panel. Accordingly, the United States submits that the dissenting views are not of legal consequence and, therefore, not pertinent to the Panel’s consideration of whether the determination of the ITC is consistent with the U.S. obligations under paragraph 16 of the Protocol of Accession.

33. We note in this regard that the Appellate Body has stated that WTO Members have considerable latitude in structuring the internal decision-making process of their competent authorities. The Appellate Body explained:

[W]e are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, *which is a singular act* for which a WTO Member may be

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<sup>40</sup>ITC Report, p. 9, n. 41. Exhibit US-1.

<sup>41</sup>ITC Report, p.9, n. 41. Exhibit US-1.

<sup>42</sup>ITC Report, p. 9, n. 41 (emphasis added). Exhibit US-1.

<sup>43</sup>ITC Report, p. 9, n. 41. Exhibit US-1.

accountable in WTO dispute settlement.<sup>44</sup>

34. The same reasoning applies to decisions under paragraph 16 of the Protocol of Accession. The Protocol also does not prescribe the internal decision-making process for making determinations of market disruption. Therefore, the Panel should address only the determination of the ITC, not the dissenting views.

35. Finally, the United States notes that China has cited the views of the dissenting Commissioners throughout its written submission on a number of issues. Although the majority and dissenting Commissioners may have come to different conclusions on certain issues, the fact that the majority and dissenting Commissioners both addressed these issues in detail only underscores that the Commission as a whole addressed the circumstances of the tires market in detail, and gave serious consideration to the arguments made by all parties before the Commission, including those parties who opposed any remedy.

## **B. QUESTIONS TO CHINA**

**Q15. Referring to paragraph 28 of China's oral statement. China says that "the USITC also failed to explain why the import trends from 2007 to 2008 were sudden enough, sharp enough, or significant enough to qualify as 'increasing rapidly'." It appears that China is combining the test developed under the safeguards agreement for "being imported .... in such increased quantities" with the phrase "imports ...are increasing rapidly" in the Protocol. Is China saying that if imports are sudden, sharp, recent and significant enough they are "increasing rapidly"?**

36. The United States agrees with the Panel that, in paragraph 28 of its oral statement, China appears to be suggesting that the standard for rapidly increasing imports under the Protocol is equivalent to the standard for increased imports under the Safeguards Agreement. The United States would simply note that this suggests that China does not believe that the standard for increasing imports under the Protocol is more stringent than that for increased imports under the Safeguards Agreement, as China argued throughout its submission and at the hearing.

## **5. Statutory causation standard**

**Q16. Regarding China's "as such" claim against Section 421, China argues that there is a difference between the words "cause" and "contribute" (FWS, para. 198). In particular, China asserts that "a cause 'produces' or 'brings about' the consequence, and does not merely 'contribute to' or 'play a part' in its occurrence". Implicit in China's argument seems to be the notion that a cause must "produce" or "bring about" the consequence in and of itself,**

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<sup>44</sup>US – *Line Pipe (AB)*, para. 158 (emphasis added).

**rather than merely contribute to the consequence along with other factors. Please comment.**

37. The United States agrees that China’s “as such” challenge to the U.S. statute seems to be mistakenly premised on the notion that the word “cause,” as used in the Protocol, requires that imports be the sole (or at least, the major) cause of material injury to the domestic industry. As the United States explained in its first written submission, this interpretation is not consistent with the text of the Protocol, the ordinary meaning of the word “cause,” or the Appellate Body’s statements in other trade remedy contexts. It is not consistent with the text of the Protocol because the Protocol provides that “market disruption shall exist” if Chinese imports constitute “a significant cause of material injury” to the industry,<sup>45</sup> which establishes that the Protocol contemplates that there may be multiple significant causes of material injury or threat to an industry.

38. Moreover, China’s arguments on this score are also not consistent with the ordinary meaning of the word “cause.” While the Shorter Oxford English Dictionary defines the word “cause” as meaning a factor that “produces an effect or consequence” or “that brings about an effect or result,”<sup>46</sup> there is no question that the word “cause” can accurately be used as a verb to describe a situation in which more than one factor is bringing about a cause or result. For example, as the United States noted at the first panel meeting, one can correctly state that the “meeting room’s heating system and the sun’s rays on the windows of the meeting room caused the meeting room to be very hot during the morning session.” In sum, the word “cause” can be properly used in situations where multiple factors “bring about” an effect or result.<sup>47</sup>

39. Finally, China’s argument is inconsistent with the Appellate Body’s own statements about the meaning of the terms “cause” and “causal link” in the safeguards context. In *US – Wheat Gluten*, the Appellate Body examined the “causal link” requirement contained in Article 4.2(b) of the Safeguards Agreement and explained:

40. 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,

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<sup>45</sup>Protocol of Accession, para. 16.4.

<sup>46</sup>China First Submission, para. 198.

<sup>47</sup>See New Shorter Oxford English Dictionary (Sixth Edition), p. 366: Be the cause of, effect, or bring about (a thing, esp. a very bad thing); occasion, produce; induce or make.

“producing,” or “inducing” the serious injury.<sup>48</sup>

41. Since China has conceded that the terms “cause” and “causal link” are effectively the same for the purposes of the analysis set forth in the Protocol,<sup>49</sup> the Appellate Body’s reasoning indicates that the ITC can reasonably assess whether increased imports are a significant “cause” of injury to the industry under the Protocol by assessing whether they significantly “contribute” to the industry’s injury

**C. QUESTIONS TO THE UNITED STATES**

**1. STANDARD OF REVIEW**

**Q18. The United States refers at para. 59 of its FWS to the Appellate Body's finding in *US – DRAMS* (para. 184) that "an 'objective assessment' under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."**

**(a) What are the obligations of Paragraph 16 of the Protocol from which the Panel should derive the "specific contours" of the standard of review in this case?**

**(b) Although the United States takes issue with the standard of review proposed by China, the United States does not propose any alternative standard of review of its own. What would be the appropriate standard of review in this case?**

42. China has challenged two aspects of the U.S. measure.<sup>50</sup> China argues that, in the first place, the United States does not have the right to impose a measure under the Protocol, because the market disruption determination did not meet the standards of paragraphs 16.1 and 16.4. In addition, China alleges that the measure imposed exceeds the bounds allowed under paragraphs 16.3 and 16.6. The standard of review must reflect the different obligations at issue with respect to each set of claims.

