

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

**(WT/DS399)**

**SECOND WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

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### Exhibit List

Exhibit US-	Title
32	Sections 201-202 of the Trade Act of 1974, as amended (19 U.S.C. §§2251 & 2252)
33	<i>Steel</i> , Investigation No. TA-201-73, USITC Pub. 3479 (December 2001) (excerpts)
34	<i>Lamb Meat</i> , Investigation No. TA-201-68, USITC Pub. 3176 (April 1999) (excerpts)
35	<i>Wheat Gluten</i> , Investigation No. TA-201-67, USITC Pub. 3088 (March 1998) (excerpts)

## **I. Introduction**

1. The United States has demonstrated, in its first written submission, oral statement, and answers to the Panel's questions, that China's basic thesis - that the standards of the transitional mechanism are so high and the analysis by the ITC so deficient - is completely unfounded and based on mischaracterizations of the text of the Protocol and the very detailed analysis conducted by the ITC. A few new issues raised by China at the panel meeting - the language difference in paragraph 16.1 and the relationship between section 421 and section 406, as examples - are distractions that do nothing to support China's arguments. Even while China conceded that the obligations of the Safeguards Agreement have not been incorporated into the Protocol, it continues its attempt to draw the Panel to a comparison with the Safeguards Agreement text. This temptation must be resisted.

2. The United States will not repeat all its arguments here, but will try to address the more salient arguments raised by China in its oral statement and answers to questions.

## **II. Interpretive Issues**

### **A. Transitional Mechanism and Safeguards Agreement**

3. The question of what, if any, relationship there is between the transitional mechanism contained in paragraph 16 of China's Protocol of Accession and the Safeguards Agreement has been a focus of attention in this dispute. This is not surprising given the fact that this is the first dispute involving the transitional mechanism and the fact that China has chosen to argue that certain terms in the Protocol are "additions" to Safeguard Agreement text (while ignoring terms that could be characterized as "deletions"). However, as the United States has noted before, this is not a useful framework for analysis.<sup>1</sup>

4. The United States recalls that during the first meeting of the Panel with the parties, China clarified that it was not arguing that the provisions of the Safeguards Agreement had been incorporated into the Protocol. Therefore, we seem to have agreement on this issue.<sup>2</sup>

5. With respect to whether the Protocol is *lex specialis*, in its answers to the Panel's questions, China states that paragraph 16 "provide[s] a more specific set of rules to address the application of safeguard measures to import from China under certain particular circumstances" and that the Safeguards Agreement provides "the more general principles."<sup>3</sup> This is simply wrong. The Safeguards Agreement and the transitional mechanism apply in different circumstances. They are separate remedies available to a WTO Member under different

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<sup>1</sup>E.g. U.S. First Written Submission, para. 61.

<sup>2</sup>The United States notes that the European Union and Japan made written submissions and oral statements also agreeing with the fact that the provisions of the Safeguards Agreement have not been incorporated into the Protocol.

<sup>3</sup>China's Answers to Panel Questions, para. 2.

circumstances. Indeed, China’s own answer acknowledges that the Protocol and the Safeguards Agreement apply in different circumstances.<sup>4</sup> Therefore, China seems to concede – as it must – that the transitional mechanism is distinct from the Safeguards Agreement - that is, it exists separate and apart from the Safeguards Agreement, as the United States has explained. Therefore, it is incorrect to state that the principle of *lex specialis* provides even limited guidance for interpreting paragraph 16.

6. Contrary to China’s assertions, the U.S. “interpretive position” is not “internally inconsistent.”<sup>5</sup> The United States simply disagrees with China’s assertion that there is “substantial overlap in structure and language”<sup>6</sup> between the transitional mechanism and the Safeguards Agreement. Even a quick reading of both reveals that there are substantial portions and concepts from the Safeguards Agreement that are simply not present in the transitional mechanism. Therefore, any analysis that starts from the premise that terms have been “added” to the Safeguards Agreement text is flawed.

7. The United States agrees that the Protocol of Accession is an integral part of the WTO. However, under the interpretive approach required by Article 3.2 of the DSU, the Panel must consider the text of the Protocol, in its context and in light of the object and purpose of the agreement. China appears to advance a different approach, under which the Panel should examine the Safeguards Agreement instead, and then add the Protocol to that agreement. Nothing in the text of the Protocol, or in the customary rules of treaty interpretation, countenance that approach. Furthermore, the most relevant context for the Panel’s consideration is the context provided by the other provisions of the transitional mechanism and the context provided by the relevant passages of the Working Party Report. To the extent that there is a need to seek broader contextual guidance, the Panel may also look to prior interpretations of similar terms or provisions of the Safeguards Agreement or any of the other WTO agreements as appropriate. Where relevant, the Panel may also consider the reasoning of other panels and the Appellate Body interpreting such provisions. However, care must be exercised to avoid importing words or obligations from one agreement that are not found in the other.

## **B. The United States Is Not Arguing that There Are No Standards To Be Applied**

8. Contrary to China’s assertions, the United States has not argued that “there is no standard

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<sup>4</sup>China’s Answers to Panel Questions, para. 3 (“Here, however, the application of global safeguards to all countries and the application of Article 16 only to China represent two related - but distinct - situations.”)

<sup>5</sup>Oral Statement of China at First Panel Meeting, para. 13.

<sup>6</sup>*Id.*

and that the authorities are always correct.”<sup>7</sup> A Member invoking the transitional mechanism must meet the standards contained in the text of paragraph 16 of the Protocol, read in conjunction with the context provided by the Working Party Report. It is evident that the text of the transitional mechanism contains different, and in some cases fewer, prescriptions than the text of the Safeguards Agreement. This is not an “extreme interpretation,”<sup>8</sup> but an interpretation consistent with the customary rules of interpretation of public international law, as required by DSU Article 3.2.

### **C. Language Differences with Respect to Paragraph 16.1 Have No Impact on Analysis**

9. As the United States has explained in its Answers to Panel Questions,<sup>9</sup> the textual difference identified by China has no bearing on the analysis of China’s argument on the ITC’s analysis of the conditions of competition. China argues that the conditions of competition analysis that the ITC did conduct as part of its causation analysis is flawed. An analysis of that issue requires the Panel to look at paragraph 16.4, not paragraph 16.1. Paragraph 16.1 sets out the conditions under which a Member may seek consultations with China under the Protocol. Whether or not the basis for consultations is the same as the standard for a finding of market disruption set out in paragraph 16.4 need not be addressed by this Panel. In any event, it does not affect the analysis of the requirements of paragraph 16.4, which is where “market disruption” is defined, and paragraph 16.4 does not require a “conditions of competition” analysis. (Nor, for that matter, does paragraph 16.1.)<sup>10</sup>

10. China seeks to rely on panel and Appellate Body reports in the Safeguards Agreement context as proof of the “importance of a conditions of competition analysis to causation findings.”<sup>11</sup> However, we believe those very same reports are evidence that whatever causation analysis is required under a particular instrument, the standard must be derived from the specific text of the relevant legal instrument. As we explained in our Answers to the Panel Questions,<sup>12</sup> that is the relevant finding from *Argentina – Footwear*. Just like the substance of the causation

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<sup>7</sup>Oral Statement of China at First Panel Meeting, para. 18.

<sup>8</sup>Id.

<sup>9</sup>U.S. Answers to Panel Questions Following First Panel Meeting, paras. 3 - 7.

<sup>10</sup>The United States notes that it is entirely consistent under the Protocol for a WTO Member to seek consultations with China where the Member considers that there is the threat of market disruption. The conditions may be such in a particular industry that the Member, and China, may reach agreement (under paragraph 16.2 of the Protocol) to prevent the market disruption.

<sup>11</sup>China’s Answers to Panel Questions, para. 9.

<sup>12</sup>U.S. Answers to Panel Questions Following First Panel Meeting, para. 6.

analysis in the Safeguards Agreement is found in Article 4.2(a) and (b), the substance of the causation analysis under the transitional mechanism must be found in paragraph 16.4 of the Protocol.

11. We note that China seems to want to reduce the issue of reconciling textual differences to a mathematical exercise. If we understand China’s “five out of six times” reference correctly, it is “counting” the three instances of “and” in Article 2.1 of the Safeguards Agreement (in English, French, and Spanish).<sup>13</sup> No one has argued that Article 2.1 was not supposed to include “and.” However, that does not prove anything about paragraph 16.1. In fact, there are other differences between the drafting of paragraph 16.1 and Article 2.1 of the Safeguards Agreement. In any case, as we have already explained, there is no need for the Panel to resolve this issue to address China’s “conditions of competition” argument.

#### **D. Standard of Review**

12. The United States has provided its views on the issue of standard of review in its Answers to the Panel Questions.<sup>14</sup> We note that China’s answers regarding this issue (to questions 9 and 18), do not address the issue of what is the proper standard of review which the Panel must use to evaluate whether the United States met its obligations. China instead confuses the standard of review with what is required by the particular obligation. In discussing what it views as the differences in “application” of the standard of review, China merely restates particular terms from the provisions of the Safeguards Agreement and the Protocol, but the terms of these provisions are not a “standard of review.”

13. Throughout its submission and statements, China has tried to argue that the ITC did not conduct a thorough analysis of the facts and did not provide sufficient and adequate explanations for its market disruption determination. The ITC Report is before this Panel, and the Panel should review it to determine whether the ITC has provided reasoned explanations as to how the evidence before it supported its conclusion that there was market disruption. For the reasons we have given, the answer is yes. It should be clear from reading the Report, that the issues raised by China in this dispute are the very issues that the ITC had before it, that the ITC evaluated the evidence appropriately, and provided reasoned conclusions. With respect to the remedy, we note that China’s arguments are likewise centered on criticizing the ITC analysis. We have explained why China’s arguments are likewise invalid.<sup>15</sup>

14. We note that in answering the Panel’s question regarding where the United States has

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<sup>13</sup>China’s Answers to Panel Questions, para. 9.

<sup>14</sup>U.S. Answers to Panel Questions Following First Panel Meeting, paras. 42 - 50.

<sup>15</sup>U.S. First Written Submission, paras. 331-357.



engaged in *ex post* rationalizations,<sup>16</sup> China cites to one alleged instance. China points to our supposed *ex post* rationalization regarding a lag effect in paragraph 248 of our first written submission. However, the comment about a “lag effect” in that paragraph is clearly not intended to be an explanation of what the ITC did, but an explanation of why China’s arguments regarding coincidence of trends analysis in this dispute are wrong. The point, which China tries to obscure, is that under the Safeguards Agreement, panels have recognized that an authority is not required to establish a coincidence in trends for every factor and for all years of the period examined, as China seems to argue.

