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

(AB-2011-4 / DS399)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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Table of Contents

Table of Reports

Short Form	Full Citation
Argentina – Footwear (Panel)	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R
Argentina – Footwear (AB)	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998
EC – Large Civil Aircraft (AB)	*EC – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 01 June 2011
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Computer Equipment (AB)	Appellate Body Report, *European Communities – A Customs Classification of Certain Equipment,* WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation on Certain Poultry Products,* WT/DS69/AB/R, adopted 23 July 1998
EC – Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, adopted 18 August 2003
India – Patent (US)	Appellate Body Report, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS50/AB/R, adopted 16 January 1998
India – Quantitative Restrictions (AB)	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999

US – Countervailing Duty Investigation on DRAMS (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by the Appellate Body Report, WT/DS296/AB/R
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Hot-Rolled Steel (Panel)	Panel Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, as modified by the Appellate Body Report, WT/DS184/AB/R
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb(AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Line Pipe (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R
US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
US – Shrimp (Article 21.5 Malaysia) (AB)	Appellate Body, *United States – Imported Prohibition of Certain Shrimp and Shrimp Products. – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R, adopted 21 November 2001, as upheld by Appellate Body Report, WT/DS58/AB/R

US – Softwood Lumber V (Article 21.5) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber From Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1
US – Steel Safeguards (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R and Corr.1
US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, and Corr.1, adopted 10 December 2003
U.S. – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton,* WT/DS267/AB/R, Corr. 1, and Add.1 to Add.3, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R
U.S. – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wheat Gluten (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

I. INTRODUCTION

1. This dispute is about the proper interpretation of the transitional product-specific safeguard mechanism ("the transitional mechanism") that is contained in paragraph 16 of the *Protocol on the Accession of the People's Republic of China* ("Protocol")[1], in particular two provisions - paragraphs 16.1 and 16.4 of the Protocol. The transitional mechanism is an integral part of the accession package negotiated and accepted by WTO Members and China. As it did before the Panel, China argues that the transitional mechanism is something entirely different than what WTO Members actually negotiated and agreed to as part of that bargain.

2. China accuses the Panel of "recalibrating" the rights and obligations of the parties[2] and attacks the objectivity of the Panel, claiming that the Panel's decision was so "egregious" that it shows that the Panel was biased against China.[3] Such an attack on the Panel's integrity is unwarranted. China did not lose this dispute because the Panel was biased, China lost because its arguments regarding the proper interpretation of paragraph 16 were unfounded.

II. EXECUTIVE SUMMARY

A. Factual Background[4]

3. In the late 1990's, the Chinese tire industry began to expand and modernize, beginning with the purchase of state-of-the-art equipment from European manufacturers.[5] By 2004, the first year covered by the USITC's period of investigation, China's passenger and light truck tires industry had a total production capacity of 93.2 million tires and total production of 83.7 million tires, less than half the size of the U.S. industry in 2004 in terms of production and capacity.[6]

4. Within three years, however, the situation had changed dramatically. By 2007, the industry in China more than doubled in size and was larger than the U.S. tire industry.[7] From 2004 to 2007, the capacity levels of the Chinese tire industry exploded, increasing from 93.2 million tires in 2004 to 201.8 million tires in 2007, a growth of more than 116 percent.[8] The

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[1] WT/L/432 (November 23, 2001).

[2] China Appellant Submission, para. 2.

[3] China Appellant Submission, para. 571.

[4] Because the factual background of this dispute comprises such an important aspect of the issue of the reasonableness of the determination by the U.S. International Trade Commission ("USITC"), we provide a summary of the facts underlying this dispute.

[5] USITC Report, p. 26 and n. 26. Exhibit US-1.

[6] USITC Report, Table IV-3. Exhibit US-1.

[7] USITC Report, Table IV-3. Exhibit US-1.

[8] USITC Report, Table IV-3. Exhibit US-1.

Chinese industry's production followed suit, with its production increasing to 182 million tires, a growth of 174 percent between 2004 and 2007.[9]

5. The industry in China continued its extraordinary growth in 2008, the last year of the USITC's period of investigation. In that year, China's production capacity grew to 235.2 million tires, representing an additional increase of 16.5 percent.[10] Its production quantities also grew, increasing by an additional 7.5 percent to 195.6 million tires.[11] Chinese producers projected that their capacity levels would grow to 258.4 million tires in 2009 and 272.6 million tires in 2010, and their production levels would grow to 217.8 million tires in 2009 and 236.6 million tires in 2010.[12]

6. As the Chinese industry grew between 2004 and 2008, it continued to rely heavily on export markets as an outlet for its growing production levels. On an absolute level, the volume of China's exports nearly tripled between 2004 and 2008, growing from 43.9 million tires in 2004 to 118.3 million tires in 2008.[13] Between 2004 and 2008, an increasingly large percentage of the industry's overall shipments went to export markets. China's export shipments increased from 52.0 percent of total shipments in 2004 to 59.5 percent of total shipments in 2008.[14] Like its production and capacity levels, the industry in China projected that total export shipments would continue to grow significantly in 2009 and 2010.[15]

7. During this period of rapid growth, the Chinese industry increasingly focused its export efforts on the U.S. market. Between 2004 and 2008, the United States remained the most important export market, by far, for the industry in China.[16] Moreover, Chinese exporters shipped an increasingly large percentage of their exports to the United States, with their U.S. exports increasing from 32.1 percent of total export shipments in 2004 to 40.4 percent of total

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[9] USITC Report, Table IV-3. The industry's production levels grew from 83.7 million tires in 2004 to 182 million tires in 2007. *Id.* Exhibit US-1.

[10] USITC Report, Table IV-3. Exhibit US-1.

[11] USITC Report, Table IV-3. Exhibit US-1.

[12] USITC Report, Table IV-3. Exhibit US-1.

[13] USITC Report, Table IV-3. Exhibit US-1.

[14] USITC Report, Table IV-3. Exhibit US-1. The record indicated that, in some instances, China requires new plants to export much or all of their Chinese tire production for a period of time as a condition for operating a plant in China. USITC Report, p. 34, n.190 (Cooper reported that it was required to export all tires at its Kushan plant in China for a period of five years after beginning that operation).

[15] USITC Report, Table IV-3. Exhibit US-1.