43. Paragraph 246(a) of the Working Party Report requires that Members can only take action to address market disruption after an “investigation by competent authorities.” Therefore, under the Protocol, which must be read together with the Working Party Report, there must be an

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<sup>48</sup>*US - Wheat Gluten (AB)*, para. 67 (emphasis added).

<sup>49</sup>China First 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 6 of the Working Party Report are used synonymously”).

<sup>50</sup>The United States understands this question to relate to China’s “as applied” claims.

investigation by an initial trier of fact.

44. Paragraph 16.5 imposes certain procedural obligations on the Member. These include the provision of reasonable public notice to all interested parties and the opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest. Paragraph 246 (b) of the Working Party Report provides additional details, such as the requirement to provide notice of the commencement of the investigation, and the opportunities for parties to present evidence on the appropriateness of the measure. Paragraph 246(d) of the Working Party Report sets out that the expectation that authorities would publish any measure proposed to be taken and provide, again, the opportunity for comments.

45. In addition, paragraph 16.5 requires that a Member shall “provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.” We understand this to mean that a Member must explain why it has the right to impose the measure (i.e. the “reasons for such measure” or as paragraph 246(e) of the Working Party Report refers to it “an explanation of the basis for the decision.”) Those reasons are found in the ITC Report, which contains the findings and determination by the initial trier of fact after its investigation.<sup>51</sup> The scope and duration of the final measure applied are set out in the President’s determination and proclamation.

46. As we noted during the first panel meeting, China has not raised a claim under paragraph 16.5, therefore, any specific findings under paragraph 16.5 would be beyond the terms of reference of the Panel. However, given that paragraph 16.5 provides the procedural requirements for the transitional mechanism, it is one of the obligations that needs to be considered with respect to the standard of review issue.

47. In light of the above, 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

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<sup>51</sup> The requirement in the Protocol is to provide “written notice.” As we have noted in reply to Q8, we do not understand the Protocol to specify the internal decisionmaking process, and we believe this extends to how a Member provides the written notice. Under section 421, the results of the investigation by our competent authority on the issue of market disruption are set out in the ITC report. This provides the basis, if the determination is affirmative, for the President’s determination and proclamation, which are the legal instruments that implement the measure under U.S. law. These Presidential documents provide notice of the scope and duration of the measure, and by referencing the ITC Report, the basis for the measure.

explanation as to how the facts supported the market disruption determination.<sup>52</sup>

48. With respect to remedy, the situation is different, as 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 requirements of paragraphs 16.3 and 16.6. The Member, of course, has an obligation not to apply a measure that fails to meet those standards.

49. Therefore, it is for the Panel to determine whether China has shown that the explanations provided by the United States support a conclusion that the measure fails to meet the standards of paragraphs 16.3 and 16.6. In this dispute, the United States relies, among other things, on the ITC's analysis supporting its remedy recommendation to the President, the fact that during the remedy phase there was additional analysis done, leading to the decision by the President to impose a remedy that was less restrictive than the ITC remedy, and the fact that the remedy phases down over the three years.

50. China's first submission finds fault with the ITC's analysis. In reviewing that analysis, it is useful to keep in mind that the Protocol does not prescribe any specific type of analysis to be conducted with respect to remedy. In addition, as the United States noted in its first written submission, the evaluation of whether a safeguard measure is to the permissible extent cannot be a matter of scientific precision.<sup>53</sup> Of course, it is for the complaining party to make a prima facie case that the standards were not met. China has not met that burden.

## **2. Interpretation**

**Q19. China argued at the Panel's first meeting with the parties that Paragraph 16.1 of the Protocol sets forth a general obligation, and that Paragraph 16.4 of the Protocol provides for a more detailed statement of that general obligation. Does the United States agree? Please explain.**

51. Paragraph 16.1 sets forth the general conditions under which a Member is authorized to seek consultations with China, that is, where there is "market disruption", or threat of "market disruption." It is not an obligation in the sense that it does not require a Member to seek consultations whenever those conditions exist, as a Member is free to decide whether to invoke

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<sup>52</sup>We note that in paragraph 186 of *US- DRAMS CVD*, the Appellate Body states 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." We believe that this level of detail is derived from the requirements found in Articles 22.4 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."

<sup>53</sup>U.S. First Written Submission, para. 337.

the Protocol mechanism or not. Thus, paragraph 16.1 does not set out a “general obligation” with respect to the market disruption question. Paragraph 16.1 does set out an obligation that if a request for consultations with China is made, that request must be notified to the Committee on Safeguards.<sup>54</sup>

52. While paragraph 16.1 includes the term “market disruption,” it is paragraph 16.4 that sets the standards that a Member has to meet in order to make an affirmative market disruption determination. Paragraph 16.4 is clear in stating that “[m]arket disruption shall exist whenever . . .” and that in “determining if market disruption exists, the affected WTO Member shall consider objective factors, including . . .” The drafting of paragraph 16.4 is clear that it is requiring the Member to make certain findings and consider certain specific factors. Paragraph 16.1 provides context for the interpretation of paragraph 16.4, but it does not set out a “general obligation.”

53. Finally, we also wish to note the differences between paragraph 16.1 and Article 2.1 of the Safeguards Agreement, which while containing some similarities in the text, are structured very differently. The first sentence of paragraph 16.1 uses the passive voice and authorizes a Member to request consultations under certain conditions. Article 2.1 of the Safeguards Agreement clearly sets out the general conditions for applying a safeguard measure (“A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported . . .”). We note, of course, that it is appropriate to use paragraph 16.1 as context for interpreting other parts of paragraph 16.

### **3. Statutory causation standard**

**Q20. At para. 26 of its oral statement, the US asserts that Section 421 "incorporates all of the specific requirements of the Protocol, and does so on an almost verbatim basis".**

**(a) Why was the "contributes significantly" definition included in the statute? Why didn't Section 421 simply replicate the Protocol on an entirely verbatim basis?**

54. The Congress included the “contributes significantly” definition in the statute in order to provide guidance and direction to the Commission on the nature of the causal link that was required by the Protocol. It is entirely reasonable for Congress to provide such guidance. Moreover, since the causation standards of the Protocol were modeled on those of section 406, it was entirely reasonable for Congress to include the same definition of “significant cause” in section 421 as is used in section 406.