### **III. Despite China’s Attempts to Obscure the Actual Record Evidence Concerning Import Volume Trends, The Record Showed Clearly that Imports of Tires from China Increased Rapidly Over the Period**

15. In its oral statement and at the first panel meeting, China has mistakenly continued to assert that the ITC failed to provide any explanation of the reason it found that Chinese imports were rapidly increasing over the period.<sup>17</sup> As the United States established in its first written submission and at the first panel meeting, the ITC explained quite clearly why imports of tires from China were rapidly increasing and were a significant cause of material injury to the U.S. tires industry.<sup>18</sup> As the ITC found, Chinese tire imports increased by significant amounts in each year of the period of investigation, growing by 42.7 percent in 2004, 29.9 percent in 2005, 53.7 percent in 2007, and 10.8 percent in 2008, the final year of the period of investigation.<sup>19</sup>

16. Moreover, as the ITC also explained, the record showed that the Chinese imports were at their highest levels of the period in 2008, having increased by 215.5 percent between 2004 and 2008.<sup>20</sup> Additionally, Chinese imports gained approximately 12 percentage points of market share during the period of investigation, which correlated with similar declines in the U.S. industry’s market share.<sup>21</sup> Finally, as the ITC pointed out, the largest portion of these increases occurred during the final two years of the period, with 60 percent of growth in the absolute volumes of imports occurring in 2007 and 2008 and 62 percent of the growth in their market share occurring in 2007 and 2008.<sup>22</sup> As the ITC concluded, the record did show that import

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<sup>16</sup>Panel Question 10, in reference to the statement by China in para. 67 of its oral statement.

<sup>17</sup>Oral Statement of China at First Panel Meeting, paras. 24-26.

<sup>18</sup>U.S. First Written Submission, paras. 78-144.

<sup>19</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>20</sup>ITC Report, pp. 11-21 and Table C-1. Exhibit US-1.

<sup>21</sup>ITC Report, pp. 11-21 and Table C-1. Exhibit US-1.

<sup>22</sup>ITC Report, pp. 11-21 and Table C-1. Exhibit US-1.

“increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.”<sup>23</sup>

17. In its first written submission and at the first panel meeting, the United States also established that China’s legal challenges to the ITC’s increased imports analysis are unfounded. For example, the Protocol does not impose a more demanding standard for increased imports than the Safeguards Agreement, as China asserts, but actually requires a less rigorous showing than the Safeguards Agreement.<sup>24</sup> In addition, there is no basis for China’s claim that the ITC did not focus on recent increases in imports. As the United States pointed out, the ITC specifically focused and relied on the import increases in the last two years of the period of investigation, 2007 and 2008.<sup>25</sup> Similarly, the United States established that China also had no basis for its argument that the ITC relied exclusively on an “end-point-to-end-point” analysis, pointing out that the ITC analyzed and relied on the year-to-year increases over the period, especially those occurring in the last two years of the period.<sup>26</sup> Finally, the United States explained that the ITC’s decision not to seek data for the first quarter of 2009 was reasonable and consistent with its established practice.<sup>27</sup>

18. In its oral statement and in its responses to the Panel’s questions, China has, to a great extent, simply repeated the same arguments it made in its first written submission. The United States will therefore simply highlight three issues raised by China at the first panel meeting and in its responses to the panel’s questions relating to increasing imports. The United States will first address the misleading nature of the import charts in China’s oral statement at the first panel meeting. It will then address China’s statements about the textual link in the Protocol between increased imports and material injury, which China would have the Panel ignore. And finally, it will address the Appellate Body’s statements in the context of the Safeguards Agreement about the need to focus on “recent” import developments.

**A. China’s Arguments about the Abatement of Import Volumes Continue to Be Misleading**

19. At the first panel meeting, China has continued to make the factually mistaken assertion that imports from China were actually “declining in 2008,” the end of the ITC’s period of

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<sup>23</sup>ITC Report, p. 12. Exhibit US-1.

<sup>24</sup>U.S. First Written Submission, paras. 92-99.

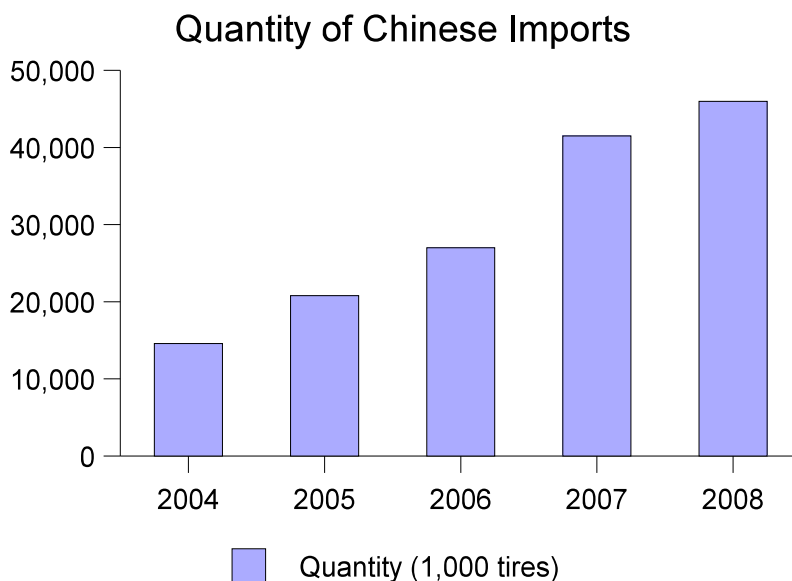
<sup>25</sup>U.S. First Written Submission, paras. 82-112.

<sup>26</sup>U.S. First Written Submission, paras. 114-118.

<sup>27</sup>U.S. First Written Submission, paras. 130-143.

investigation.<sup>28</sup> According to China, the ITC’s record did not show that imports were continuing to increase in the last year of the period.<sup>29</sup> Instead, China asserts, Chinese imports were “dramatically slowing” in 2008, when viewed either on an annual or quarterly basis.<sup>30</sup>

20. The record actually tells quite a different story. The import data in the record clearly and unequivocally show a rapid and recent increase in the volumes of the Chinese imports, whether measured on an absolute or relative basis.<sup>31</sup> For example, there was a rapid rise in the absolute volumes of the Chinese imports, including the years 2007 and 2008, which were the final two years of the period:



As can be seen, the quantities of the Chinese imports were at their highest levels in 2008, the final year of the period.<sup>32</sup> In fact, in 2008, they were 10.8 percent higher than in 2007, which is when the largest single increase in import volumes occurred.<sup>33</sup> Moreover, in 2008, the absolute volumes of imports were 70 percent higher than in 2006, 121 percent higher than in 2005, and

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<sup>28</sup>Oral Statement of China at First Panel Meeting, para. 7.

<sup>29</sup>Oral Statement of China at First Panel Meeting, paras. 27-32.

<sup>30</sup>Oral Statement of China at First Panel Meeting, paras. 27-32.

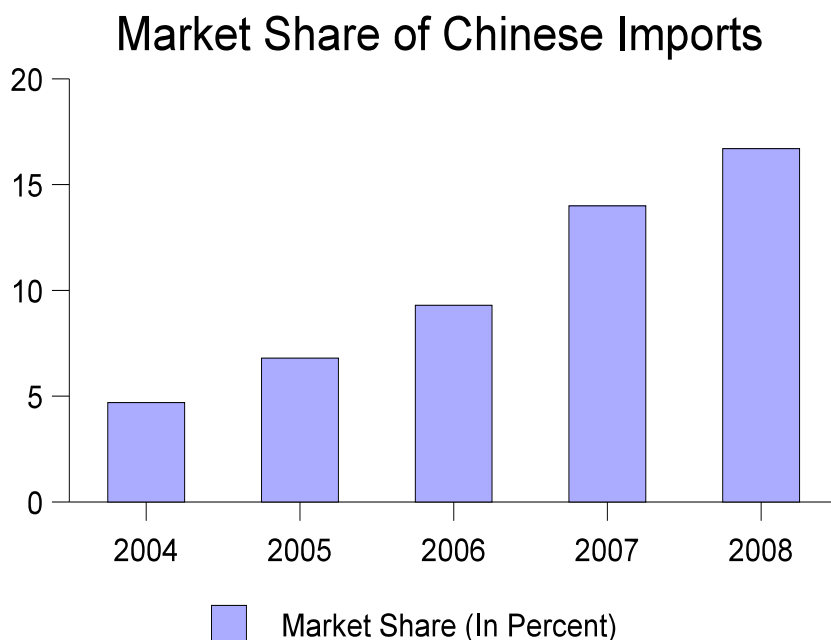
<sup>31</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>32</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>33</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

215.5 percent higher than in 2004.<sup>34</sup> It should be clear that, in 2008, the Chinese imports continued to increase in a rapid manner, just as they had throughout the period of investigation.

21. The record also showed a clear and rapid increase in the relative volumes of the Chinese imports. As can be seen below, there was a rapid rise in the market share of the Chinese imports over the period, including the years 2007 and 2008:



Again, the record shows that the market share of the Chinese imports were at their highest levels in 2008, the final year of the period.<sup>35</sup> In 2008, the market share of those imports was 2.7 percentage points higher than in 2007. That market share increase was the second highest increase in the period of investigation.<sup>36</sup> Moreover, the market share of the Chinese imports in

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<sup>34</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>35</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>36</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1. The market share increase of 2.7 percentage points compared to an increase of 2.4 percentage points in 2006 and 2.1 percentage points in 2005. Given this, China's continued claims that the Chinese imports were increasing at a pace lower than the rest of period are simply mistaken. See China's Answers to Panel Questions, paras. 52-57. In 2008, as noted, the increase in market share was the second highest of the period of investigation, after 2007. ITC Report, p. 12 and n. 52, and Table C-1. Similarly, the increase in the ratio of Chinese imports to domestic production in that year was also the second largest of the period of investigation, again after 2007. ITC Report, p. 12 and n. 52, and Table V-1. In 2008, the ratio in Chinese imports to domestic production increased by 5.7 percentage points, which was higher than the increase of

2008 was 7.4 percentage points higher than in 2006, 9.9 percentage points higher than in 2005, and 12.0 percentage points higher than in 2004.<sup>37</sup> Once again, it is clear that the increase in market share for the Chinese imports in 2008 continued to be rapid.