[16] USITC Report, Table IV-4. Exhibit US-1.

export shipments in 2008.[17]

8. Because the Chinese industry had increasingly focused on the U.S. market during the period, the quantity of imports of tires from China into the U.S. market increased rapidly between 2004 and 2008.[18] During that period, the quantity of U.S. imports of tires from China grew by 215 percent, increasing from 14.6 million tires in 2004 to 45.97 million tires in 2008.[19] Moreover, the imports from China more than tripled their share of the U.S. market between 2004 and 2008, with their share of the market growing from 4.7 percent in 2004 to 16.7 percent in 2008.[20]

9. The two largest year-to-year increases in the relative volumes of Chinese imports occurred during 2007 and 2008, the last two years of the period of investigation.[21] The rapid growth in imports from China continued in 2008, when imports of subject tires from China rose by more than 10 percent from their 2007 levels, even though apparent U.S. consumption declined by 6.9 percent in that year.[22] This rapid increase in the volume of subject imports was accompanied by consistent and significant underselling.[23]

10. While imports of tires from China entered the market in ever growing volumes, virtually all the indicators of the U.S. tire industry's conditions were in significant decline, with nearly all indicators being at their lowest level in the final year of the period.[24] Specifically, the industry's production of tires decreased throughout the period, falling by 26.6 percent between 2004 and 2008, with more than a third of this overall decline occurring in 2008.[25] Similarly, the U.S. industry's capacity levels and capacity utilization rates fell considerably during the period, as the industry's capacity levels declined by 17.8 percent between 2004 and 2008 and its capacity utilization rates declined by 10.3 percentage points during that same period.[26]

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[17] USITC Report, Table IV-3. Exhibit US-1.

[18] USITC Report, Table II-1. Exhibit US-1.

[19] USITC Report, Table II-1. Exhibit US-1.

[20] USITC Report, Table C-1. Exhibit US-1.

[21] USITC Report, p. 12. Exhibit US-1.

[22] USITC Report, Table V-1. Exhibit US-1.

[23] Imports from China undersold U.S.-made tires in 119 of the 120 instances in which the USITC was able to make a comparison. USITC Report, Tables V-9 to V-17. Exhibit US-1. The USITC uses the term "underselling" in its analysis to refer to price "undercutting."

[24] USITC Report, Table C-1. Exhibit US-1.

[25] USITC Report, Table C-1. Exhibit US-1.

[26] USITC Report, Table C-1. Exhibit US-1.

11. U.S. industry net sales and U.S. shipment quantities also declined considerably between 2004 and 2008.[27] The U.S. industry's domestic shipments of tires fell by 29.7 percent between 2004 and 2008, with the largest percentage decline occurring in 2008, when Chinese import volume was at its highest.[28] Similarly, the net sales quantities of the industry declined by 28.3 percent between 2004 and 2008, with the largest single percentage decline occurring again in 2008, the final year of the period.[29] Finally, the U.S. industry's employment indicators all fell at significant rates during the period. The number of the industry's production workers fell by 14.2 percent, hours worked fell by 17 percent, and wages paid fell by 12.5 percent.[30]

12. Moreover, the U.S. industry's profitability levels deteriorated considerably. The industry's gross profits fell by 33.6 percent and its operating income margins fell by 4.8 percentage points between 2004 and 2008.[31] The industry's gross profit and operating income levels and its operating income margin fell to their worst levels in 2008, when subject import volumes were at their highest.[32] In that year, the industry as a whole operated at a significant loss and six of the reporting firms indicated that they operated at a loss on their tire operations.[33] The industry's poor profitability levels in 2008 reflected a sharp decline from the industry's modest operating profit in 2007, when three of the reporting firms reported an operating loss for the year.[34]

13. Finally, U.S. producers announced the closure of three plants in 2006 and one plant in 2007, representing an aggregate operating capacity of 43.4 million tires.[35] Furthermore, U.S. producers announced in late 2008 and early 2009 that they would close three more plants during 2009, with an aggregate operating capacity of 22.5 million tires.[36] Given this record evidence, the USITC had a firm factual basis for its determination that rapidly increasing imports of tires from China were a significant cause of material injury to the industry.

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[27] USITC Report, Table C-1. Exhibit US-1.

[28] USITC Report, Table C-1. Exhibit US-1.

[29] USITC Report, Table C-1. Exhibit US-1.

[30] USITC Report, Table C-1. Exhibit US-1.

[31] USITC Report, Table C-1. Exhibit US-1.

[32] USITC Report, Table C-1. Exhibit US-1.

[33] USITC Report, Table III-5. Exhibit US-1.

[34] USITC Report, Table III-5. Exhibit US-1.

[35] USITC Report, Table I-3. Exhibit US-1.

[36] USITC Report, Table I-3. Exhibit US-1.

B. Summary of Argument

14. The United States's decision to impose additional duties on Chinese imports of tires was fully consistent with the Protocol. As the Panel concluded, the USITC reasonably found that imports of rapidly increasing tires from China were a significant cause of material injury to the industry. The Panel correctly rejected China's interpretations of the legal standards regarding increasing imports and causation because they were not warranted by the text of the Protocol. Furthermore, the Panel performed a comprehensive analysis of the ITC's findings on rapidly increasing imports and causation, as well as China's arguments attacking those findings. The Panel's analysis was thorough and consistent with its obligation to make an objective assessment of the matter before it. The Panel committed no error in reaching its conclusions, and its findings should be upheld.

1. The USITC's "Rapidly Increasing Imports" Finding Was Consistent with the Protocol

15. The Panel correctly found that the USITC 's "rapidly increasing imports" finding was consistent with the Protocol.[37] After carefully considering China's arguments on this issue, the Panel explained in a thorough analysis that the USITC had, in fact, established that imports from China were "increasing rapidly" throughout the period, including the recent years of the period. [38] As the Panel pointed out, the record showed that imports of Chinese tires increased by more than 215 percent and gained more than 12 percentage points of market share over the period, with the largest increases in these measures occurring in the final two years of the period.[39] As a result, the Panel correctly concluded, the USITC had a firm factual foundation for its finding that the increases in Chinese imports were "large, rapid and continuing" throughout the period, including the final two years of the period.[40]

16. Moreover, the Panel correctly rejected China's attempts to re-define the "rapidly increasing imports" standard of the Protocol. As the Panel stated, the Protocol does not require an authority to focus on the "most recent increases" in imports.[41] Moreover, the Protocol does not require an authority to assess whether there was a continuing acceleration in the "rate of increase" for Chinese imports over the period.[42] Finally, the Panel rejected China's arguments that the ITC failed to place the increases in context, noting that the USITC engaged in a variety

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[37] Panel Report, paras. 7.38 - 7.110.

[38] Panel Report, paras. 7.38 - 7.110.

[39] USITC Report, pp. 11-12; Panel Report, paras. 7.83 - 7.100.

[40] USITC Report, pp. 11-12; Panel Report, paras. 7.83 - 7.100.

[41] Panel Report, paras. 7.87 - 7.93.