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<sup>54</sup>We note that under the U.S. implementing legislation, consultations with China are requested after the receipt of an affirmative determination from the ITC. See 19 U.S.C. 2451(j). Exhibit US-3. However, the Protocol does not specifically set out when exactly the consultations should be requested.

55. As a general matter, how Members implement their international obligations into domestic law will vary with each Member’s domestic legal system and the specific obligations at issue. “Treaty text” often has to be adapted to fit into a Member’s existing legal system and put in terms that will provide the appropriate guidance to the domestic authorities. There are provisions in the Protocol that do not need to be set out in U.S. legislation, for example, the provisions requiring notification to the Committee on Safeguards. On the other hand, Section 421 contains very robust procedural requirements that implement the more generic Protocol and Working Party Report provisions. There should be no doubt that it is entirely appropriate for a Member to do this. In this regard, Article XVI:4 of the WTO Agreement states: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” This provision does not, however, prescribe any particular means (such as giving the WTO Agreement direct effect in a Member’s legal regime, or transposing the text of the Agreement into domestic law) by which a Member must “ensure” such conformity.

**(b) If "contributes significantly" means the same as "significant cause", what purpose does the statutory definition serve?**

56. As noted above, Congress included the definition in the statute to ensure that the ITC would apply the standard in a manner that is consistent with the Protocol. Because the statute makes clear that the ITC must assess whether Chinese imports are a “significant cause” of material injury and whether they “contribute significantly” to material injury, the ITC clearly understands – and has consistently explained in its determinations – that its obligation under the statute is to assess whether “a direct and significant causal link exists” between rapidly increasing imports and material injury.<sup>55</sup> Moreover, because of the statute’s definition of “significant cause,” the ITC has consistently made clear that imports from China may not be considered a “significant cause” of material injury if they are such an “unimportant,” “subordinate” or “subsidiary” cause of injury that they do not have a “direct and significant causal link” to the industry’s injury.<sup>56</sup> This approach is, of course, fully consistent with the Protocol’s requirement that the competent authority establish that imports from China are “a significant cause” of material injury or threat to an industry.<sup>57</sup>

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<sup>55</sup>ITC Report, p. 18. Exhibit US-1. *See also Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>56</sup>ITC Report, p. 18. Exhibit US-1.

<sup>57</sup>ITC Report, p. 18 Exhibit US-1. In this regard, we note that the Working Party Report expressly equates the phrase “cause” as used in paragraph 16.4 with the term “causal link.” Working Party Report, para. 246(c) (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 . . .”).

- (c) **The United States asserted at the Panel's first meeting with the parties that the USITC's interpretation of the "contributes significantly" definition should be treated as "part and parcel" of that definition. Please explain.**

57. The ITC's interpretation and application of the statute's definition of "significant cause" is an important aspect of establishing the scope and meaning of that provision under U.S. law. The United States notes that the scope and meaning of municipal law is not just established by the text of the law alone, but by evidence of the consistent application of the law by courts and administering authorities, among other things.<sup>58</sup> In its determinations under section 421, the ITC has consistently explained that imports from China are a "significant cause" of material injury to the industry only if "a direct and significant causal link exists" between rapidly increasing imports and material injury.<sup>59</sup> The ITC's consistent application of this standard constitutes clear evidence that the statute is fully consistent with U.S. obligations under the Protocol.

- (d) **Is the "contributes significantly" definition binding on the USITC?**

58. Finally, the statute's "contribute significantly" definition is binding on the ITC to the extent that it requires the Commission to ensure that it find that rapidly increasing imports are a "significant cause" of material injury to the U.S. industry. As the ITC has explained, the "contributes significantly" standard ensures that the ITC will only issue an affirmative finding under the statute if there is a "a direct and significant causal link" between rapidly increasing imports and material injury.<sup>60</sup> Nonetheless, aside from this aspect of the standard, we would add that the statute does provide the ITC with a wide level of discretion in terms of the methodologies used to perform this assessment, and the analysis conducted by the ITC.

**Q.21 At para. 184 of its FWS, the United States argues that "the Protocol's requirement that the rapidly increasing imports be a cause of 'material injury' to the industry – rather than a cause of "serious injury" to the industry – further indicates that the transitional measure was not intended to be subject to the same exacting standards that are applicable to a global safeguards measure." At para. 17 of China's oral statement, China argues that the fact that the injury threshold is lower in Paragraph 16 of the Protocol than the Safeguards Agreement does not change the fact that the**

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<sup>58</sup>US – German Steel (AB), para. 157.

<sup>59</sup>ITC Report, p. 18. Exhibit US-1. See also *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>60</sup>ITC Report, p. 18. Exhibit US-1. See also *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

**Paragraph 16 causation standard is stronger. If Paragraph 16 were to provide that rapidly increasing imports should be the sole cause of material injury, would the US accept that the Protocol provides for a stricter causation standard than the Safeguards Agreement, notwithstanding the lesser injury threshold?**

59. Yes, in the sense that the inclusion of a “sole cause” requirement in the Protocol – which appears neither in the Protocol nor in the Safeguards Agreement – would add an additional limitation on the causal link standard. As the United States indicated at the first panel meeting, neither the Protocol nor the Safeguards Agreement contain a requirement that imports be the “sole cause,” or even the most important cause, of the level of injury specified in each.<sup>61</sup> Instead, the Protocol and the Safeguards Agreement both contemplate that imports can be one of several factors that have the requisite level of causal link to the injury contemplated under the Protocol or Agreement. Thus, if the Protocol were to provide that rapidly increasing imports must be the “sole” cause of material injury to the industry, then it would restrict the competent authority’s ability to find market disruption in a way that the Protocol does not, in fact, do. This situation contrasts with the current requirements of the Protocol and the Safeguards Agreement, which permit imposition of a remedy when imports are one of several factors causing the requisite degree of injury to the industry.