22. The record shows clear evidence of the rapid growth in imports over the period of investigation, including the last two years of the period. Yet China continues to present the Panel with misleading arguments and data supposedly showing that imports were “declining” or “abating” in 2008. For example, in its oral statement, China provided a chart to the Panel intended to suggest there was a declining trend in the volumes of Chinese imports in 2008, when compared to the trends seen in 2005, 2006, and 2007.<sup>38</sup> That chart does not represent, however, a comparison of the actual volumes or market share of Chinese imports for each year of the period of investigation.

23. Instead, it consists solely of data showing the rate of increase in the volumes of Chinese imports for each of these years.<sup>39</sup> It is only by preparing a chart that includes only data showing only the changes in the rate of growth of import increases during the period, rather than a chart showing the actual volumes or market shares of the imports, that China can provide any support for its claim that there was a “declining” or “lessening” trend in import volumes during 2008, the final year. If China had prepared a chart showing the actual volumes or market share of its imports, it would demonstrate, as the charts provided above do, that there was a clear and significant increase in imports in every year of the period.

24. As the United States pointed out in its first written submission,<sup>40</sup> China’s reliance on this chart is premised on the mistaken notion that the increase in import volumes in 2008 did not constitute a “rapid increase” under the Protocol because imports were growing at an accelerating rate of growth at the end of the period.<sup>41</sup> The problem with China’s theory is that the Protocol does not require that subject imports be growing at an increasingly rapid rate at the end of the period, or that imports be increasing at a rate that is higher than the rate of growth of imports in any earlier point of the period.<sup>42</sup> In fact, the Protocol does not mention the word “rate” at all; it simply provides that the competent authority should establish that imports were “increasing

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3.3 percentage points in 2005 and 4.6 percentage points in 2006. *Id.*

<sup>37</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>38</sup>Oral Statement of China at the First Panel Meeting, para. 28.

<sup>39</sup>Oral Statement of China at the First Panel Meeting, para. 28.

<sup>40</sup>United States First Written Submission, para. 121.

<sup>41</sup>China First Submission, paras. 120-135.

<sup>42</sup>Protocol of Accession, para. 16.4.

rapidly”, on an absolute or relative basis.<sup>43</sup> In light of this, it does not matter that the subject imports may have increased at a smaller rate in 2008 than they did in 2007, as China appears to believe. The issue for this Panel is whether the ITC reasonably found that the data showed that the subject imports increased rapidly over the period, especially at the end.<sup>44</sup>

25. As we noted above, any reliable analysis of the volume and market share of the Chinese imports establishes that they were not “declining” or “abating” in the last year of the period. In 2008, the Chinese imports continued to grow at a rapid pace, increasing by 10 percent over the rapid increases seen in 2007, a year in which China has now conceded the Chinese imports were growing rapidly.<sup>45</sup> Moreover, in 2008, the quantity of the Chinese imports was considerably higher than it had been in 2004, 2005, or 2006, with those quantities being 70 percent higher than in 2006, 121 percent higher than in 2005, and 215.5 percent higher than in 2004.<sup>46</sup> Thus, even if the rate of growth in absolute terms may have lessened somewhat in 2008 when compared to the extremely rapid rate of growth seen in 2007, the quantities of Chinese imports in that year continued to grow in a rapid manner in that year.

26. In its oral statement, China has also continued to argue that a quarterly analysis of import volumes for 2008 shows that imports were declining in 2008.<sup>47</sup> Again, China’s arguments and data charts are misleading. As the United States explained in its first written submission,<sup>48</sup> China’s comparison of changes in the quarterly volumes of Chinese imports in 2008 involves a comparison of quarterly data for successive quarters. This type of comparison can be inherently

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<sup>43</sup>Protocol of Accession, para. 16.4. In fact, as we have previously noted, the Appellate Body has confirmed that, under the standards of the Safeguards Agreement, a decline in volumes in the most recent period examined by the competent authority does not preclude the authority from making a finding of “increased imports” under the Agreement. *US – Steel Safeguards (AB)*, para. 367.

<sup>44</sup>China makes the same critical legal error in its response to question 14 of the Panel’s questions. In its response to that question, China explains that a competent authority can only find that imports are increasing rapidly if they are “increasing more ‘rapidly’ than they have been increasing previously.” China’s Answers to Panel Questions, para. 54. China adds that, “[i]f imports are simply continuing on the *same* longer term trend line they have been following for years, those imports have cannot be considered to be ‘increasing rapidly.’” *Id.* As the United States noted in its first written submission, China is reading into the Protocol words that are not there. U.S. First Written Submission, para. 121. The Protocol does not state that Chinese imports must be increasing “more rapidly” at the end of the period than any prior period, nor does it state that imports may not be found to be increasing rapidly if they are simply increasing at a consistently rapid rate. Protocol of Accession, para. 16.4. The Protocol only requires that they be increasing rapidly, which is exactly what occurred in 2007 and 2008, the final two years of the ITC’s period of investigation. ITC Report, p. 12. Exhibit US-1.

<sup>45</sup>China’s Answers to Panel Questions, para. 49.

<sup>46</sup>ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

<sup>47</sup>Oral Statement of China at the First Panel Meeting, para. 31.

<sup>48</sup>U.S. First Written Submission, paras. 123-127.

distortive, however, because changes in import shipment data between quarters can be affected by variations in production schedules, seasonal demand, and weather developments.<sup>49</sup>

27. To avoid making these sorts of misleading comparisons, the ITC routinely compares quarterly data at comparable times of year.<sup>50</sup> Specifically, the ITC typically compares data for the first quarter of a year with the data for the first quarter of the previous year. Similarly, when comparing interim data for a half year period, the ITC will compare data for the first half of one year to data for the first half of the previous year. By doing so, the ITC is able to minimize the possibility of comparing quarterly data that may reflect seasonal or other variations in demand or production.<sup>51</sup>

28. If one compares the quarterly data for the individual quarters of 2008 cited by China in its oral statement with comparable quarterly data for 2007, the comparison actually shows that Chinese imports were generally increasing throughout 2008. Specifically, the comparison shows that:

- The quantity of subject imports in the first quarter of 2008 was 23 percent higher than in the first quarter of 2007.
- The quantity of imports in the second quarter of 2008 was 13.9 percent higher than the second quarter of 2007.
- The quantity of the subject imports in the third quarter of 2008 was 9.3 percent higher than the third quarter of 2007.
- The quantity of the subject imports in the fourth quarter of 2008 was essentially the same (less than 1 percent smaller) than the fourth quarter of 2007.<sup>52</sup>

In other words, when one performs a reasoned comparison of the quarterly data for 2007 and 2008, as opposed to China's misleading analysis, these comparisons show a continued and significant increase in the quarterly quantities of the subject imports in 2008 when compared to

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<sup>49</sup>See, e.g., *US - Line Pipe (Panel)*, para. 7.203.

<sup>50</sup>E.g., *Circular Welded Non-alloy Steel Pipe from China*, Inv. No. TA-421-6, USITC Pub. 3807 (October 2005) at pp. I-21, II-2, and III-8, Exhibit US-8; *Certain Steel Wire Garment Hangers from China*, Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003) at pp. I-15, I-25 and I-26. Exhibit US-9.

<sup>51</sup>In fact, a WTO panel approved the ITC's use of this comparison methodology under the Safeguards Agreement. *US – Line Pipe (Panel)*, paras. 7.202-7.205.

<sup>52</sup>See China First Written Submission, para. 127 (quarterly data chart for 2007 and 2008).

2007.<sup>53</sup> Despite China’s claims, a quarterly analysis does not establish that imports were “abating” in 2008.

**B. China’s Increasing Imports Arguments Ignore the Textual Link in the Protocol Between Increased Imports and Material Injury**

29. In its oral statement, China has also continued to argue the United States has incorrectly “conflat[ed] two distinct issues”: increased imports and material injury.<sup>54</sup> It is, however, China’s interpretation which is at odds with the language of the Protocol. The concept of increased imports does not stand alone, as China claims. As the United States has explained, the language of the Protocol links the issue of rapidly increasing imports to material injury. The language of paragraph 16.4 makes clear that the increase in imports must be rapid enough “so as to be a significant cause of material injury, or threat of material injury” to the industry.

30. Accordingly, when considering the meaning and scope of the term “rapidly,” the Panel must take into account the “context” in which that term is used. The Protocol’s language, which links “rapid increases” of imports to material injury or threat of material injury, establishes that the import increases required by the Protocol are less significant than those required in the context of the Safeguards Agreement, where increased imports are linked to serious injury. China’s assertion that increased imports is an issue separate and apart from the issue of material injury is simply inconsistent with the text of the Protocol itself.

**C. China’s Argument that the Appellate Body Requires a Competent Authority to Obtain Data for the “Most Recent Past” is Inaccurate**

31. In its oral statement and at the first panel meeting, China has also continued to assert that the ITC should have obtained full data for the first quarter of 2009, relying primarily on the Appellate Body’s statement in *Argentina – Footwear* that “domestic authorities must focus on the most recent past.”<sup>55</sup> China’s argument misconstrues the import of that statement. The Appellate Body’s statement in *Argentina – Footwear* that the investigation period “*should be the recent past*” can be properly understood only if viewed in the context of other statements in that report and in its later report in *US – Lamb Meat*.

32. In paragraph 129 of *Argentina – Footwear* the Appellate Body stated:

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<sup>53</sup>The United States notes that China’s analysis also ignores the fact that the quarterly import volumes in each quarter of 2008 were considerably higher than the import volumes in any comparable quarter in 2004, 2005, and 2006. See U.S. First Written Submission, para. 124 (*citing* quarterly data chart in China’s First Written Submission, para. 162).

<sup>54</sup>Oral Statement of China at the First Panel Meeting, para. 21.

<sup>55</sup>Oral Statement of China at the First Panel Meeting, para. 20.



Thus, we do not dispute the Panel’s view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing end points) under Article 4.2(a). As a result, we agree with the Panel’s conclusion that “Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used.”<sup>56</sup>

The investigation period in *Argentina – Footwear* consisted of the years 1991 through 1995.<sup>57</sup> As the underscored part of the paragraph quoted above makes clear, the Appellate Body specifically endorsed an examination of import trends that began in 1994. Thus, it did not view the examination of data pertaining to 1994, 1995 and, perhaps also 1996, to be inconsistent with its admonition that the investigation period be “the recent past.”