[42] Panel Report, paras. 7.92.

of temporal comparisons of import increases over the period, and that the USITC correctly concluded that there was a "clear and uninterrupted upward trend in import volumes."[43]

2. The USITC's Causation Analysis Was Consistent with the Protocol

a. The Panel Applied the Correct Standard When Reviewing the USITC's Causation Analysis

17. The Panel also correctly rejected China's arguments that the USITC's causation analysis was inconsistent with the Protocol.[44] In doing so, the Panel properly rejected China's argument that the Protocol incorporates a higher causation standard than other WTO agreements. Rather than adopting China's unfounded analysis of the text of the Protocol, the Panel reasonably chose to define the causation standard's scope by relying on the ordinary meaning of its actual words and placing that meaning within the context of the Protocol, as required by the customary rules of treaty interpretation.[45] Specifically, the Panel correctly found that, under the Protocol, the USITC was required to assess whether rapidly increasing imports are an "important" or "notable" cause of material injury to the domestic industry.[46] The Panel applied this standard to the USITC's analysis and correctly concluded that the USITC's causation analysis was fully consistent with this standard.[47]

18. The Panel also rejected China's argument that, under the Protocol, the Panel should have assessed whether there was a specific "correlation in the degree of magnitude between increases in imports and decreases in the domestic industry injury factors." As the Panel noted, in their analysis with respect to the Safeguards Agreement, the Appellate Body and WTO panels have consistently concluded that a "coincidence of trends" analysis was appropriately founded on a temporal relationship between movements in imports and movements in the injury factors,[48] that is, on an assessment of the year-by-year correlations between movements in import trends and the industry's condition factors. The Panel also correctly pointed out that no Appellate Body or panel report has suggested that "the orders of magnitude {in the changes} are key" to a correlations analysis, or that "changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors."[49]

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[43] Panel Report, para. 7.102.

[44] Panel Report, paras. 7.111- 7.379.

[45] *See* Panel Report, paras. 7.37, 7.111 - 7.178, and 7.228 - 7.233.

[46] Panel Report, paras. 7.158 and 7.159.

[47] Panel Report, paras. 7.111- 7.379.

[48] Panel Report, paras. 7.230-232.

[49] Panel Report, para. 7.232.

19. The Panel also correctly rejected China's theory that the USITC was required to "separate and distinguish" the injurious effects of other causes in its analysis, an approach that the Appellate Body has found to be embodied in the "non-attribution" language of the causation provisions of the Safeguards Agreement, the Antidumping Agreement and the SCM Agreement.[50] The Panel correctly concluded that the USITC was not required to perform such an analysis here because the Protocol does not contain a "non-attribution" requirement. Nonetheless, even though a "separate and distinguish" analysis was not required by the text of the Protocol, the Panel reasonably explained, the ITC was still required to perform an "analysis of the injurious effects of other factors" that was consistent with the approach taken by the WTO panel in *US - Upland Cotton*.[51] The Panel applied this standard to the USITC's analysis and correctly concluded that the USITC's analysis was consistent with it.[52]

b. The USITC Performed a Reasoned and Adequate Analysis of Causation

20. China also contends that the USITC did not have a basis for finding that there was a coincidence between Chinese import trends and the industry's decline. As the USITC and the Panel concluded, the record showed that there was a clear coincidence in trends between the rapidly increasing imports and their effects on the domestic industry.[53] During the period, as Chinese import volumes increased rapidly in every year of the period, the record showed that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;[54]
- 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;[55]

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[50] Panel Report, paras. 7.174 - 7.177.

[51] Panel Report, paras. 7.174 - 7.177.

[52] Panel Report, paras. 7.262 - 7.379.

[53] USITC Report, pp. 22 - 29.

[54] USITC Report, pp. 25-26. Exhibit US-1.

[55] USITC Report, pp. 15-18 and 24. Exhibit US-1.

- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 percent;[56]

- The domestic industry's production-related workers fell by 14.2 percent, the number of hours worked by the industry's employees fell by 17.0 percent, and wages paid to the industry's employees fell by 12.5 percent over the period.[57]

21. Furthermore, the U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008.[58] For example:

- 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.[59]

Given this data, China's argument that there was no coincidence between import and industry trends is unfounded.

22. The Panel also correctly rejected China's argument that competition between the Chinese and U.S. tires was "attenuated" because Chinese and U.S. tires were largely focused on different segments of the market. As the USITC and the Panel concluded, there was a significant degree of competition between Chinese and U.S. tires within the market, particularly in tiers 2 and 3 of the replacement tire market.[60] Moreover, the USITC reasonably rejected China's claim that there was a significant competitive barrier between the three tiers of the replacement market.[61] As the ITC correctly stated, even though market participants agreed that the U.S. replacement market was perceived to contain three categories or tiers, there was no industry-wide consensus on what

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[56] USITC Report, pp. 23-24. Exhibit US-1.

[57] USITC Report, pp. 17 and 24 and Table C-1. Exhibit US-1.

[58] USITC Report, Table C-1. Exhibit US-1.

[59] USITC Report, pp. 17 and 24 and Table C-1. Exhibit US-1.

[60] USITC Report, pp. 26 - 27; Panel Report, para. 7.195.

[61] USITC Report, pp. 26 - 27; Panel Report, paras. 7.185 - 7.197.

tires or brands were in each tier, how large the tiers were, or whether they even existed.[62] Given this, they reasonably found that the existence of these tiers did not limit competition between the Chinese and U.S. tires to any significant degree.[63]

23. Moreover, the USITC also properly considered whether other causes of injury, such as non-subject imports, demand declines, and the industry's alleged "business strategy" decision to shift away from the low end of the market, severed the causal link between the Chinese imports and material injury. As the Panel stated, the USITC's findings on these issues were reasonable.[64] For example, as the Panel found, the USITC reasonably rejected the theory that the industry voluntarily withdrew from the low end of the replacement market, thereby intentionally ceding that market to Chinese imports.[65] Instead, the USITC correctly stated, the industry chose to shut down significant amounts of capacity due to competition from low-priced imports, including those from China.[66]

24. Similarly, the USITC properly concluded that demand declines were not the primary cause of the industry's deteriorating condition because the declines in the industry's condition over the period did not correlate with demand declines, as China claimed.[67] Finally, the USITC reasonably chose not to consider non-subject imports a significant contributor to the industry's declines because these imports were higher-priced than the Chinese imports and their volumes remained relatively stable over the period.[68] In sum, the Panel conducted a thorough analysis of the evidence, in light of the arguments of the parties and correctly concluded that the ITC had reasonably considered and rejected these factors as factors that broke the causal link between Chinese imports and the industry's declines.

25. Finally, throughout its brief, China attacks the objectivity of the Panel, claiming that the Panel's decision was so "egregious" that it indicates the Panel was biased against China. The United States submits that China did not lose this dispute at the Panel level because the Panel was biased against it. Instead, China lost this dispute because the USITC established that rapidly increasing imports from China were a significant cause of material injury to the U.S. tires industry. The Panel reviewed the record evidence and the arguments made by the parties and correctly concluded that the USITC's decision was well-founded on the factual record and in

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[62] USITC Report, pp. 26 - 27; Panel Report, paras. 7.185 - 7.197.