**Q22. At para. 172 of its FWS, the United States asserts that "the terms 'cause' and 'causal link' are effectively the same for the purposes of the analysis set forth in the Protocol." In US – Wheat Gluten, the Appellate Body referred to the need for investigating authorities to establish the requisite causal link by determining "whether this causal link involves a genuine and substantial relationship of cause and effect" between the increased imports and the serious injury. In light of the US assertion that the terms "cause" and "causal link" are "effectively the same", please comment on the relevance of the abovementioned finding by the Appellate Body to the interpretation of the phrase "significant cause" in Paragraph 16.4 of the Protocol. Need an investigating authority determine "a genuine and substantial relationship of cause and effect" between increased imports and material injury in order to meet the "significant cause" standard?**

60. No. As the United States has explained in its first written submission and at the first panel meeting, the causation standards contemplated by the Protocol and the Safeguards Agreement are different enough that it is difficult to determine with precision whether the “significant cause” standard in the Protocol is necessarily equivalent to the causal link standard contemplated by the Safeguards Agreement, and which the Appellate Body has explained as meaning a “genuine and substantial” relationship of cause and effect. As the United States

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<sup>61</sup>See also U.S. First Written Submission, paras. 156 and 172-173.

explained in response to Panel question 5, because “significant” and “substantial” can both be defined as meaning “important,”<sup>62</sup> one might conclude that they have the same meaning when used with the words “cause” or “causal link.” On the other hand, the word “substantial” is also defined as meaning of “real significance.”<sup>63</sup> Since the word “real” is used as an intensifier of the word “significance,” this aspect of the definition would suggest that the word “substantial” actually connotes that a “substantial” factor needs to have somewhat more significance than one that is merely “significant.”

61. Ultimately, the United States submits that it is difficult to determine with precision whether the “causal link” standard as elaborated by the Appellate Body is higher than or equal to the “significant cause” standard. Instead, the United States would simply recommend that the Panel look to assess whether rapidly increasing imports are a “significant,” that is, “important” or “notable,” cause of injury to the industry.<sup>64</sup>

62. The United States would add that it relied on the Appellate Body’s statements in *US - Wheat Gluten* solely to point out how the Appellate Body has interpreted the meaning of the words “cause” and “causal” link within the context of the Safeguards Agreement. The United States cited these statements because the words “cause” and “causal link” are referenced in paragraph 16 of the Protocol and in the Working Party Report, which meant that the Appellate Body’s reasoning in *US - Wheat Gluten* may have some relevance to this Panel’s understanding of the phrase “significant cause” as used in the Protocol. The U.S. discussion of this report was not intended to suggest that all aspects of the Appellate Body’s statements about the causation standard of the Safeguards Agreement should be incorporated wholesale into the Protocol.

#### **4. Increasing imports**

**Q23. Referring to paragraphs 99, 105 and 143 of the US first written submission. The US draws on jurisprudence from US - Steel regarding "in such increased quantities" to conclude that a recent decrease does not prevent an overall finding of increased imports. There is a reference to serious injury in the jurisprudence which the US argues at paragraph 75 of its FWS and in paragraph 9 of its oral statement is a distinguishing contextual factor. Does the jurisprudence apply in this instance? Please explain.**

63. As explained in paragraph 75 of our first written submission, textual differences between

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<sup>62</sup>Specifically, the New Shorter Oxford English Dictionary defines both terms, in part, as meaning “important.”

<sup>63</sup>New Shorter Oxford English Dictionary (Sixth Edition), p. 3088.

<sup>64</sup>The United States believes that a comparison of the two words makes only one thing clear: there is nothing in the definition of the word “significant” that indicates that it is intended to require a more “rigorous” or “stringent” causal link showing than the “genuine and substantial” causal link standard, as China mistakenly argues.

the Protocol and the Safeguards Agreement – most notably, different injury standards – indicate that the Protocol does not incorporate the standards and obligations of the Safeguards Agreement or GATT Article XIX. But, this does not mean that previous reports considering the Safeguards Agreement are entirely irrelevant in construing terms that are contained in the Protocol.

64. Reasoning in previous reports under the Safeguards Agreement may have some relevance where they deal with language that is similar or identical to language used in the Protocol. For example, paragraph 16.1 of the Protocol uses a phrase (“are being imported . . . in such increased quantities”) which is identical (except for the use of the plural instead of the singular) to a phrase used in Article 2.1 of the Safeguards Agreement (“is being imported . . . in such increased quantities”). Because of this similarity in the language, the Appellate Body’s statement in *US–Steel Safeguards*, that “Article 2.1 does *not* require that imports need to be increasing at the time of the determination” is instructive for interpreting paragraph 16.1 of the Protocol, as explained in paragraph 105 our first written submission.

65. In addition, while the assessment of whether imports are increasing rapidly over the period of investigation is an assessment that should be performed on a case-by-case basis, it is at least noteworthy that there have been disputes in which increases in imports that were smaller and less sustained than the increases in this dispute were found to satisfy the “increased imports” standard set forth in the Safeguards Agreement, as detailed in footnote 212 of our first written submission. Given that the increases in imports under the Safeguards Agreement are linked to a higher standard of injury (serious injury as opposed to material injury under the Protocol), this suggests that the increases in imports in this dispute were sufficient to meet the increased imports standard of the Protocol.

## **5. Causation**

### **(a) Conditions of competition / correlation**

**Q24. Please comment on para. 46 of China's oral statement, where China notes that the French and Spanish versions of Paragraph 16.1 of the Protocol refer to "in such increased quantities and under such conditions", as opposed to "or under such conditions". How, if at all, does this affect the United States' argument that there is no need for a detailed conditions of competition analysis under Paragraph 16 of the Protocol?**

66. The United States addressed this issue in its response to Q2. Nonetheless, whether or not the Panel finds that there was an obligation under the Protocol to conduct a conditions of competition analysis, the ITC did in fact conduct a detailed conditions of competition analysis in this proceeding. On pages 20-22 of its determination, the ITC identified the pertinent conditions of competition affecting the U.S. tire market during the period of investigation, including demand, channels of distribution, substitutability, market segmentation, and non-subject

imports.<sup>65</sup> The ITC then conducted its analysis of the volume of subject imports, the effect of subject imports on prices, and the effect of subject imports on the domestic industry in light of these conditions of competition. As noted in the United States' First Written Submission, the ITC considered and addressed arguments of the parties related to issues such as declining demand, the industry business strategy, and alleged attenuation of competition among the different market segments in its causation analysis.<sup>66</sup> The ITC found that none of these alleged factors broke the causal link between rapidly increasing imports and material injury to the domestic industry. Accordingly, the ITC complied with any requirement to examine conditions of competition under the Protocol.