33. The Appellate Body shed further light on how recent the period of assessment for increased imports should be in *US – Lamb Meat*. In that case, the affirmative determination was based on threat of serious injury. The ITC had focused its analysis on the last 21 months of a five-year period of investigation. The Panel endorsed the examination of this more recent 21-month period, noting that “due to the future-oriented nature of a threat analysis, it would seem logical that occurrences at the beginning of an investigation period are less relevant than those at the end of that period.”<sup>58</sup>

34. The Appellate Body disagreed and cautioned that a longer period than 21 months was appropriate. It agreed with the Panel that in a threat case – where competent authorities are called upon to evaluate the likelihood of a future event – “in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.” However, the Appellate Body explained that “competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation.” The Appellate Body explained further that “in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.”<sup>59</sup>

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<sup>56</sup>Italicized text shows emphasis in original; underscored text shows emphasis added; footnotes omitted.

<sup>57</sup> *Argentina – Footwear (Panel)*, para. 8.148. The Argentine authorities also gathered and analyzed data for 1996, although they did not treat this year as formally within the period of investigation. *Argentina – Footwear (Panel)*, para. 8.160.

<sup>58</sup>*US – Lamb Meat (Panel)*, para. 7.192.

<sup>59</sup>*US – Lamb Meat (Panel)*, paras. 137 and 138.

35. The Appellate Body then addressed the question of how this guidance is to be reconciled with its statement in footnote 130 *Argentina – Footwear* that “the investigation period should be the recent past.” It explained:

We note that, at footnote 130 of our Report in *Argentina – Footwear* . . . we said that “the relevant investigation period should not only *end* in the very recent past, the investigation period *be* the recent past. In this Report, we comment on the relative importance, within the period of investigation, of the data from the end of the period, as compared with data from the beginning of the period. *The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry.*<sup>60</sup>

36. It should be noted that *US – Lamb Meat* involved a threat determination. As the Appellate Body recognized in that case, because of the future-oriented analysis involved in a threat determination, there was more reason to focus on recent data than there would be in a determination based on serious injury. Even so, the Appellate Body believed that 21 months was too short a period on which to focus. Presumably, then, the Appellate Body would countenance a considerably longer period in a serious injury determination under the Safeguards Agreement. In sum, China’s assertion that “Appellate Body decisions confirm that domestic authorities must focus on the most recent past”<sup>61</sup> is not borne out by an examination of the relevant Appellate Body reports.

37. Finally, it bears repeating that the Protocol contains no language requiring the ITC to collect data for the first quarter of 2009, as China continues to assert. In fact, the Protocol does not mention or discuss a competent authority’s period of investigation at all. Thus, while the United States agrees that the ITC should focus on import increases during the recent past under the Protocol,<sup>62</sup> the ITC is only obliged as a general matter to choose a period of investigation that “allows it to focus on the recent imports” and that is “sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.”<sup>63</sup> Moreover, the Panel’s assessment of the reasonableness of the ITC’s choice of period of investigation should “tak[e] into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case.”<sup>64</sup> In this case, the ITC’s choice of a period of investigation that ended less than four months before the beginning of its investigation was fully consistent with

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<sup>60</sup>*US – Lamb Meat (AB)*, para. 138 n. 88 (emphasis added).

<sup>61</sup>Oral Statement of China at the First Panel Meeting, para. 20.

<sup>62</sup>ITC Report, pp. 11-12.

<sup>63</sup>See *US – Line Pipe (Panel)*, para. 7.201.

<sup>64</sup>*Mexico – Antidumping Measures on Rice (Panel)*, para. 7.58.

these standards.

#### **IV. China Has Not Established, As it Must, That the U.S. Statute’s Causation Standard Is Inconsistent, As Such, with the Protocol**

38. In its first written submission, the United States established that the causation standard of the U.S. statute is fully consistent as such with paragraphs 16.1 and 16.4 of the Protocol. As the United States pointed out, section 421’s definition of a “significant cause” of material injury as a cause that “contributes significantly to the material injury of the domestic industry” is consistent with the language of the Protocol itself, the ordinary meaning of the words “cause” and “contribute,” and the Appellate Body’s own definitions of the words “cause” and “causal link” under the Safeguards Agreement.<sup>65</sup> Simply put, there is no basis at all for China’s claim that section 421 “impermissibly lowers” the causation standard of the Protocol.

39. At the first panel meeting and in its response to the Panel’s questions, China has done nothing to further its claim that section 421 is inconsistent with the Protocol. Rather than pointing out why the U.S. arguments about the statute’s consistency with the Protocol are mistaken, China continues to misinterpret the Protocol’s requirements, to misconstrue the provisions of the U.S. statute, and to offer unfounded interpretations of the provisions of the Protocol that are inconsistent with their ordinary meaning.

40. The United States does not intend to reiterate all of the arguments it made in its first written submission. Instead, it will seek to correct the more significant misstatements made by China in its opening statement and during the Panel’s questioning. There should be no doubt that section 421 is entirely consistent with the provisions of the Protocol.

##### **A. Section 421’s Causation Definition Does Not Weaken or Impermissibly Lower The Causation Standard of the Protocol**

41. In its oral statement and in response to questioning, China again asserts, without foundation, that section 421’s definition of “a significant cause” of material injury as a cause that “contributes significantly” to material injury is not consistent with the ordinary meaning of the words “cause” and “contribute.”<sup>66</sup> In doing so, China continues to assert that the ordinary meaning of the term “contributes significantly” somehow “conveys a meaning that is weaker” than the term “significant cause.”<sup>67</sup> China has, however, failed to explain exactly why this is the case, based either on a textual reading of the Protocol or on a persuasive analysis of the ordinary meaning of the two terms. Simply repeating over and over again that the term “contributes

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<sup>65</sup>U.S. First Written Submission, paras. 148-186.

<sup>66</sup>Oral Statement of China at First Panel Meeting, paras. 36-38.

<sup>67</sup>Oral Statement of China at First Panel Meeting, paras. 37.

significantly” to material injury is somehow “weaker” than the term “a significant cause” does not make it so.

42. China’s argument on this score appears to be premised on the mistaken notion that the Protocol requires that imports from China be the sole cause of material injury to an industry. China’s assumption is not consistent with the text of the Protocol or the ordinary meaning of the word “cause.” It is also not consistent with the Appellate Body’s statements in other trade remedy contexts. First, China’s argument is inconsistent with the text of the Protocol. The Protocol provides that “market disruption shall exist” if Chinese imports constitute “a significant cause of material injury” to the industry.<sup>68</sup> By providing that Chinese imports may constitute “a significant cause” of injury, the Protocol explicitly contemplates that there may be multiple significant causes of material injury or threat to an industry, a point which China ignores.

43. Second, China’s argument is inconsistent 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>69</sup> there is no question that the word “cause” can be used to describe a situation where more than one factor brings about or produces a particular effect or result. For example, as the United States noted at the first panel meeting, one can correctly state that the “hearing room’s heating system and the sun’s rays on the windows of the hearing room caused the hearing room to be very hot during the morning session.” Given that it is entirely correct to use “cause” in this manner, it is also clear that “cause” can be used with respect to situations where multiple factors contribute to “bringing about” or “producing” an effect or result.

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

The word “causal” means “relating to a cause or causes,” while the word “cause,” in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, “brought about,” “produced,” or “induced” the existence of the second element. The word “link” indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal “connection” or “nexus” between these two elements. Taking these words together, the term “causal link” denotes, in our view, a relationship of cause and effect such that increased imports contribute to “bringing about, “producing,” or “inducing” the serious injury.”<sup>70</sup>

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<sup>68</sup>Protocol of Accession, para. 16.4.

<sup>69</sup>China First Written Submission, para. 198.

<sup>70</sup>*US – Wheat Gluten (AB)*, para. 67.

Since China has conceded that the words “cause” and “causal link” are effectively the same for the purposes of the analysis set forth in the Protocol,<sup>71</sup> this reasoning would suggest that the ITC can reasonably assess whether increased imports are a significant “cause” of injury to the industry by assessing whether they significantly “contribute” to the industry’s injury. Given the language of the Protocol, the ordinary meaning of the words “contribute” and “cause,” and the Appellate Body’s reasoning in cases like *US – Wheat Gluten*, China’s claim that section 421’s definition of “significant cause” somehow weakens or lessens the causation standard contained in the Protocol is not tenable.

45. China also continues to mistakenly argue that the U.S. statute “allows the U.S. investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be considered as ‘a significant cause.’”<sup>72</sup> This is clearly incorrect. Specifically, the statute itself makes clear that rapidly increasing imports from China must “contribute significantly” to material injury in order to be considered a significant cause of injury to the industry.<sup>73</sup> Indeed, as the ITC has consistently stated, this statutory definition requires a finding that Chinese imports have a “direct and significant causal link” to the industry’s material injury.<sup>74</sup> Moreover, the ITC has consistently made clear, it may not find imports from China to be a significant cause of material injury if they constitute a “minimal” or “unimportant” cause of such injury.<sup>75</sup> Accordingly, there is no basis for China’s claim that the statute allows the ITC to find that imports are a significant cause of injury even if they contribute minimally to that injury. It is certainly not the way the United States interprets the statute.

46. In fact, in its oral statement, China effectively conceded that the U.S. statute is in fact consistent with the Protocol. In its oral statement, China conceded that “this dispute would be very different” with respect to its “as such” claim if “the statute required a “direct and significant causal link, as does the ITC determination.” However, this is indeed the case. In order to establish that the U.S. statute is inconsistent, as such, with the Protocol, China cannot simply offer its own interpretation of the statute as though that were the actual meaning of the statute. To establish, as a matter of fact, the actual meaning of the statutory provisions in question, it is necessary to refer both to the language of the statute and to evidence of how that language has been applied, including statements by the agencies who administer the statute as to the statute’s

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<sup>71</sup>China First Written Submission, para. 180 (“the term ‘cause’ in the text of Article 16 of the Protocol and the phrase ‘causal link’ as used in the discussion of Article 6 of the Working Party Report are used synonymously”).

<sup>72</sup>Oral Statement of China at First Panel Meeting, para. 38.

<sup>73</sup>19 U.S.C. §2451(c)(1). Exhibit US-3.

<sup>74</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>75</sup>ITC Report, p.18. Exhibit US-1.

meaning.<sup>76</sup> Thus, under the U.S. legal system, the ITC’s explanation that it must assess whether there is a “direct and significant causal link” between Chinese imports and material injury under the statute is directly relevant and, in fact, determinative of the issue as to what the statute means and requires.