[63] USITC Report, pp. 26 - 27; Panel Report, paras. 7.185 - 7.197.

[64] Panel Report, paras. 7.262 - 7. 7.379.

[65] USITC Report, pp. 26-27.

[66] USITC Report, pp. 26 - 27.

[67] USITC Report, p. 26; Panel Report, paras. 7.285 - 7.327.

[68] USITC Report, pp. 22 and 26; Panel Report, paras. 7.360 - 7.367.

accordance with the requirements of the Protocol.

III. LEGAL ARGUMENT

A. Standard of Review

26. The Panel clearly understood the nature of the "objective assessment" it was required to undertake in this dispute.[69] It understood that its role was not to conduct a *de novo* review of the USITC's determination, nor grant total deference to it[70], and that the standard of review "must be understood in the light of the obligations of the particular covered agreement at issue."[71] It correctly noted that in taking into account the obligations of paragraph 16, its review would contain a formal aspect - whether the USITC evaluated "objective factors" as required by paragraph 16.4; and a substantive aspect - whether the USITC provided a reasoned and adequate explanation of its determination, in line with paragraph 16.5.[72]

27. The Panel noted that the main disagreement between the parties on the issue of standard of review was whether the USITC had to address alternative explanations of the evidence and the data before it.[73] China argued that, based on *US – DRAMS (AB)*, the USITC "should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions."[74] In answers to questions from the Panel, the United States explained that it "believe[d] that this level of detail is derived from the requirements found in Articles 22.4 and 22.5 of the SCM Agreement, and particularly the requirement in Article 22.5 for the notice or report to contain 'the reasons for acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers'."[75]

28. After reviewing the arguments presented by the parties, the Panel correctly noted that

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[69] See generally, Panel Report, paras. 7.11 - 7.21.

[70] Panel Report, para. 7.15.

[71] Panel Report, para. 7.15, citing to *US – DRAMS (AB)*, para. 184.

[72] Panel Report, para. 7.15. As the United States noted during the Panel proceedings, China did not raise a claim under paragraph 16.5. However, given that paragraph 16.5 provides the procedural requirements for the transitional mechanism, it is one of the obligations that needs to be considered with respect to the standard of review issue. See U.S. Answers to Panel Questions Following First Panel Meeting, para. 46.

[73] Panel Report, para. 7.16.

[74] China's Second Written Submission, para. 46, citing *US – DRAMS (AB)*, para. 186.

[75] U.S. Answers to Panel Questions Following First Panel Meeting, para. 47, n. 52.

"there is no obligation in Paragraph 16 of the Protocol requiring the USITC to address, in its determination, alternative explanations that could reasonably be drawn from the evidence or data before it" and that, therefore, it could not impose such an obligation on the USITC.[76] Therefore, on this issue, the Panel used the guidance provided by the Appellate Body in *US – Lamb*:

> A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[77]

29. Thus, the Panel noted that, in reviewing whether the USITC's determination was reasoned and adequate, it was to "assess whether the reasoning provided by the USITC in its determination seems adequate in light of plausible explanations of the record evidence or data advanced by China in this proceeding."[78] In addition, the Panel clearly understood that there is a distinction between "alternative explanations" to be drawn from the evidence or data before it and the substantive question of whether the USITC should have considered alternative causes of injury or conducted a non-attribution analysis.[79] Although China's arguments often conflate both issues, the Panel was clear that these are two separate issues.

B. The Panel Properly Found That The USITC's "Rapidly Increasing" Imports Finding Was Consistent with the Protocol

30. The Panel conducted a thorough analysis of the record evidence and properly found that the USITC had established that imports of tires from China were "increasing rapidly," both absolutely and relatively, so as to be a significant cause of material injury to the U.S. tires industry.[80] As the USITC stated, the record before it showed that imports from China increased rapidly on an absolute and relative level during the period of investigation, with the quantity of the Chinese imports increasing by 215 percent and the market share of the subject imports more than tripling during the period.[81] The USITC also found that the largest increases in volume and

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[76] Panel Report, para. 7.18.

[77] Panel Report, para. 7.17, citing to *US – Lamb (AB)*, para. 106 (emphasis in original).

[78] Panel Report, para. 7.18.

[79] Panel Report, para. 7.18, n. 59.

[80] *See* Panel Report, paras. 7.38 - 7.110; USITC Report, pp. 10-12 and 22. Exhibit US-1.

[81] USITC Report, pp. 11-12 and 22. Exhibit US-1.

market share occurred in 2007 and 2008, the final years of the period.[82]

31. In its Appellant Submission, China makes many of the same arguments that it made before the Panel. China first argues that the USITC and the Panel were required by the Protocol to focus their analysis on the "most recent increases" in imports from China, which China defines as the import increases occurring in 2008.[83] China argues that the USITC failed to do so by focusing on the overall trends in imports over the period and the Panel erred in accepting those conclusions.[84] China next argues that the USITC and the Panel failed to properly account for changes in the rates of increase in imports, an analysis China believes shows that imports were no longer "rapidly increasing" in 2008.[85] Finally, China contends that the Panel and the USITC "never put the most recent rate of increase in context with prior rates of increase."[86] As China sees it, by allegedly failing to put these trends in context, the USITC and the Panel failed to distinguish between "imports that were merely 'increasing' and those that were doing so 'rapidly'," as it argues the Protocol requires.[87]

32. China's arguments have no merit. The Panel considered and rejected essentially the same arguments now being made by China. The Panel correctly concluded that the Protocol required the USITC to focus on "recent increases" in imports, but not on the "most recent increases" in imports.[88] The Panel also correctly concluded that the USITC was not required to find that there was a continuing increase in the "rate of increase" for Chinese imports in the final year of the period, 2008.[89] Finally, the Panel rejected the idea that the USITC failed to place the increases in context, noting that the USITC engaged in a variety of temporal comparisons of import increases over the period.[90] As a result, the Panel concluded, the USITC properly established that the increases in the Chinese imports were "large, rapid and continuing" throughout the period of investigation, including the final years of the period.[91] We discuss these issues below.

1. The Protocol Does Not Incorporate the Improperly Heightened

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[82] USITC Report, pp. 10-12 and 22. Exhibit US-1.

[83] *E.g.*, China Appellant Submission, para. 15.

[84] *E.g.*, China Appellant Submission, para. 15.

[85] *E.g.*, China Appellant Submission, para. 16.

[86] *E.g.*, China Appellant Submission, para. 17.

[87] *Id.*

[88] Panel Report, paras. 7.87 - 7.93.

[89] Panel Report, paras. 7.91 - 7.92.

[90] Panel Report, para. 7.102.

[91] Panel Report, para. 7.110.