**Q25. The United States asserts that Paragraph 16.4 of the Protocol does not require the investigating authority to examine conditions of competition (FWS, para. 217), or to perform a coincidence of trends analysis (FWS, para. 238). The United States argues that Paragraph 16.4 only requires the investigating authority to evaluate "objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products" (FWS, para. 236).**

- (a) Is it possible for an investigating authority to evaluate "the effect of imports on prices for like or directly competitive articles" without assessing conditions of competition and / or correlation? Please explain.**
- (b) Is it possible for an investigating authority to evaluate "the effect of imports on the domestic industry producing like or directly competitive products" without assessing conditions of competition and / or correlation? Please explain.**

67. Yes. The United States believes 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 modeling exercise, such as a static equilibrium or a linear regression modeling analysis. Although such an analysis would not constitute the type of "coincidence of trends" or "conditions of competition" analysis that authorities like the ITC

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<sup>65</sup>The United States discussed this analysis in detail in its first written submission in paras. 216-234 and 306-328.

<sup>66</sup>U.S. First Written Submission, paras. 216-234 and 306-328.

typically use to assess causation in trade remedy proceedings, it would certainly be one reasonable way of assessing the effects of the subject imports.

68. Even apart from the use of economic modeling, the United States believes that a competent authority can reasonably establish the injurious effects of imports without relying on a “coincidence of trends” analysis referenced in prior Appellate Body and WTO panel decisions. Under the Safeguards Agreement, for example, the Appellate Body and WTO panels have consistently indicated that, even if an authority has not established that there was a “coincidence of trends” between imports and declines in the industry’s condition, the authority may still make an affirmative causation finding if it can explain in a compelling manner why a causal link between imports and injury exists.<sup>67</sup> For example, in *US – Steel Safeguards*, the panel noted that a “coincidence of trends” analysis was a “central” aspect of a causation analysis under the Safeguards Agreement.<sup>68</sup> Nonetheless, the panel noted that “there may be cases ... where a competent authority does not undertake a coincidence analysis or does so, but the facts do not support a finding of causal link on the basis of such an analysis.”<sup>69</sup> In these situations, the panel explained that “reference could be made to the conditions of competition as between imports and domestic products with a view to providing a compelling explanation, in the absence of coincidence, as to why a causal link nevertheless exists.”<sup>70</sup>

69. Indeed, in that report, the panel found that the ITC had actually provided a compelling explanation of why there was a causal link between hot-rolled bar and rebar imports and declines in the industry’s condition.<sup>71</sup> In the case of rebar imports, for example, the panel noted that “the [ITC] did not conduct a coincidence analysis.”<sup>72</sup> Nevertheless, the panel concluded that the ITC established a causal link between imports and injury because the record showed that “increased imports exerted downward price pressure on domestic prices and that this, in turn, had an impact upon the financial performance of domestic producers.”<sup>73</sup> As a result, the panel found, the ITC had “provided a compelling explanation indicating the existence of a causal link between

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<sup>67</sup>*Argentina-Footwear (AB)*, paras 144-145; *Argentina - Footwear (Panel)*, para. 8.328; *US – Steel Safeguards (Panel)*, para. 10.314.

<sup>68</sup>*US – Steel Safeguards (Panel)*, para. 10.296.

<sup>69</sup>*US – Steel Safeguards (Panel)*, para. 10.314.

<sup>70</sup>*US – Steel Safeguards (Panel)*, para. 10.314.

<sup>71</sup>*US – Steel Safeguards (Panel)*, paras. 10.424 to 10.430, 10.470 to 10.477. The Appellate Body explicitly declined to make findings on the issue of causation, and thus neither reversed nor upheld these findings. *US – Steel Safeguards (AB)*, para. 483.

<sup>72</sup>*US – Steel Safeguards (Panel)*, para. 10.473.

<sup>73</sup>*US – Steel Safeguards (Panel)*, para. 10.477.

increased imports and serious injury ....”<sup>74</sup> In other words, even under the Safeguards Agreement, an authority need not perform a “coincidence of trends” analysis to establish the existence of a causal link between imports and injury.

**Q26. At para. 39 of its oral statement, the US asserts that the USITC analyzed the volume of imports, the effect of imports on prices, and the effect of such imports on the domestic industry "after considering conditions of competition". Was the USITC's conditions of competition analysis entirely separate from its evaluation of the volume of imports, the effect of imports on prices, and the effect of such imports on the domestic industry?**

70. No. The ITC’s conditions of competition analysis was not entirely separate from its evaluation of the volume of imports, the effect of imports on prices, and the effect of such imports on the domestic industry. As discussed in response to question 24, the ITC identified the pertinent conditions of competition on pages 20-22 of its determination. After identifying the pertinent conditions of competition, the ITC then conducted its causation analysis of volume of imports, the effect of imports on prices, and the effect of such imports on the domestic industry in light of these conditions, and discussed the pertinent conditions of competition where applicable. In this analysis, the ITC also specifically addressed the major arguments of the parties, such as declining demand, the industry business strategy, and attenuation of competition among the different market segments, and then found that none of these alleged factors broke the causal link between rapidly increasing imports and material injury to the domestic industry.<sup>75</sup>

**Q27. At para. 49 of its oral statement, China asserts that subject imports were "virtually absent in approximately 74% of the US tire market". The United States indicated at the Panel's first meeting with the parties that this figure is "inaccurate". Please explain the alleged inaccuracy.**

71. China alleges that the record confirms that tires from China were not competing significantly with U.S.-made tires because Chinese imports were virtually absent in approximately 74 percent of the U.S. tire market. The United States disagrees with China’s argument that China was “virtually absent” from 74 percent of the market, and with its assertion that Chinese tires do not compete with U.S. tires.

72. China’s assertion that Tier 1 tires constitute 70 percent of the total replacement market is

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<sup>74</sup>US – Steel Safeguards (Panel), para. 10.477. This finding was subject to fulfillment of the Agreement on Safeguards non-attribution requirement.