47. In sum, the statute and the ITC’s own interpretation of the statute make clear that China has no basis for claiming that the statute allows the ITC to find that imports are a “significant cause” of material injury if they are a “minimal” or “unimportant” cause of such injury. Instead, under the statute, the ITC must determine that imports from China have a “direct and significant” causal link to the industry’s injury, a standard that is fully consistent with the Protocol.

**B. The United States is Not Arguing That the “Significant Cause” Standard of the Protocol is a Lower One Than the “Genuine and Substantial” Causal Link Standard Contemplated in the Safeguards Agreement**

48. China mistakenly argues that the United States is taking the position that the “significant cause” standard of the Protocol is a “lower” standard than the “genuine and substantial” causal link standard contemplated by the Safeguards Agreement.<sup>77</sup> This is a significant misstatement of the U.S. position. The United States has not argued that the “significant cause” standard of the Protocol is clearly lower than the “genuine and substantial” causal link standard under the Safeguards Agreement. On the contrary, as the United States emphasized in its first written submission and at the first panel meeting, it does not believe that it is possible to determine with precision whether or not the “significant cause” standard is equal to, or lower than, the “genuine and substantial” causal link standard of the Safeguards Agreement.<sup>78</sup>

49. In particular, the United States pointed out that, although the words “significant” and “substantial” may have some definitions in common, other definitions of the word “substantial” could be read to suggest that the term “genuine and substantial” causal link requires a somewhat more significant causal link than the “significant cause” standard of the Protocol.<sup>79</sup> Ultimately, the United States submits that it is difficult to determine with precision whether the “genuine and substantial” causal link standard is higher than or equal to the “significant cause” standard. Instead, the United States simply recommends that the Panel assess whether rapidly increasing imports are a “significant,” that is, “important” or “notable,” cause of injury to the industry.

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<sup>76</sup>*US – German Steel (AB)*, para. 157-158.

<sup>77</sup>Oral Statement of China at First Panel Meeting, para. 36.

<sup>78</sup>See U.S. First Written Submission, paras. 178 and 179; U.S. Answers to Panel Questions Following First Panel Meeting, paras. 17-20 and 60-62.

<sup>79</sup>U.S. First Written Submission, paras. 178-179.

50. The United States would add, however, that China is correct in one respect. The United States does believe that, in one particular sense, the Safeguards Agreement does impose a more rigorous overall analysis on authorities than the Protocol. For example, as the United States has pointed out in its first written submission, at the first Panel meeting, and in its response to the Panel’s questions, in contrast to the Safeguards Agreement, which specifies that increased imports must cause or threaten to cause “serious injury” to the industry, the Protocol requires only that imports from China be a significant cause of “material injury or threat of material injury” to the industry. Since that “material injury” requires a less significant showing of effect than a finding of “serious injury,”<sup>80</sup> 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 – indicates that the Protocol’s transitional measure contemplates a lower overall showing of effect than the Safeguards Agreement.

51. Moreover, the United States notes that, unlike the provisions of Article XIX of the GATT 1994 and the provisions of the Safeguards Agreement, nothing in the Protocol indicates that the Protocol’s transitional measure was intended to be an “emergency action”<sup>81</sup> or that the rapid increase in imports from China must be the result of “unforeseen developments.”<sup>82</sup> Nor does the Protocol require an authority to ensure that it not attribute the injurious effects of other factors to the Chinese imports, as the Safeguards Agreement does. Given these, and other “key” distinctions<sup>83</sup> between the Protocol and the Safeguards Agreement, the United States would submit that, on an overall level, the Safeguards Agreement contains a more rigorous causation requirements than the Protocol.

### **C. China Misreads the Legislative History of Section 406**

52. In its response to the Panel’s questions, China has now raised, for the first time, the claim that the legislative history of section 406, the U.S. statute on which the Protocol was modeled, indicates that the “significant cause” standard of section 406 “was intended to be an easier standard to satisfy than” the “substantial cause” standard of section 201, the U.S. global safeguards statute.<sup>84</sup> China’s statements seriously misconstrue the legislative history of section 406 and the relationship of the causation standards set forth in sections 406 and 201.

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<sup>80</sup>*US - Lamb Meat (AB)*, para. 124.

<sup>81</sup>GATT 1994, Article XIX:1(a); Safeguards Agreement, Article 11.1(a).

<sup>82</sup>GATT 1994, Article XIX:1(a).

<sup>83</sup>We note that China conceded in its oral statement that the Protocol “departs in key respects” from other WTO trade remedies, including the Safeguards Agreement. Oral Statement of China at First Panel Meeting, para. 15.

<sup>84</sup>China Response to Panel Questions, Q. 6.

53. China neglects to mention that the “substantial cause” standard of section 201 contains an additional element that makes the statutory “substantial cause” standard a higher one than section 406’s “significant cause” standard. In section 201, the Congress defines “substantial cause” to mean “a cause which is important and not less than any other cause” of serious injury to an industry.<sup>85</sup> Thus, as the ITC has consistently explained in its global safeguards determinations, “increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause.”<sup>86</sup> Put another way, under section 201, imports must be both an important cause of injury to the industry and one that causes injury that is greater than or equal to the injury caused by any other single factor injuring the industry.

54. In light of this, it is critical to make two points. First, section 406’s “significant cause” standard is lower than the section 201 standard because it does not require the ITC to conclude that the injury caused by the subject imports is greater than or equal to the injury caused by any other factor injuring the industry.<sup>87</sup> Instead, section 406 requires the ITC to find only that the subject imports are a significant cause of material injury or threat to the industry.<sup>88</sup> In contrast, section 201 allows the ITC to find that global imports are a “substantial cause” of serious injury to an industry only if they are an “important cause” of serious injury and if they are as important a cause of serious injury as the largest other individual cause of injury.<sup>89</sup> Thus, the standard of section 201 is higher because it requires a finding that global imports be as important as any other cause of serious injury to the domestic industry during the period of investigation.<sup>90</sup>

55. Second, section 201’s requirement that global imports be as important a cause of injury as the most important cause of serious injury is not a requirement contained in the Safeguards Agreement.<sup>91</sup> The Safeguards Agreement contemplates that global imports can have a “genuine and substantial” causal link to serious injury even if they are not as important as any other cause of injury to the domestic industry.<sup>92</sup> Indeed, as we have previously pointed out, in *US – Wheat*

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<sup>85</sup> 19 U.S.C. §§2252(b)(1)(B). Exhibit US-32.

<sup>86</sup> *Steel*, Inv. No. TA-201-73, USITC Pub. 3479 at 34 (emphasis added), Exhibit US-33; *Lamb Meat*, Investigation No. TA-201-68, USITC Pub. 3176 (April 1999) (Excerpts), Exhibit US-34; *Wheat Gluten*, Investigation No. TA-201-67, USITC Pub. 3088 (March 1998) (Excerpts), Exhibit US-35.

<sup>87</sup> 19 U.S.C. §2436(e)(B)(ii). Exhibit US-26.

<sup>88</sup> 19 U.S.C. §2436(e)(B)(ii). Exhibit US-26.

<sup>89</sup> 19 U.S.C. §2252(b)(1)(B). Exhibit US-32.

<sup>90</sup> 19 U.S.C. §2252(b)(1)(B), Exhibit US-32 ; *Steel*, Inv. No. TA-201-73, USITC Pub. 3479 at 34. Exhibit US-33.

<sup>91</sup> See generally Safeguards Agreement, Article 4.

<sup>92</sup> Safeguards Agreement, Article 4.2.



*Gluten* and *US – Lamb*, the Appellate Body has indicated that global imports can be found to be causing serious injury to the industry even if they are one of several factors contributing to bringing about or causing that injury, just so long as the imports have a genuine and substantial causal link to such injury.<sup>93</sup> Thus, because the Safeguards Agreement itself does not require that imports be as important a cause of injury as any other important cause of injury, section 201's causation standard is actually a higher causation than that set forth in the Safeguards Agreement.

56. Because of this, China's reliance on the legislative history does not have the meaning that China would like to ascribe to it. The "significant cause" standard of section 406 is not lower than the "substantial cause" standard of section 201 as a result of the fact that section 406 requires that the subject imports "contribute significantly" to material injury while section 201 requires that imports be an "important cause" of injury. Instead, the causation standard of 406 is lower than that of section 201 because section 201 requires that imports be as important a cause of injury to the industry as the most important other cause of injury, while section 406 does not. In fact, this is exactly why section 406 (and section 421 in turn) specify that the subject imports "need not be equal to or greater than any other cause" of injury.<sup>94</sup> That language emphasizes that, in a section 406 or 421 investigation, the ITC need not find, as it would in a section 201 investigation, that the subject imports are as important a cause of injury as the most important other cause of injury to the industry.

57. It should be clear why China is mistaken in claiming that, in providing that Chinese imports "need not be equal to or greater than any other cause" of injury to the industry, section 421 permits the ITC to find that imports are a significant cause of material injury even if they are a minimal cause of such injury.<sup>95</sup> The phrase simply does not mean that imports can be considered a "significant cause" if they are "less than any other cause," including a minimal cause of injury, as China asserts. Instead, this language establishes imports from China need not be the most important cause, or equal in effect to the most important cause, of material injury to the industry, a concept that is consistent with the requirements of the Protocol.<sup>96</sup> Again, China's unique and novel interpretation of the statute is not based on the actual language of section 421 or any pertinent legislative history.

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<sup>93</sup>*US – Wheat Gluten (AB)*, para. 67; *US – Lamb*, para. 166.

<sup>94</sup> 19 U.S.C. §2436(e)(B)(ii), Exhibit US-26 and 19 U.S.C. §2451(c)(2), Exhibit US-3.

<sup>95</sup> Oral Statement of China at First Panel Meeting, para. 38 (*citing* 19 U.S.C. §2451(c)(2)).

<sup>96</sup> Like section 421, the Protocol does not require that Chinese imports be the sole factor causing material injury to an industry, or as important a cause of injury as any other factor. Protocol of Accession, paras. 16.1 and 16.4.

## **V. The ITC’s Causation Analysis, As Applied, Was Consistent with the Requirement of the Protocol**

58. In its first written submission and at the first panel meeting, the United States established that, as applied, the ITC’s analysis of the causal link between rapidly increasing imports from China and the industry’s declining condition was also fully consistent with paragraph 16.4 of the Protocol. As the United States has shown, the ITC objectively and thoroughly analyzed the record evidence on these issues and established, clearly and unambiguously, that rapidly increasing imports from China were a significant cause of material injury to the domestic industry.