Standard of "Rapidly Increasing Imports" Proposed by China

a. The Standards of the Protocol

33. Under the Protocol, a competent authority must establish that imports of a product from China were "increasing rapidly, either absolutely or relatively," before it may find that "market disruption" exists.[92] Paragraph 16.1 of the Protocol provides that:

> In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, . . . the WTO Member so affected may request consultations. (Emphasis added).

34. Paragraph 16.4 of the Protocol provides further detail on the type of increase contemplated under the Protocol. Specifically, paragraph 16.4 provides that:

> Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. (Emphasis added).

35. Before addressing the merits of China's arguments, it is important to make several points about the "increasing rapidly" standard of the Protocol. First, aside from the language cited in the two preceding paragraphs, paragraph 16 does not otherwise define the nature of the "rapid increase." Accordingly, when assessing whether the USITC properly found that the subject imports were "increasing rapidly" during the period, the Panel properly looked to determine the meaning of this term by examining the ordinary meaning of the term within the specific context of the Protocol.[93]

36. Second, because the Protocol provides that imports from China must be "increasing rapidly ... so as to be a significant cause of material injury" to the industry, the Protocol suggests that a competent authority should focus its "increasing rapidly" imports analysis on the recent past, rather than at some distant point during the period of investigation.[94] However, the Protocol does not contain any language stating, explicitly or implicitly, that an authority must focus solely on import increases in the "most recent period" of time when performing its "rapidly increasing

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[92] Protocol of Accession, paras. 16.1 and 16.4.

[93] Articles 31 and 32 of the Vienna Convention; *see US – Line Pipe (AB)*, para. 244.

[94] *See* USITC Report, p. 10. Exhibit US-1.

imports" analysis.[95] In fact, the causation provisions of the Protocol do not actually specify a particular time frame for this analysis, nor do they mention the words "recent" or "period" at all.[96]

37. Finally, the Protocol does not specify how rapid an increase must be to meet the "increasing rapidly" standard of the Protocol. Thus, the Protocol does not indicate that imports must be growing at their most rapid pace at the end of the period examined, nor does it state that the rate of growth must be consistently "steep" over the final years of the period. Accordingly, the Protocol does not preclude a competent authority from finding imports to be "increasing rapidly" over the period examined simply because the rate of increase of the imports lessens somewhat at the end of the period.[97] The Protocol requires only that there be a "rapid increase" in imports, on an absolute or relative basis.[98]

b. The USITC's Analysis

38. The USITC analyzed the record to determine whether the subject imports from China were "increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry."[99] In its decision, the USITC explained that, to constitute a rapid increase, the increases in Chinese imports "should be recent or continuing, as opposed to in the distant past."[100] It also explained that it "focus{es} on recent increases in subject imports" when analyzing whether there is a rapid increase in imports.[101] Finally, the USITC noted that it "look[s] to the increase and rate of increase in subject imports" as a basis for assessing whether a rapid increase is occurring.[102]

39. Taking these principles into account, the USITC concluded that imports of tires from China were increasing rapidly over the period.[103] The USITC observed that "imports of the subject tires from China increased throughout the period of investigation," and that they "were

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[95] *See* Protocol of Accession, paras. 16.1 and 16.4.

[96] *See* Protocol of Accession, paras. 16.1 and 16.4.

[97] China First Submission, paras. 111-135.

[98] Protocol of Accession, para. 16.4.

[99] USITC Report, pp. 11-12. Exhibit US-1.

[100] USITC Report, p. 10 (emphasis added). Exhibit US-1.

[101] USITC Report, p. 11. Exhibit US-1.

[102] USITC Report, p. 11 (emphasis added). Exhibit US-1.

[103] USITC Report, pp. 11-12 and 22. Exhibit US-1.

[at] the highest, in terms of both quantity and value, in 2008, at the end of the period."[104] The USITC pointed out that "[t]he quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008."[105] Moreover, the USITC explained, the aggregate "value of subject imports {from China} rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008."[106]

40. In terms of relative increases, the USITC also found that imports from China were rapidly increasing during the period.[107] As the USITC observed, the ratio of the Chinese imports to U.S. production and their share of the market both rose consistently through the period examined, and both measures were at their highest levels in 2008.[108] Specifically, the USITC stated that "[t]he ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008," and emphasized that "the two largest year-to-year increases also occurr{ed} at the end of the period in 2007 and 2008."[109] The USITC also noted that the market share of Chinese imports increased by 12.0 percentage points between 2004 and 2008, and again emphasized that the "two largest year-to-year increases also occurr{ed} at the end of the period in 2007 and 2008."[110]

41. Finally, the USITC specifically addressed and rejected Chinese respondents' arguments that increases in the subject imports had been "gradual" or "small" during the period, and had "abated" at the end of the period.[111] The USITC explained that the volumes of the subject imports had increased by significant amounts, on an absolute and relative basis, throughout each year of the period of investigation, and were at their highest levels in 2008, the end of the period of investigation.[112] As the USITC stated:

> Whether viewed in absolute or relative terms, and whether viewed in terms of the

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[104] USITC Report, pp.11-12 and 22. Exhibit US-1.

[105] USITC Report, pp.11-12 and 22. Exhibit US-1.

[106] USITC Report, pp. 11-12 and 22. Exhibit US-1.

[107] USITC Report, p. 12. Exhibit US-1.

[108] USITC Report, pp. 12 and 22. Exhibit US-1.

[109] USITC Report, pp. 12 and 22. Exhibit US-1. The ratio of subject imports to U.S. production increased from 14.6 to 23.0 percent between 2006 and 2007, and then increased from 23.0 to 28.7 percent between 2007 and 2008. USITC Report, Table II-2. Exhibit US-1.

[110] USITC Report, pp. 12 and 22. Exhibit US-1. The market share of the subject imports increased from 9.3 percent in 2006 to 14.0 percent in 2007, and then to 16.7 percent in 2008. *See* USITC Report, Table C-1. Exhibit US-1.

[111] USITC Report, p. 12. Exhibit US-1.

[112] USITC Report, p. 12. Exhibit US-1.

> increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.[113]

In sum, the USITC provided a reasoned explanation of the basis for its finding that subject imports were increasing rapidly, on both an absolute and relative basis. The USITC's analysis was fully consistent with the "rapidly increasing imports" standard of the Protocol.