<sup>75</sup>ITC Report, pp. 22-29. Exhibit US-1.

belied by the very article China cites in support of its claim.<sup>76</sup> The Modern Tire Dealer article cited on page V-6 of the ITC’s Staff Report reported that “major brands” represented 72.6 percent of domestic brand share in 2008.<sup>77</sup> However, it is clear from the article that the “major brand” category is much more expansive than the Tier 1 category as respondents understood it, and clearly includes a large percentage of tires that fall into Tier 2. Specifically, Respondents defined Tier 1 tires as flagship brands such as Bridgestone, Goodyear, and Michelin, and Tier 2 tires with secondary or former Tier 1 brand tires such as BF Goodrich, Uniroyal, and General, as well as some foreign brands such as Pirelli.<sup>78</sup> Chart 4 in the Modern Tire Dealer article shows clearly that the Tier 1 brands accounted for only 30 percent of 198 million passenger tire market in 2008, and 27 percent of the 31 million tire light truck market, far less than the 70 percent claimed by China.<sup>79</sup> What is clear is that a much larger percentage of the tires included in the “major brand” label fall into Tier 2, as defined by the respondents themselves. China does not, and cannot argue, that Chinese imports were absent from this tier.<sup>80</sup>

73. Moreover, China alleges that Chinese imports were virtually absent from the OEM market. The United States disagrees. 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 percent of the market. It was certainly not true for 2008 when subject import volumes rose to their period high of 2.3 million tires and accounted for approximately 5 percent of the market. It is also noteworthy that, as non-subject import volumes remained relatively flat over the period, this growth in Chinese imports into the OEM market came at the direct expense of the domestic industry, whose shipments to the OEM market declined to a period low in 2008. Accordingly, the ITC’s finding that Chinese imports were present in the OEM market and that there was competition between Chinese tires and domestic tires in 2008 was fully supported by the record.

74. Going beyond the inaccuracies in China’s 74 percent figure, China’s theory that competition between Chinese imports and U.S.-produced tires in the U.S. tire market is so attenuated due to market segmentation is not supported by the record. Although the ITC found

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<sup>76</sup>China claims that the Tier 1 segment represents 56 percent of the total market (70 percent x 80 percent of the replacement market), which combined with 18 percent for the OEM market represents 74 percent of the total market. China’s Oral Statement at the First Panel Meeting, p. 3 n.1.

<sup>77</sup>ITC Report, V-6 *citing* Modern Tire Dealer, “No Smoke or Mirrors,” January 2009. Exhibit US-29.

<sup>78</sup>ITC Report, V-4. Exhibit US-1.

<sup>79</sup>The inaccuracy of China’s 70 percent figure is further confirmed by the testimony of a witness for the respondents at the ITC’s hearing who stated that, “In our business roughly 60 percent of our sales are out in what we consider in tier one/ tier two type brands.” ITC’s Hearing Tr. at 312 (Berra). Exhibit US-30. Even combined, sales of Tier 1 and Tier 2 tires do not add up to the 70 percent figure cited by China for Tier 1 sales alone, and this testimony is entirely consistent with the data cited in the Modern Tire Dealer article.

<sup>80</sup>Modern Tire Dealer, “No Smoke or Mirrors,” January 2009, Chart 4 (listing the 2008 U.S. replacement consumer tire brand shares). Exhibit US-29.

that the U.S. replacement market can generally be segmented into three categories or tiers, there was no industry-wide and universally accepted definition establishing a bright-line rule for what tires are classified in each tier. Consequently, market participants did not agree on what tires should be included in the different tiers.<sup>81</sup> Confirming this lack of a bright-line dividing line between the three tiers, market participants provided a wide range of estimates of the share of U.S. producers and subject Chinese tire shipments that fall into each category.<sup>82</sup>

75. What was clear was that in 2008 shipments of both domestically produced tires and subject imports from China, were sold in all three categories.<sup>83</sup> For example, U.S. producers' U.S. shipments of Tier 3 tires accounted for approximately 18.6 percent of their total U.S. shipments.<sup>84</sup> There were also significant shipments of subject tires from China that fell into category two, equalling approximately 64.3 percent of the quantity of China's shipment's in category three. In addition, the ITC found that there was competition in the OEM market, with subject imports accounting for 4.9 percent of that market in 2008 and domestically produced tires accounting for 51.6 percent in 2008.

76. These data are consistent with the fact that the large majority of all market participants, U.S. producers, U.S. importers, and purchasers, reported that Chinese imports and U.S. tires were either "frequently" or "always" interchangeable. In fact, 56 percent of market participants reported that subject imports and U.S. tires were always interchangeable.<sup>85</sup> The interchangeability of subject imports and domestically produced tires was further confirmed by the fact that the ITC was able to conduct pricing comparisons of large quantities of shipments by U.S. producers and importers of subject tires all for six specific pricing products, with specific dimensions, load indexes, and speed ratings, in the large majority of quarters over the period.<sup>86</sup> In other words, this information showed that, in the view of the large majority of all market participants, market segmentation was not a bar to, or limit on, the interchangeability of Chinese and U.S. tires.

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<sup>81</sup>ITC Report, p. 27. Exhibit US-1.

<sup>82</sup>ITC Report, p. 27. Exhibit US-1.

<sup>83</sup>ITC Report, p. 27. Exhibit US-1.

<sup>84</sup>ITC Report, p. 27. Exhibit US-1. It is important to recall that the domestic industry shipped 18.6 percent of its shipments into the category three sector in 2008, the last year of the period. *Id.* At that point the domestic industry had undertaken substantial reductions and plant closures to reduce its production of low-end tires, a decision that was made in reaction to the significant and increasing volume of subject imports from China. ITC Report, p. 27-28. Exhibit US-1. Thus, any alleged lack of competition in that category by 2008 was significantly the result of the subject imports themselves.

<sup>85</sup>ITC Report, Table V-6. Exhibit US-1.

<sup>86</sup>ITC Report, Tables V-9-V-14. Exhibit US-1.

77. In the end, China’s arguments concerning market segmentation are simply the same arguments that were considered and rejected by the ITC in its determination. China points to no evidence supporting its theory that the tiers in the replacement market serve as absolute bars to competition. The evidence on the record fully supports the ITC’s finding that there was competition between Chinese imports and U.S. produced tires in all three tiers of the replacement market, as well as the OEM market. Moreover, the ITC specifically rejected the contention that subject imports that are present in one market segment have little, if any, effect on the volume and price of U.S.-produced tires in the other market segments and thus little if any effect on U.S. producers. Given the close substitutability of Chinese imports and U.S. produced tires, it is hardly surprising that as subject imports increased throughout the period, gaining 12.0 percentage points of market share over the period, the domestic industry’s market share declined by 13.7 percentage points. In light of these facts, China’s attenuation of competition theory simply does not withstand scrutiny.