59. In its oral statement, China has largely repeated the same arguments made in its first written submission. In its various responses, the United States has detailed the legal insufficiencies and factual errors in these arguments. In this second written submission, the United States responds to the few additional causation arguments related to conditions of competition and correlation raised by China during the panel meeting, and shows how these arguments are similarly unavailing.

### **A. The ITC Reasonably Analyzed The Conditions of Competition in the U.S. Market**

60. Rather than raising any additional issues concerning conditions of competition, China “decided to concentrate” at the first panel meeting on the ITC’s alleged failure to recognize and consider objectively the attenuated nature of competition between Chinese and domestic tires in the U.S. market.<sup>97</sup> Essentially, China argues that subject imports could not have been a significant cause of material injury to the domestic industry because they were supposedly “virtually absent in approximately 74% of the US tire market.”<sup>98</sup> As the United States explained in its detailed response to the Panel’s written questions, the 74 percent figure cited by China is inaccurate.<sup>99</sup> Moreover, China’s argument that competition was highly attenuated between Chinese tires and U.S. tires was belied by the record.

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<sup>97</sup>Oral Statement by China at First Panel Meeting, para. 49. In its oral statement, China simply repeats its statement that the ITC misinterpreted and distorted the conditions of competition in the U.S. market. China’s Oral Statement at First Panel Meeting, para. 47. The ITC did nothing of the sort. Rather, as discussed in the U.S. first written submission, the ITC provided a detailed and reasoned explanation of the pertinent conditions of competition in the U.S. tire market. U.S. First Written Submission, paras. 198, and 216 - 234. The ITC reasonably analyzed issues argued by the parties, such as declining demand and the industry’s business strategy, and found that the record evidence did not establish that these issues broke the requisite causal link under the Protocol. U.S. First Written Submission, paras. 220-224, 306-322.

<sup>98</sup>Oral Statement by China at First Panel Meeting, para. 49.

<sup>99</sup>U.S. Response to Panel Question 27, paras. 71-77.

61. China’s argument that Tier 1 tires constitute 70 percent of the total replacement market is belied by the very article it cites for support.<sup>100</sup> The Modern Tire Dealer article cited by China reported that “major brands” represented 72.6 percent of domestic brand share in 2008.<sup>101</sup> China’s argument assumes incorrectly that all of these “major brands” fall into Tier 1. It is clear from the article, however, that the “major brand” label is much more expansive than the Tier 1 label as defined by respondents before the ITC. Instead, the article shows that the major brand category includes a large percentage of tires that fall into Tier 2 as defined by respondents, a tier in which Chinese tires competed fully.<sup>102</sup>

62. 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 in 2008, when subject import volumes rose to their period high of 2.3 million tires and accounted for approximately 5 percent of the OEM market. 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 consistent with the record.

63. Going beyond the inaccuracies in China’s 74 percent figure, China’s theory that competition between Chinese imports and U.S. tires in the U.S. market was attenuated during the period of investigation is belied by the record. Although the ITC found that the U.S. replacement market can generally be segmented into three categories, the ITC also found that there was no industry-wide and universally accepted definition establishing a bright-line rule for what tires are classified in each tier.<sup>103</sup> Consequently, it should come as no surprise that market participants did not agree on what tires should be included in the different tiers, and therefore provided a wide range of estimates of the share of U.S. producers and subject Chinese tire shipments that fall into each category.<sup>104</sup>

64. The record was clear, moreover, that in 2008 shipments of both domestically produced

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<sup>100</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. Oral Statement, by China at First Panel Meeting, p. 3 n.1.

<sup>101</sup>ITC Report, V-6 *citing* Modern Tire Dealer, “No Smoke or Mirrors,” January 2009 Exhibit US-1.

<sup>102</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. U.S. Response to Panel Question 27. These Tier 2 tires would include Firestone, BF Goodrich, Cooper, and Pirelli, among others.

<sup>103</sup>ITC Report, p. 21 and 27. Exhibit US-1.

<sup>104</sup>ITC Report, p. 21 and 27. Exhibit US-1.

tires and subject imports from China, were sold in all three categories.<sup>105</sup> For example, in 2008 U.S. producers' U.S. shipments of tires in category or tier three accounted for approximately 18.6 percent of their total U.S. shipments.<sup>106</sup> There were also significant shipments of subject tires from China that fell into category two, with shipments in that category equaling approximately 64.3 percent of the quantity of China's shipment's in category three.<sup>107</sup>

65. These data are consistent with the fact that the majority of market participants, reported that Chinese imports and U.S. tires were always interchangeable.<sup>108</sup> Clearly, the market participants themselves did not find that market segmentation in the replacement sector limited the interchangeability of the subject and U.S. tires.<sup>109</sup> Given the close substitutability of Chinese imports and U.S. produced tires, it is hardly surprising that, while subject imports gained 12.0 percentage points of market share over the period, the domestic industry's market share declined by 13.7 percentage points.<sup>110</sup>

66. In the end, the arguments concerning market segmentation made by China to the panel simply repeat the same arguments made by respondents that were considered and rejected by the ITC in its determination.<sup>111</sup> China points to no evidence supporting its theory that the tiers in the replacement market attenuate competition to any meaningful degree. Rather, the evidence on the record 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.

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<sup>105</sup>ITC Report, p. 21 and 27. Exhibit US-1.

<sup>106</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. 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. Thus, any alleged lack of competition in that category by 2008 was significantly the result of the subject imports themselves.

<sup>107</sup>ITC Report, p. 27. Exhibit US-1.

<sup>108</sup>ITC Report, Table V-6. Exhibit US-1. 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 for all six specific pricing products, in almost every quarter over the period. ITC Report, Tables V-9-V-14. Exhibit US-1.

<sup>109</sup>ITC Report, Table V-6. Exhibit US-1.

<sup>110</sup>ITC Report, p. 24. Exhibit US-1.

<sup>111</sup>ITC Report, p. 24. Exhibit US-1.

**B. The ITC Reasonably Found that Rapidly Increasing Imports of Chinese Tires Were A Significant Cause of Material Injury to the Domestic Industry**

67. In its oral statement, China repeats its argument that there was “no correlation between imports and injury.”<sup>112</sup> As detailed in the U.S. first written submission and its oral statement, this statement shows China’s fundamental misunderstanding of the extensive record that was before the ITC in the *Tires* investigation. That evidence established a clear overall coincidence between rapidly increasing subject imports volumes and the deterioration in the condition of the domestic industry. China’s bold claim of no correlation in light of this record, calls into doubt the credibility of China’s other arguments in this proceeding.

68. At the outset, in China’s oral statement at paragraphs 56-59, China attempts to establish that a coincidence analysis is required under the Protocol by referring to the requirements under the Safeguards Agreement. China refers to the Safeguards Agreement because it acknowledges that there is no express requirement in the language of the Protocol to conduct a correlation analysis. China’s position is interesting, given that, at the meeting before the panel, China agreed with the United States that it is the language of the Protocol that should govern this proceeding, not the requirement of the Safeguards Agreement. China fails to reconcile these inconsistent positions.

69. As a legal matter, China’s rather transparent attempt to impose obligations on the United States not found in the language of the Protocol does not withstand scrutiny. China asserts that because Article 16 of the Protocol involves the same causal analysis as in the Safeguards Agreement, a “‘coincidence’ analysis is logically required under the Protocol.”<sup>113</sup> As the United States pointed out in its first written submission, however, the Appellate Body and WTO panels have found a “coincidence of trends” analysis to be an important component of an authority’s analysis under the Safeguards Agreement because Articles 4.2 (a) - (b) of the Safeguards Agreement direct an authority to examine the “rate and amount of the increase in imports” as well as “changes:” in the levels of various injury indicators.<sup>114</sup> The Appellate Body and the panels have therefore concluded that “the words ‘rate and amount’ and ‘changes’ in Article 4.2(a) mean that ‘the *trends* – in both the injury factors and the imports – matter as much as their absolute levels.’”<sup>115</sup> The Protocol does not include language similar to this. As a result, China’s

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<sup>112</sup>Oral Statement of China at First Panel Meeting, para. 55.

<sup>113</sup>Oral Statement of China at First Panel Meeting, para. 59.

<sup>114</sup>U.S. First Written Submission, paras. 238-242.

<sup>115</sup> As the Appellate Body has stated in the context of the Safeguards Agreement and the Anti-Dumping Agreement, the Appellate Body has stated that an investigating authority “is free to choose the methodology it will use in examining the ‘causal relationship’ between [unfair] imports and injury.” *EC – Pipe Fittings (AB)*, para. 189 *US – Hot-Rolled Steel (AB)*, para. 224.

emphasis on such analysis in its submission is misplaced.<sup>116</sup> China disregards the different language between the Safeguards Agreement and the Protocol.

70. China’s argument suffers from an even more serious and fatal flaw than the obvious differences in the language between the two texts. Specifically, the Appellate Body and WTO panels had made clear that investigating authorities are not required to perform a correlation analysis even under the Agreement on Safeguards. China’s statement that the Appellate Body required an investigating authority to perform only a coincidence analysis in *Argentina – Footwear (AB)* is incorrect.<sup>117</sup> In fact, the Appellate Body approved the Panel’s finding that, even in the absence of coincidence, an investigating authority could still provide a compelling analysis of why causation is present.<sup>118</sup> Moreover, in *US – Steel Safeguards*, 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>119</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>120</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.

71. China’s arguments on the lack of coincidence are also misplaced as a factual matter. As the ITC stated there was a clear overall “coincidence” in trends between the rapidly increasing imports and their effects on the domestic industry.<sup>121</sup> This finding was reasoned, fully supported by the record, and met the requirements under the Protocol. As the United States noted in both its first written submission<sup>122</sup> and in its oral statement,<sup>123</sup> during a period in which Chinese import volumes increased rapidly in every year of the period, the record showed that:

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<sup>116</sup> In fact, under the Antidumping and Subsidies Agreements, WTO panels have specifically concluded that there is “no generalized requirement to establish a temporal correlation between increased imports and injury in the context of a countervail investigation.” *EC – DRAMS (Panel)*, para. 7.399 n.277; see *US – DRAMS CVD (Panel)* para. 7.319 n.283.

<sup>117</sup>China Oral Statement, First Panel Meeting, para. 36Oral Statement of China at First Panel Meeting, paras. 55-59.

<sup>118</sup>*Argentina – Footwear (AB)*, paras 144-145.

<sup>119</sup>*US – Steel Safeguards (Panel)*, para. 10.314.