2. The Panel Properly Found that the USITC's "Rapidly Increasing" Imports Analysis Was Consistent with the Protocol

42. China takes thousands of words to explain why, under the Protocol, the two-word phrase, "increasing rapidly ", should not be given its plain and ordinary meaning of "growing swiftly or quickly."[114] In China's view, it is not enough that the USITC was able to establish that Chinese imports were clearly growing "quickly" or "swiftly" throughout the period, including its final years.[115] Instead, China contends that the Protocol required the USITC to focus solely on increases in the "most recent period," which China defines as being 2008. Moreover, China argues that the USITC should have assessed whether there was a continuing "steep" growth in the rate of increase for the Chinese imports in that year.[116] The Panel accurately and succinctly summarized China's argument on this score, the "thrust of China's argument is that a decline in the rate of increases in 2008, the most recent period in China's view, means that imports were no longer 'increasing rapidly.'"[117]

43. The Panel correctly rejected these arguments. As the Panel explained, the Protocol does not require a Member to find there was a "swift progression in the rate of increase in imports" throughout the entire period. Instead, as the Panel pointed out, the Protocol requires only that the Chinese imports be increasing "with great speed" or "swiftly" during the period.[118] Nor does the Protocol require a Member to ignore evidence by focusing on increases in the last year of the period; instead it suggests that the Member should consider "recent increases" in imports in its analysis.[119] Finally, the Panel properly concluded that the USITC did, in fact, explain in a reasoned way why it found Chinese imports were increasing rapidly in the final years of the

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[113] *Id.*

[114] China Appellant Submission, paras. 53-183.

[115] China Appellant Submission, paras. 53 - 183.

[116] China Appellant Submission, para. 59.

[117] Panel Report, para. 7.38.

[118] Panel Report, para. 7.92.

[119] Panel Report, paras. 7.87 - 7.91.

period and fully consistent with the Protocol.[120] That decision was not in error and should be upheld.

a. The Panel Properly Concluded that the USITC Was Not Required to Focus on the "Most Recent" Increases in Chinese Imports

i. The Text of the Protocol Does Not Support China's Theory

44. China asserts that, under the Protocol, an authority may not simply focus its analysis on "recent increases" in imports. Relying heavily on a comparison of the text of the Protocol with the text of other WTO agreements, China argues that the text of the Protocol requires an authority to focus its analysis on the increases in the "most recent period" available to the authority, which China argues was 2008.[121] China argues that, rather than relying on this "most recent period," the USITC chose to improperly perform an "end-point-to-end-point" analysis of import data for the period of investigation.[122] According to China, the USITC therefore did not properly establish that Chinese imports were increasing rapidly at the end of the period.[123]

45. China's arguments have no merit. China argues that the language of the Protocol requires an authority to focus on the "most recent period" in its analysis.[124] Yet, the Protocol does not provide, explicitly or implicitly, that an authority must focus solely on import data for the "most recent period" available to it.[125] In fact, it does not require the authority to focus on import data for any specific period at all.[126] Instead, the Protocol simply provides that a Member must assess whether Chinese imports "are increasing rapidly" so as to be a significant cause of material injury.[127] Since the Appellate Body has explained that "words must not be read into {an} Agreement that are not there,"[128] the Panel properly rejected China's attempt to read into the

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[120] Panel Report, paras. 7.82-7.110.

[121] China Appellant Submission, paras. 55 - 85 and 129 - 136.

[122] China Appellant Submission, paras. 17 and 163.

[123] China Appellant Submission, paras. 55 - 85 and 129 - 136.

[124] China Appellant Submission, paras. 55 - 85 and 129 - 136.

[125] Protocol of Accession, paras. 16.1 and 16.4.

[126] Protocol of Accession, paras. 16.1 and 16.4.

[127] Protocol of Accession, para. 16.4.

[128] *US - Line Pipe (AB)*, para. 250 (citing to *India – Quantitative Restrictions (AB)*, para. 94; *India – Patents (AB)*, para. 45; *EC – Hormones (AB)*, para. 181; *see also EC - Bed Linen (AB)*, para. 83; *EC - Certain Computer Equipment (AB)*, para 83; *EC – Poultry (AB)*, para. 146.)

Protocol additional language requiring an authority to focus on the "most recent period."

46. Second, since the Protocol does not specify that an authority must focus its analysis on any particular period of time, the USITC had the discretion to adopt a reasonable time frame for its analysis, as long as the time period allowed it to focus on recent imports.[129] As the Appellate Body has explained under the Safeguards Agreement, if an Agreement does not contain specific rules specifying the period on which an authority must focus its analysis, the authority may analyze import data over any reasonable period, so long as the period "allows it to focus on the recent imports" and so long as it is "sufficiently long to allow conclusions to be drawn regarding the existence of increased imports."[130] Thus, as the Panel correctly concluded,[131] the USITC's five-year period was both sufficiently recent to allow the USITC to examine "recent" increases in Chinese imports, and sufficiently long to allow it to draw conclusions about the existence of increased imports.

47. Third, the Protocol does not require a focus on data for the "most recent period" simply because it states that an authority must assess whether imports "are increasing rapidly."[132] China argues that, because the Protocol uses the phrase "are increasing rapidly," which is in the "present continuous tense," that phrase "emphasizes the importance of time, particularly the most recent period."[133] As the Panel reasonably explained, even though the phrase "are increasing rapidly" may be in the "present continuous tense," the use of the present tense simply suggests, at best, that an authority should focus its analysis on import increases during a "recent period."[134] Aside from this inference, however, the Protocol's use of the "present continuous tense" says nothing whatsoever about an authority's alleged need to focus on the "most recent period," especially if it must do so to the exclusion of other recent periods of time.[135]

48. Fourth, the Protocol's use of the "present continuous tense" to describe the requisite import increases does not distinguish the Protocol significantly from other WTO trade remedy agreements, despite China's assertions to the contrary.[136] To take just two examples, the Safeguards Agreement and the Agreement on Textiles and Clothing ("ATC") both use the

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See also US – Steel Safeguards (AB), para. 471.

[129] Panel Report, para. 7.107.

[130] *See US - Line Pipe (Panel)*, para. 7.201.

[131] Panel Report, para. 7.107; *see also* USITC Report, pp. 10-11. Exhibit US-1.

[132] China Appellant Submission, paras. 58 and 61-66.

[133] China Appellant Submission, para. 58.

[134] Panel Report, para. 7.88.

[135] Panel Report, paras. 7.88 - 7.91.

[136] China Appellant Submission, paras. 61-66.

"present continuous tense" when describing the import increases that are necessary for imposition of a remedy. In the case of the Safeguards Agreement, for example, a Member may only impose a global safeguard remedy if a product "is being imported ... in such increased quantities" as to be a cause of serious injury to an industry.[137] Similarly, in the case of the ATC, a Member could only impose a remedy if the textiles product "is being imported ... in such increased quantities" as to cause serious damage.[138] Thus, both agreements use the "present continuous tense" to describe the increases required. China can take scarce comfort in the existence of alleged grammatical differences between the Protocol and other agreements to support its argument about the "most recent period."