**Q28. At the Panel's first meeting with the parties, the United States sought to demonstrate the overlap between the different tiers in the replacement market by referring to a Pirelli tyre placed in tier 2 of the replacement market. The United States suggested that one might normally have expected such a branded tyre to be placed in tier 1. Please provide evidence regarding the placement of this particular Pirelli tyre, and explain why this tyre might normally be expected to be placed in tier 1.**

78. The classification of Pirelli tires is a good example of the flaws in China’s argument that competition between U.S. and Chinese tires was attenuated due to market segmentation. As discussed above, it is not just one type of Pirelli tire that has been placed in tier 2 in the U.S. replacement market, but all Pirelli tires. Respondents defined Tier 1 tires as consisting of flagship brands such as Bridgestone, Goodyear, and Michelin, and Tier 2 tires as consisting of “secondary” or “former Tier 1” brand tires such as BF Goodrich, Uniroyal, and General. Respondents also included in Tier 2 some foreign brands such as Pirelli, even though these tires are flagship brands in their own country or other export markets.<sup>87</sup> The fact that some respondents would place Pirelli tires in Tier 2 highlights the fact that there is no standard industry definition for each of the tiers. As noted by the ITC in its determination, the lack of bright line definition for the tiers was confirmed by the lack of agreement between market participants as to which tires were included in the tiers.<sup>88</sup>

79. According to China’s theory of attenuated competition based on different tiers in the replacement market, Pirelli tires do not and cannot compete with Michelin tires in the U.S. market because they are in different tiers. Further, BF Goodrich tires could not compete with Bridgestone tires because they are in different tiers. Obviously, the flaw in China’s argument

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<sup>87</sup>ITC Report, V-4. Exhibit US-1.

<sup>88</sup>ITC Report, p. 27. Exhibit US-1.

would be apparent anyone who has ever had to buy a tire for their car, and their theory finds no support in the record. These tires compete with each other in the U.S. marketplace by providing consumers with numerous choices in terms of replacement tires.<sup>89</sup> Their subjective classification as a certain tier of tire for purposes of this dispute has no real bearing on the actual competition between these types of tires in the marketplace, and certainly did not mandate an attenuated competition finding by the ITC.

80. At the ITC's hearing, a witness for the respondents confirmed the presence of competition between tier three tires and tier one and tier two tires. Specifically, he stated:

Les Schwab sells tires in the third segment of the market, which includes private brand tires. Within this third tier, our tires cover the same broad spectrum of size and performance as are offered in the first two segments. When all the advertising and marketing is stripped away, our tires are just as well made, just a safe, and just as carefully inspected as brand names. Our tires simply do not have a flag or secondary brand name on their sidewall.<sup>90</sup>

81. The evidence on the record before the ITC showed that the major difference between a tier 3 tire and a tier 1 tire is essentially brand, marketing, and price.<sup>91</sup> This is entirely consistent with the ITC's finding of close substitutability between Chinese imports and U.S. produced tires, and the large volumes of both Chinese tires and U.S. tires in the quarterly comparisons for all of the specific pricing products.

82. In its determination, the ITC considered and rejected respondents' arguments related to attenuated competition due to the fact that the largest share of U.S. producers' shipments falls into tier 1 and the largest share of subject import shipments falls into tier 3. China is simply retreading the same rejected arguments before this Panel. There is simply no evidence on the record that the placement of tires into different tiers serves as a bar to competition. Accordingly, China's argument that Chinese tires could not be a significant cause of injury to the U.S. industry due to attenuated competition, must fail.

**(b) Non-attribution**

**Q29. At para. 297 of its FWS, the US asserts that "the Protocol does not specifically require a competent authority to consider the possible effects of other factors causing material injury or threat of material injury as part of**

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<sup>89</sup>US - Cotton Yarn (AB), para. 91.

<sup>90</sup>ITC's Hearing Tr. at 246 (Borgman) (Emphasis added). Exhibit US-30

<sup>91</sup>ITC Report, p. 9 n.41. Exhibit US-1.

**its causation analysis." At para. 53 of its oral statement, the US argues that "the Protocol does not specifically require a competent authority to perform a detailed 'non-attribution' analysis of the possible effects of other factors causing material injury". We note the inclusion of the word "detailed" in the US oral statement. Does the US accept that a "non-detailed" analysis of non-attribution is required under the Protocol? If so, how should such analysis be undertaken?**

83. No. As the United States explained in its first written submission,<sup>92</sup> it does not believe that an analysis of other factors, whether detailed or non-detailed, is required under the causation provisions of the Protocol. As the United States pointed out at the first panel meeting, it used the phrase “detailed” to refer to the specific type of non-attribution analysis that the Appellate Body has stated is required by the “non-attribution” language of the Safeguards Agreement and the Antidumping Agreement.<sup>93</sup> As the United States pointed out in its first written submission, the Protocol does not contain the specific “non-attribution” language contained in the Safeguards Agreement or the Antidumping Agreement. Since the negotiators of the Protocol were presumably aware of the “non-attribution” language of Safeguards Agreement and the Antidumping Agreement and 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 routinely imposed on a competent authority in an investigation. It would only be when a cause of injury is so dominant in terms of its injurious effect on an industry that a competent authority might be expected under the language of the Protocol to provide a reasoned explanation of whether that factor severs the apparent causal link between imports and material injury.

## **6. Remedy**

**Q30. At para. 59 of its oral statement, the US asserts that the USITC "used economic modelling to assess the likely impact of various options and proposed an additional tariff of 55 percent in the first year, which was estimated to reduce shipments of Chinese tires by 38.2 to 58.4 percent". At para. 341 of its FWS, the United States asserts that the USITC "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". The United States does not cite to any particular part of the USITC Report when making this assertion. Please explain:**

**(a) how the USITC determined that a 55 per cent tariff would reduce subject imports by 38.2 to 58.4 per cent in the first year; and**

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<sup>92</sup>U.S. First Written Submission, para. 295-305.

<sup>93</sup>US - *Lamb Meat (AB)*, paras. 162-181; US - *Hot-Rolled Steel (AB)*, paras. 216-236.

**(b) how the USITC determined that a 38.2 to 58.4 per cent reduction in subject imports in the first year would address the market disruption found to exist.**

84. The ITC determination that a 55 percent tariff would reduce subject imports by 38.2 to 58.4 percent was based on economic modeling results. To quantify the impact of the remedy, the COMPAS (Commercial Policy Analysis System) model was used to estimate changes in domestic production, domestic shipments, and imports resulting from the additional duties and/or quantitative restrictions on imports of subject tires from China. To estimate the impact, the ITC compared the market in 2008 with the market assuming the proposed remedy was in place. The COMPAS model is a partial equilibrium model. “Partial equilibrium” here means that the analysis for one product is considered in isolation of other products, without considering the interactions of different product markets.