<sup>120</sup>*US – Steel Safeguards (Panel)*, para. 10.314.

<sup>121</sup>ITC Report, p. 29. Exhibit US-1.

<sup>122</sup>First Written Submission of the United States, para 207.

<sup>123</sup>U.S. Oral Statement, First Panel Meeting, para. 42.

- The domestic industry’s market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;<sup>124</sup>
- The domestic industry’s production declined in every year of the period, resulting in an overall decline of 26.6 percent;
- The domestic industry’s capacity declined in every year of the period, for an overall decline of 17.8 percent;
- The domestic industry’s U.S. shipments declined in every year of the period, for an overall decline of 29.7 percent;<sup>125</sup>
- The domestic industry’s net sales quantities declined in every year of the period, for an overall decline of 28.3 percent;<sup>126</sup> and
- The domestic industry’s employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2 percent, the number of hours worked falling by 17.0 percent, and wages paid falling by 12.5 percent over the period.<sup>127</sup>

All of these factors were at their lowest levels in 2008, while Chinese tire imports were at their highest levels in 2008.

72. Moreover, as the ITC also explained, U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008.<sup>128</sup> For example:

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<sup>124</sup>ITC Report, pp. 25-26. Exhibit US-1.

<sup>125</sup>ITC Report, pp. 15-18 and 24. Exhibit US-1.

<sup>126</sup> ITC Report, pp. 23-24. Exhibit US-1.

<sup>127</sup> ITC Report, pp. 17 and 24. Exhibit US-1.

<sup>128</sup>ITC Report, Table C-1. Exhibit US-1. The ITC also reasonably found that the subject imports affected prices for the domestic like product. The ITC found that subject imports undersold the domestic product throughout the period. Specifically, the subject imports undersold U.S. tires in 119 out of 120 comparisons. Moreover, the average margins of underselling were at their highest in 2007 and 2008, which was also when the volumes of subject imports were at their highest. The ITC also reasonably concluded that this continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs. As the ITC noted, domestic producers’ ratio of cost of goods sold to net sales increased from 84.7 percent in 2004 to 90.1 percent in 2008, an increase of 5.4 percentage points over the period. The sharp increase in this ratio in 2008 – which occurred when the volume of subject imports was highest and the margins of underselling were high –

- Productivity fell by 11.5 percent over the period.
- Capacity utilization fell by 10.3 percentage points over the period.
- Operating margins fell by 4.8 percentage points over the period.
- Operating income fell from \$256.2 million in 2004 to a loss of 262.8 million in 2008.

Given this, there was clear evidence of a coincidence between imports and declines in the industry's condition over the period of investigation.<sup>129</sup>

73. China also has no basis for claiming that the United States is arguing that the trends in the industry's condition in 2007 were an "anomaly."<sup>130</sup> China's argument misstates the U.S. position on this issue. As the United States noted in both its first written submission and in its oral statement, the ITC found there was a clear coincidence in trends between rapidly increasing imports and the large majority of the indicia of the industry's condition in 2007.<sup>131</sup> Specifically, as increasing volumes of subject imports continued to undersell the domestic product by its largest margins in 2007, the industry's capacity, shipments, net sales quantities, market share, production and related workers, hours worked, wages paid, and hourly wages declined in that year. Moreover, even the few factors, such as profitability and productivity, that improved somewhat in 2007 nonetheless quickly declined to their lowest levels in 2008, the same year that the volume and market share of the subject imports were at their highest levels.

74. Next, China claims that there was a complete absence of correlation in 2008 between rising imports and the deteriorating condition of the domestic industry.<sup>132</sup> This argument is truly puzzling considering the record evidence. In 2008, despite an almost seven percent decline in apparent consumption, subject imports increased by more than ten percent over the already high levels seen in 2007, reaching their highest levels of the period in terms of volume and market share.<sup>133</sup> At the same time, virtually every injury factor that the ITC examined fell to its lowest

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indicated that U.S. producers were experiencing a cost-price squeeze and were unable to pass increasing raw material costs on to their customers. ITC report, pp. 23-24.

<sup>129</sup>Oral Statement by China at First Panel Meeting, para. 67.

<sup>130</sup>Oral Statement, by China at First Panel Meeting, para. 67. China appears to concede correlation in 2005 and 2006. *Id.*

<sup>131</sup>U.S. First Written Submission, para. 251; U.S. Oral Statement, paras. 49-50.

<sup>132</sup>Oral Statement by China at First Panel Meeting, para. 67.

<sup>133</sup>ITC Report, Table C-1. Exhibit US-1.



level for the period in 2008. Specifically, from 2007 to 2008:

- Domestic producers’ capacity fell by 5.0 percent;
- Domestic producers’ U.S. shipments fell by 12.1 percent;
- Domestic producers’ market share fell by 2.9 percentage points;
- Domestic producers’ net sales quantities fell by 8.8 percent;
- Domestic producers’ capacity utilization fell by 5.9 percentage points;
- Domestic producers’ production and related workers fell by 1.9 percent;
- Domestic producers’ hours worked fell by 6.1 percent;
- Domestic producers’ wages paid fell by 5.0 percent;
- Domestic producers’ productivity fell by 5.3 percent;
- Domestic producers’ operating income fell by \$770 million; and
- Domestic producers’ operating margins fell by 6.9 percentage points.<sup>134</sup>

In light of this record evidence, China’s argument that there was a complete absence of correlation in 2008 lacks any merit.

75. In sum, the ITC more than met its obligations under the Protocol. The overall trends in imports and the overall trends in the condition of the industry over the period of investigation, as well as the ITC’s reasoned explanation of these trends, supports the ITC’s finding that rapidly increasing subject imports were a significant cause of material injury to the domestic industry.

**C. The ITC Reasonably Concluded that Other Factors Did Not Detract From the Significance of Rapidly Increasing Imports from China**

76. As its final challenge to the ITC’s causation analysis, China continues to argues that the

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<sup>134</sup>ITC Report, Table C-1. Exhibit US-1. Moreover, domestic producers’ ratio of cost of goods sold to net sales increased by 5.8 percentage points from 2007 to 2008. ITC Report, Table C-1. Exhibit US-1. As the ITC noted, this “sharp increase in the ration in 2008, when the volume of subject imports was highest and the margin of underselling was nearly at its greatest, indicated that U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw material costs on to their customers.” ITC Report, p. 24. Exhibit US-1.

ITC “ignored” or decided to “forgo any analysis of other causal factors.”<sup>135</sup> This is incorrect. As discussed in the U.S. First Written Submission,<sup>136</sup> the ITC did investigate, consider, and analyze all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury. Indeed, the ITC directly considered and addressed the two other factors primarily relied on by China in its oral statement, i.e., the industry’s alleged “business strategy” of shifting its U.S. production away from low-end tires to high-end products, and declines in demand in the U.S. tires market over the period.<sup>137</sup> The ITC examined these issues and reasonably concluded that they did not indicate that subject imports were not a significant cause of material injury to the industry.<sup>138</sup>

### **1. The Protocol Does Not Require the Investigating Authority to Conduct a “Non-Attribution” Analysis**

77. China continues to argue that a Member cannot determine whether subject imports are “a significant cause” of injury as required by the Protocol without examining whether other factors were responsible.<sup>139</sup> China’s claims ignore the fact that the Protocol, unlike the Safeguards Agreement,<sup>140</sup> does not specifically require a Member to consider the possible effects of other factors causing material injury or threat of material injury as part of its causation analysis.

78. Instead, the Protocol requires a Member, when assessing whether rapidly increasing imports are a significant cause of material injury or threat of material injury to the industry, to consider the “volume of imports,” their “effect . . . on prices for like or directly competitive articles, and the effect of such imports on the domestic industry” producing such articles.<sup>141</sup> Since the negotiators of the Protocol were presumably aware that the Safeguards Agreement and the Antidumping Agreement contained “non-attribution” language but chose not to include any “non-attribution” requirement in the causation provisions of the Protocol, the Panel should

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<sup>135</sup>China’s Oral Statement, First Panel Meeting, paras. 72, 74.

<sup>136</sup>U.S. First Written Submission, paras. 304-330.

<sup>137</sup>Oral Statement by China at First Panel Meeting, paras. 74-79.

<sup>138</sup>*E.g.*, ITC Report, pp. 22 and 26. Exhibit US-1. The ITC also specifically considered other alleged causes of injury, such as increases in the industry’s raw material and other costs, changes in its productivity levels, changes in the levels of non-subject imports, and the impact of rising gas prices on demand, and found that they too did not indicate that the subject imports from China were not a significant cause of material injury to the industry.

<sup>139</sup>Oral Statement by China at First Panel Meeting, para. 73.

<sup>140</sup>Safeguards Agreement, Article 4.2(b)(second sentence).

<sup>141</sup>Protocol of Accession, paragraph 16.4.

assume that such an analysis was not intended to be required.<sup>142</sup>

79. China once again attempts to rewrite the language of the Protocol to create obligations that simply do not exist. By stating that imports from China can be “a significant cause” of material injury to the industry, the text of the Protocol establishes that there may be more than one significant cause of material injury. The Protocol does not require the United States to determine whether one of these factors is the most important factor or is more important than the Chinese imports. As long as the ITC reasonably concluded that Chinese tires were “a significant cause” of material injury to the domestic industry injury, then the conditions for the United States to impose a remedy were met.

80. Contrary to China’s argument,<sup>143</sup> the United States is not asking for the Panel to conclude that the United States has unfettered discretion to make such a determination. Instead, the United States is simply pointing out that Members are only required to perform the specific obligations that are set forth in the relevant legal text. Since China has not, and cannot, demonstrate that the Protocol imposes on the United States any obligation to address the injurious effects of other factors as part of its causation analysis, China’s claim in this regard must fail. Moreover, even if such an obligation were found to exist, the ITC did consider all of the other factors that could reasonably be claimed to be injuring the domestic industry in a significant manner.

## **2. China’s Arguments on Demand Declines and Industry Business Strategy are Unavailing**

### **a. The ITC Reasonably Concluded that Demand Declines Did Not Sever the Causal Link Between Chinese Imports and Injury**

81. In its oral statement, China has continued to argue that the ITC “largely ignored the U.S. tire market’s prolonged contraction in demand,” and failed to acknowledge that changes in demand might have been a cause of injury to the industry.<sup>144</sup> As discussed in the U.S. First Written Submission, however, the ITC fully addressed demand trends in the market, including those in the OEM market, and found that demand trends did not break the causal link between the subject imports and injury.<sup>145</sup>

82. First, it is worth noting that China mistakenly claims there was a “prolonged” contraction

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<sup>142</sup>See U.S. First Written Submission, paras. 295-303.