49. Moreover, China's argument overlooks Appellate Body and WTO panel findings on this same issue under the Safeguards Agreement. As the Panel pointed out,[139] the Appellate Body and panels have concluded that, as used in that agreement, the phrase "is being imported" does not connote that imports must be increasing in the "most recent period." Instead, in *Argentina – Footwear (AB)*, the Appellate Body stated that the term, "is being imported," only requires an authority to determine whether import increases were "sudden and recent."[140] Similarly, in *US - Line Pipe (Panel)*, the panel observed:

> The word "recent" – which was used by the Appellate Body {in *Argentina - Footwear* when} interpreting the phrase "is being imported" – is defined as "not long past; that happened, appeared, began to exist or existed lately." In other words, the word "recent" implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation.[141]

Given that the phrase "are being imported" used in paragraph 16.1 of the Protocol and the phrase "is being imported" used in Article 2.1 of the Safeguards Agreement have the same grammatical construction,[142] the Panel reasonably concluded that "there {was} nothing in the use of the present continuous tense in Paragraphs 16.1 and 16.4 of the Protocol that would require an investigating authority to focus on the movements in imports during the *most* recent past, or

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[137] Safeguards Agreement, Article 2.1 (emphasis added).

[138] Textiles Agreement, Article 6.2 (emphasis added).

[139] Panel Report, para. 7.88 - 7.90.

[140] Panel Report, para. 7.88 (*citing Argentina – Footwear (AB),* para. 130).

[141] *US – Line Pipe (Panel)*, para. 7.204 (emphasis added).

[142] Panel Report, para. 7.90.

during the period immediately preceding the authority's decision."[143]

50. Furthermore, the Panel reasonably rejected the notion that any differences in the language used in paragraphs 16.1 and 16.4 of the Protocol suggest that an authority must focus on increasing imports in the "most recent period,"[144] an argument China now pursues forcefully in this appeal.[145] The Panel rejected this idea, stating that:

> We agree there is a temporal difference between imports that have increased rapidly and those that are increasing rapidly. However, the text of Paragraph 16.1 does not say "increased rapidly". The text says "are being imported … in such increased quantities" and, as acknowledged by China, this phrase uses the same grammatical tense as the phrase "increasing rapidly" in Paragraph 16.4. Reading the terms "increased" and "increasing" in their proper context, we do not consider that the use of the term "increasing" in Paragraph 16.4 requires a focus on a more recent period than the term "increased" in Paragraph 16.1.[146]

In other words, the Panel reasonably found that there was not a sufficient grammatical difference between the phrases, "are increasing rapidly," and the phrase "are being imported ... in such increased quantities" to warrant China's assertion that the Protocol necessarily requires a focus on the "most recent period.[147] In fact, China admitted as much before the Panel.[148] Given this, it is difficult to understand how China can now argue that the grammatical distinctions between the tenses used in Articles 16.1 and 16.4 of the Protocol would warrant such an approach.

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[143] Panel Report, para. 7.90.

[144] Panel Report, para. 7.91.

[145] Panel Report, para. 7.91. It is interesting to note that China did not draw the critical distinctions between Paragraphs 16.1 and 16.4 when making this argument before the Panel. On the contrary, during the Panel process, China actually stressed the similarities between paragraphs 16.1 and 16.4, including the fact that both were couched in the "present continuous tense." For example, China stated "the use of the present continuous tense [in Paragraph 16.1] – products that 'are being imported' – emphasizes the importance of time, and considers the most recent period." First Written Submission of China, para. 70. Similarly, China asserted that "[t]he phrases 'are being imported' in Article 16.1 and 'are increasing' in Article 16.4 thus complement and reinforce each other in requiring a focus on the present situation at the time of the investigation, not the past." First Written Submission of China, para. 78. Having lost before the Panel, China now appears to have had a change of heart on this matter.

[146] Panel Report, para. 7.91 (footnotes omitted)(emphasis added).

[147] Panel Report, para. 7.91.

[148] Panel Report, para. 7.91.

51. Nor is there merit to China's argument that the language of paragraph 16.4 should have been given controlling effect on this issue because it is more specific than language of paragraph 16.1.[149] First, paragraph 16.4 is not more specific on the questions of what increase in imports is required than paragraph 16.1[150] Second, it is a fundamental principle of treaty interpretation that the terms of a treaty should be interpreted in a harmonious and coherent manner.[151] In its analysis, the Panel gave effect to this principle by making clear that it was reading the "increased imports" language in paragraph 16.1 and "increasing imports" language of paragraph 16.4 in a harmonious way.[152] As the Panel explained:

> Paragraphs 16.1 and 16.4 are interrelated. They should be read together, and each provision provides important context for interpreting the other. The interrelation between Paragraphs 16.1 and 16.4, the joint reading of these provisions, and the definitional nature of Paragraph 16.4, suggest that Paragraph 16.4 clarifies the substance of the trigger conditions provided for in Paragraph 16.1.[153]

The Panel correctly applied the principles of effective treaty interpretation in its interpretation of paragraphs 16.1 and 16.4, reading them in a harmonious way, rather than interpreting them in a manner that rendered the language of one provision a nullity.[154]

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[149] China Appellant Submission, paras. 101-103.

[150] The United States would point out that the reports cited by China for this proposition involve situations in which a treaty provision was clearly more specific than another or where one provision explicitly prevailed over another. For example, in *EC – Tariff Preferences*, paragraph 1 of the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause") specifically stated that, to the extent that there was a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1 of the GATT 1994, the Enabling Clause would prevail. This is not the case here.

[151] *E.g., US – Continued Zeroing*, para. 268.

[152] Panel Report, para. 7.33 - 7.37.

[153] Panel Report, para. 7.36.

[154] *See US – Gasoline (AB)*, p. 23 ("'One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"). It is also difficult to understand China's criticism of the Panel's analysis on this score because China argued before the Panel that the two provisions should be read as informing one another. Specifically, before the Panel, China argued:

> In one respect, the two agreements use identical language to describe the kind of

ii. The Protocol Is Not An "Extraordinary Remedy" Warranting Heightened Standards

52. In addition, China asserts that the Protocol's "object and purpose" also require a focus on "the most recent period".[155] Relying on Appellate Body statements that global safeguards remedies are "extraordinary remedies" intended to be used in "emergency" situations, China argues that the Protocol's transitional mechanism is also an "extraordinary remedy," and therefore requires an authority to apply a heightened standard when analyzing import increases.[156]

53. China misreads the Appellate Body's statements on this score. Although the Appellate Body has stated that a global safeguard measure should be considered an "extraordinary remedy," the Appellate Body founded this conclusion on explicit language contained in Article XIX of the GATT and the Safeguards Agreement suggesting that global safeguard remedies were intended to be "emergency actions.[157] Moreover, in these same reports, the Appellate Body also explained that global safeguard remedies were "extraordinary remedies" because they may be imposed only if the import increases covered by the remedy result from "unforeseen developments."[158] Unlike the GATT 1994, the Protocol does not contain any language stating that the transitional mechanism was intended to be an "emergency action," nor does it contain language suggesting that increases in Chinese imports must be the result of "unforeseen developments."[159] Given these critical distinctions, China has no foundation for its argument that the transitional mechanism was intended to embody the same "extraordinary remedy" characteristics as a global safeguard remedy.