85. To estimate the impact of a remedy, the model relies on a variety of information: the magnitude of the additional duties and/or quantitative restrictions in the remedy, the initial market shares for domestic and foreign producers of the product, the degree to which domestic demand for the subject product responds to price changes, the degree to which domestic and foreign producers respond to price changes, and the degree of substitutability between the domestically produced product and imports from other countries.

86. The model depends on an elasticity of substitution, an aggregate demand elasticity, and price elasticities of supply for domestic shipments and imports; and the value of U.S. shipments of U.S. production and imports of subject tires from China and from non-subject countries. Since the selection of the elasticities can impact the modeling results, the ITC provides the opportunity for interested parties to comment on the elasticities values selected. The discussion of the elasticities is found in Part V of the ITC Report, pages V-18 to V20<sup>94</sup>, as well as in the Staff Remedy Memorandum<sup>95</sup>. For a more detailed and technical discussion of the model please see the explanation by Francois and Hall, “Partial Equilibrium Modeling,” in *Applied Methods for Trade Policy Analysis: A Handbook*.<sup>96</sup>

87. In regards to subpart (b), the United States refers the Panel to the views on remedy section of the majority, starting on page 30 of the ITC Report, and the separate views on remedy of Chairman Aranoff, starting on page 39 of the ITC Report.<sup>97</sup> Although the views must be considered in their entirety, we draw attention to particular aspects of those views below.

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<sup>94</sup>Exhibit US-1.

<sup>95</sup>Exhibit US-20.

<sup>96</sup>Exhibit US-31. The model used is the nonlinear Armington model described in “Partial Equilibrium Modeling” by Francois, Joseph F. and H. Keith Hal, in *Applied Methods for Trade Policy Analysis: A Handbook*, edited by Joseph F. Francois and Kenneth A. Reinsert, 122–55. Cambridge: Cambridge University Press, 1997.

<sup>97</sup>Exhibit US-1.

88. In the middle of page 35, the majority explains:

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. In proposing this remedy, we are mindful of record evidence that domestic producers have already significantly reduced their capacity to produce for the lower-priced end of the market in which imports from China compete most extensively. Nevertheless, there is substantial competition between U.S.-produced tires and imports from China in all segments of the market, and the imposition of higher duties will increase prices and permit U.S. producers to utilize their available capacity to increase production, sales, and employment.

89. In our first written submission, we noted the discussion on page 36 in which the majority explains why it rejects the remedy proposed by petitioners.<sup>98</sup>

90. In Part E of the remedy discussion, beginning on page 37, where the majority addresses the short- and long-term effects of the recommended remedy, the majority also explains:

As explained above, in the first year we propose a 55 percent tariff on all imports of subject tires. This duty would likely reduce shipments of subject tires by 38.2 to 58.4 percent in the first year. Increases in shipments by domestic producers would likely make up for most of the reduction in the volume and market share of subject imports. Although both domestic and non-subject import shipments would likely increase by 3.4 to 6.8 percent, the volume of domestic shipments is much higher than that of non-subject import shipments, and domestic shipments will thus likely enjoy a much more substantial increase. Further, the increased tariff will not preclude growth if market conditions change. The tariff is likely to result in a modest increase in prices for domestic and imported tires. Domestic industry and non-subject import prices are estimated to increase by 1.3 to 2.2 percent.

The increased quantity and prices of domestic industry shipments would significantly improve the domestic industry's revenues. The benefit provided by the tariff – a revenue increase of 5.1 to 8.6 percent – should allow the industry to go from incurring operating losses to earning operating profits. Any negative effects on U.S. consumers will likely be very small in absolute terms and even smaller in relative terms, given that tires are generally a small cost component in their ultimate end uses in passenger vehicles and light trucks. [footnotes removed]

91. The Commission views on the effects of the proposed remedy are further enhanced by the

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<sup>98</sup>U.S. First Written Submission, para. 341.

discussion contained in Chairman Aranoff's separate views. Beginning on page 40, she explains:

In determining what remedy to propose, I took into account the nature of the market disruption that I have found to exist - specifically the rapid increase in imports of subject tires from China, the large absolute volume of those imports, and the underselling by the imports. It is my view that, in order to be effective, a remedy must address and alleviate these specific elements of market disruption, by reducing the volume of imports from China in the U.S. market and raising the prices of the remaining volume of such imports in an effective way and for an effective period of time.

The remedy that I am proposing achieves these results. According to the estimates by the Commission staff, a 55 percent additional tariff in the first year would reduce the volume of subject imports from China by 33 to 58 percent, and would raise prices of subject imports from China by 12 to 23 percent. This would have the effect of reducing market share of subject imports to 7.3 to 10.6 percent (from 16.7 percent), based on the quantity of apparent consumption in 2008, and of largely negating the average underselling margins of 23.6 percent associated with subject imports in 2008.

92. On page 41, Chairman Aranoff further explains:

The action I am recommending is likely to raise domestic producers' revenues by 5.1 to 8.6 percent in the first year, which should be sufficient to restore the domestic industry to modest profitability. The recommended remedy is not intended to address the effects of the current recession or to restore the domestic industry to a level of shipments and profitability that prevailed in any particular year, because decreasing demand, rising raw material costs, natural disasters and other factors all affected the operating performance of the domestic industry between 2004 and 2008 in addition to the market disruption caused by imports from China. Thus, the level of profitability likely to prevail once the market disruption is remedied would not be expected to exceed that experienced by the domestic industry in the earlier years of the POI when a stronger economy contributed to healthier operating results.

The proposed remedy is likely to increase domestic production by 2.9 to 5.8 percent. Making the reasonable assumption that an increase in domestic production is likely to translate into a comparable increase in employment, I would similarly expect an increase in employment of 2.9 to 5.8 percent in the first year, or approximately 900 to 1,800 jobs. To the extent that workers at some domestic tire production facilities are currently working short shifts, this positive employment effect may manifest itself at least in part in the form of an increase in hours worked, rather than jobs saved or new jobs created, due to the temporary nature of the remedy. [footnotes removed]