<sup>143</sup>China Oral Statement, First Panel Meeting, para. 18.

<sup>144</sup>Oral Statement of China at First Panel Meeting, para. 74.

<sup>145</sup>ITC Report, pp. 22 and 26. Exhibit US-1.

in demand “apparent across the entire period of investigation.”<sup>146</sup> The record showed that apparent U.S. consumption declined slightly by 0.8 percent from 2004 to 2005, and by 4.4 percent from 2005 to 2006, but actually increased by 1.6 percent from 2006 to 2007, before declining by 6.9 percent from 2007 to 2008. In other words, China’s claims of a “prolonged” contraction are, like many of its other factual assertions, an overstatement of the record evidence. Instead, as the ITC itself found, demand “fluctuated” somewhat during the period, even though it had declined overall by the end of the period.<sup>147</sup>

83. Moreover, the ITC specifically addressed whether demand declines were the cause of the declines in the industry’s condition, specifically in 2008, the year in which the largest percentage decline during the period occurred. The ITC noted that, even though apparent U.S. consumption fell in 2008, shipments of low-priced subject imports not only remained strong but continued to grow during the market contraction.<sup>148</sup> By way of comparison, the ITC noted, non-subject imports declined in 2008 by 6.1 percent, roughly equivalent to the decline in apparent consumption. Moreover, the ITC also noted, domestic production declined by 20.0 million tires in 2008, or by 11.1 percent, thus meaning that the industry absorbed virtually all the decline in U.S. apparent consumption that year.<sup>149</sup> The fact that low-priced subject imports were able to increase both absolutely and relatively in the face of a contracting market in 2008, even as the quantities of domestically produced tires and non-subject imports both declined, contradicts China’s argument that any injury to the domestic industry was caused by declines in demand due to the recession.<sup>150</sup>

84. Finally, China argues that the ITC failed to grasp that this “prolonged” contraction in demand was apparent in the U.S. market and on a worldwide basis throughout the period of investigation.<sup>151</sup> The United States has already stated why it disagrees with China’s characterization of demand trends for the period. China’s argument does lead one to ask a

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<sup>146</sup>Oral Statement of China at First Panel Meeting, paras. 77-78.

<sup>147</sup>ITC Report, p. 15 and 32. Exhibit US-1.

<sup>148</sup>ITC Report, p. 26. Exhibit US-1.

<sup>149</sup>ITC Report, p. 26. Exhibit US-1. The U.S. industry’s domestic shipments fell by 12.1 percent in 2008, also essentially absorbing nearly all of the decline in demand. ITC Report, table C-1. Exhibit US-1.

<sup>150</sup> China argues that the drop in 2007-2008 consumption of 20 million tires is a “one-to-one” correspondence with the drop in U.S. producer shipments of 19 million, and therefore declining demand was the cause of injury to the domestic industry. China fails to grasp that the U.S. producers were only part of the market, and therefore they should not have absorbed declining demand at this level. The U.S. producers absorbed more than their pro rata share of declining demand because of the subject imports. China does not attempt to explain why imports from China were increasing during this same period, *i.e.*, why imports from China were increasing while consumption was declining.

<sup>151</sup>Oral Statement of China at First Panel Meeting, para. 79.

fundamental question, however: If declines in global demand trends were so apparent over the period, how does China explain the fact that the reported capacity, production, and shipments of the Chinese industry all more than doubled over the period.<sup>152</sup> This fact, coupled with the fact that Chinese imports to the U.S. market more than tripled during a period of overall declining demand and took market share from the domestic industry on almost a one-to-one basis, provides more than sufficient support for the ITC’s finding that subject imports were a significant cause of material injury to the domestic industry.

**b. The ITC Considered Whether the Industry’s “Business Strategy” Was the Cause of Its Injury**

85. In its oral statement, China has recycled its argument that the ITC “chose to attribute plant closings to imports from China, when the record does not support such a conclusion.”<sup>153</sup> The United States has now addressed why this argument is incorrect several times, and China’s latest submission offers no additional support for its position. As the United States has previously explained,<sup>154</sup> the ITC addressed this very issue in its determination, citing ample record evidence to support its finding.<sup>155</sup> After noting that several parties had argued that the “domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market and that the subject imports simply filled the void left by their departure,” the ITC rejected this argument.<sup>156</sup> The ITC explained that imports of tires from China were rapidly increasing before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006 and 2008.<sup>157</sup> Moreover, the ITC explained that these “three companies confirmed in statements issued at the time of the announcements [of the closings] that low-price competition from Asia, including

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<sup>152</sup>ITC Report, p. 25, n.143 Exhibit US-1.

<sup>153</sup> Oral Statement of China at First Panel Meeting, para. 79.

<sup>154</sup>U.S. First Written Submission, paras. 306-315.

<sup>155</sup>ITC Report, p. 26. Exhibit US-1.

<sup>156</sup>ITC Report, p. 26. Exhibit US-1. There is no basis for China’s assertion that the ITC “rejected” the testimony of the U.S. producers that these closures were not related to the influx of Chinese imports. China First Submission, paras. 350-351. In its submission, China points to no actual statements to support this claim but instead to statements from the three producers who closed these facilities. The ITC considered these statements and found that they were outweighed by the fact that the producers themselves stated, at the time of the closings, that they were due, in significant part, to competition from low-priced imports. ITC Report, p. 26, n. 147, and p. III-16, n. 62. Exhibit US-1.

<sup>157</sup>ITC Report, p. 26 and Table C-1. Exhibit US-1.

China,” was an important factor in the decisions.<sup>158</sup> As the producers stated, the decision to close those facilities was not a voluntary decision that was made independently of imports. It was, instead, a direct response to the growing presence in the market of low-cost Chinese imports, that had already had a “profound” effect on the U.S. market at the very beginning of the period according to contemporaneous press reports.<sup>159</sup>

86. Finally, China repeats its claim that for U.S. producers, “imports from China were, and are, a positive factor” for the domestic, noting that U.S. producers themselves were responsible for importing many of these tires.<sup>160</sup> In light of the record in this proceeding, this is simply an amazing claim. As the ITC noted U.S. producers were responsible for only importing only 23.5 percent of Chinese imports in 2008.<sup>161</sup> As a result, U.S. producers were not responsible for the large bulk of the increase in Chinese imports over the period, because the record showed that 84.2 percent of the growth in subject imports over the period of investigation was imported by companies other than U.S. producers.<sup>162</sup>

87. But more importantly, China simply disregards the fact that as low priced Chinese imports continued to increase throughout the period, while at the same time taking market share away from the domestic industry, the large majority of the domestic industry’s performance indicia declined on a yearly basis over the period of investigation. The notion that rapidly increasing imports were a “positive” factor for the domestic industry is inconsistent with the record showing that there were significant domestic factory closings, and double digit percentage declines in U.S. capacity, production, shipments, net sales quantities, production workers, and market share.<sup>163</sup> It also ignores the fact that, as the industry’s imports grew over the period, the U.S. industry’s profitability levels continued to decline in three out of four years of the period, falling from an operating profit at the start of the period to an operating loss by the end of it.<sup>164</sup> This is hardly a situation in which the industry “benefitted” from their increasing imports of

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<sup>158</sup>ITC Report, p. 26 and III-16, n. 62. Exhibit US-1. Specifically, Bridgestone stated that ““fierce competition from low-cost producing countries” was a factor in its decision to close its Oklahoma City, Oklahoma plant in 2006, Goodyear stated that a contributing factor in its decision to close its Tyler, Texas plant in 2008 was due to “pressure from low-cost imports,” and Continental stated that it closed its Charlotte, North Carolina plant in 2006 due to “global competition” and cheaper manufacturing costs overseas. ITC Report, p. 26, n. 147. Exhibit US-1.

<sup>159</sup>ITC Report, pp.. 26-27, n. 150. Exhibit US-1.

<sup>160</sup>Oral Statement of China at First Panel Meeting, para. 79.

<sup>161</sup>ITC Report, p. 26. Exhibit US-1.

<sup>162</sup>ITC Report, Table II-3. Exhibit US-1.

<sup>163</sup>ITC Report, Table C-1. Exhibit US-1.

<sup>164</sup>ITC Report, Table C-1. Exhibit US-1.

Chinese tires.

## **VI. China Has Not Met Its Burden of Proof on Remedy**

88. In its answers to the Panel questions, China acknowledges that paragraph 16.3 of the Protocol does not require a Member to “separate and distinguish other causes”<sup>165</sup> and that there “is no specific obligation to quantify.”<sup>166</sup> Despite these admissions, China asserts that “the less compelling the authorities’ explanation of how it distinguished the role of imports from other causes, the greater the likelihood the authorities improperly imposed a remedy that goes too far.”<sup>167</sup> However, China fails to provide any explanation why an alleged failure to quantify, where quantification is not required, requires a “compelling explanation”, and why the explanations provided by the United States are not adequate.

89. China’s argument on remedy seems to be that it is not satisfied with the explanations provided. In the U.S. First Written Submission<sup>168</sup> and in the U.S. reply to Panel question 30<sup>169</sup>, the United States has pointed to the detailed explanations provided by the ITC in its report in which it explains how its proposed remedy addresses the market disruption of which imports from China are a significant cause. In addition, the United States has explained that the remedy actually imposed by the United States is less stringent than the remedy recommended by the ITC. This was as a result of additional information gathered during the remedy phase and additional fact-finding conducted by the Office of the U.S. Trade Representative and other agencies during this phase. An explanation of this was provided at the time the measure was imposed and was even included by China as one of its exhibits.<sup>170</sup> Finally, as the United States has also explained, the remedy imposed is reduced by five percentage points in the second and third years. China has failed to establish how the measure fails to meet the requirements of paragraphs 16.3 and 16.6.

## **VII. Conclusion**

90. For the reasons set forth above, and in our first written submission and answers to questions from the Panel, the United States requests that the Panel reject China’s claims in their entirety.

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<sup>165</sup>China’s Answers to Panel Questions, para. 70.

<sup>166</sup>China’s Answers to Panel Questions, para. 71.

<sup>167</sup>China’s Answers to Panel Questions, para. 70.

<sup>168</sup>U.S. First Written Submission, paras. 331-357.

<sup>169</sup>U.S. Answers to Panel Questions Following First Panel Meeting, paras. 84 - 92.

<sup>170</sup>See Exhibit CN-14.