54. China also ignores another critical distinction between the Protocol and the Safeguards

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> increase needed. Article 16.1 of the Protocol uses the phrase "in such increased quantities," and Article 2.1 of the Agreement on Safeguards uses the identical phrase. In such a situation, panel and Appellate Body decisions interpreting the identical language in the Agreement on Safeguards take on particular weight in this case. The Appellate Body has repeatedly interpreted the phrase "in such increased quantities" in the context of Article 2.1 of the Agreement on Safeguards. It is therefore worth recalling these interpretations, and the principles the Appellate Body has articulated.

First Written Submission of China, para. 93.

[155] China Appellant Submission, para. 88.

[156] China Appellant Submission, paras. 78 - 85.

[157] *Argentina – Footwear (AB)*, paras. 93-95; *US - Line Pipe* (AB), para. 81.

[158] *Argentina – Footwear (AB)*, paras. 93-95; *US - Line Pipe* (AB), para. 81.

[159] Protocol of Accession, paras. 16.1 and 16.4.

Agreement. Under the Safeguards Agreement, a competent authority can only impose a global safeguard if it concludes that increased imports have caused "serious injury" to the industry.[160] In contrast, the Protocol requires only that rapidly increasing imports from China be a significant cause of "material injury."[161] Since the Appellate Body has made clear the "material injury" standard is a lower standard of injury than the "serious injury" standard of the Safeguards Agreement,[162] the existence of a lower standard of injury in the Protocol undermines China's claim that a comparison of the two agreements shows that the Protocol was intended to embody a more rigorous standard than the Safeguards Agreement.

iii. Despite China's Claims, the USITC and the Panel Clearly Focused on the Import Increases in 2008

55. Finally, and perhaps most importantly, China asserts throughout its argument that the USITC failed to focus on import data for the "most recent period," which China defines as 2008.[163] In fact, the USITC – and the Panel – both examined the data for that year and concluded that import increases in that year were large, continuing and rapid.[164] In its analysis, the USITC specifically cited and emphasized the significant, continuing increases in Chinese imports that occurred in 2008, noting that:

- "Imports of the subject tires from China increased throughout the period of investigation," and "were the highest, in terms of both quantity and value, in 2008, at the end of the period."[165]

- "The quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008."[166]

- The aggregate "value of subject imports {from China} rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008."[167]

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[160] *See* Safeguards Agreement, Articles 2.1 and 4.2.

[161] Protocol of Accession, para. 16.4.

[162] *US - Lamb Meat (AB)*, para. 124.

[163] Panel Report, paras. 129 - 136.

[164] USITC Report, pp. 10-11 and 22. Exhibit US-1.

[165] USITC Report, p. 11. Exhibit US-1.

[166] USITC Report, p. 12. Exhibit US-1.

[167] USITC Report, p. 12. Exhibit US-1. (Emphasis added).

- The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with "the two largest year-to-year increases occurring at the end of the period in 2007 and 2008."[168]

- The market share of the Chinese imports increased by 12.0 percentage points between 2004 and 2008, with the "two largest year-to-year increases also occurring at the end of the period in 2007 and 2008."[169]

56. Furthermore, the USITC also addressed and rejected Chinese respondents' arguments that increases in the subject imports had "abated" by 2008.[170] Citing the import data summarized above, the USITC explained that the volumes of the subject imports had increased by significant amounts, on an absolute and relative basis, throughout each year of the period of investigation. The USITC pointed out that subject import volumes were at their highest levels in 2008, the end of the period of investigation.[171] As the USITC stated:

> Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.[172]

57. China also asserts that the Panel failed to examine or focus on the rapid import increases in 2008. This is incorrect. As we have noted, the Panel rejected China's argument that the USITC was required to focus on data for the "most recent period." Nonetheless, the Panel also concluded that the USITC reasonably determined that, even in 2008, the increases in Chinese imports were rapid and continuing.[173] As the Panel explained:

> {E}ven if the USITC had been required to focus on imports during the last year of the period, the fact that the 10.8 per cent increase in 2008 was lower than the increase in the

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[168] USITC Report, p. 12. Exhibit US-1. The USITC also noted that the ratio of subject imports to U.S. production increased from 14.6 to 23.0 percent between 2006 and 2007, and then increased from 23.0 to 28.5 percent between 2007 and 2008. USITC Report, p. 12, n. 52. Exhibit US-1.

[169] USITC Report, p. 12. Exhibit US-1. The USITC also noted that the market share of the subject imports increased from 9.3 percent in 2006 to 14.0 percent in 2007, and then to 16.7 percent in 2008. USITC Report, p. 12, n. 52. Exhibit US-1. (Emphasis added).

[170] USITC Report, p. 12. Exhibit US-1.

[171] USITC Report, p. 12. Exhibit US-1.

[172] USITC Report, p. 12. Exhibit US-1.

[173] Panel Report, para. 7.93.

> preceding year does not mean that imports were not "increasing rapidly" in 2008. An increase of 10.8 per cent in 2008 by no means precludes a finding that imports are "increasing rapidly", especially when that increase is assessed in context. Nor is it a "modest" increase. In this regard, we recall that the 10.8 per cent increase in absolute volumes between 2007 and 2008 was *in addition* to an increase of 53.7 per cent between 2006 and 2007, which was *in addition* to an increase of 29.9 per cent between 2005 and 2006, which was *in addition* to an increase of 42.7 per cent between 2004 and 2005. In our view, the 10.8 per cent increase in absolute volumes from 2007 to 2008 reinforces the USITC's conclusion that imports were "increasing rapidly" during the period, and continued to be "increasing rapidly" at the end of the period.[174]

In sum, it is not correct that the USITC and the Panel failed to focus appropriately on increases in Chinese imports for the "most recent period." Both did so, and both found these increases to be rapid.

58. It is also not correct that the USITC relied solely on an "end-point-to-end-point" analysis of trends in import quantities.[175] This contention is demonstrably wrong. In its analysis, the USITC did not merely recite that there was a growth in imports between the first and last years of the period.[176] Instead, as the Panel pointed out,[177] the USITC specifically considered the growth in the absolute and relative quantities for the subject imports during each year of the period of investigation,[178] and concluded that the "subject imports increased, both absolutely and relatively, throughout the period, by significant amounts in each year."[179]

b. The Panel Properly Concluded that the USITC Was Not Required to Focus on A Lessening of the "Rate of Increase" for the Chinese Imports in 2008

59. China argues that the USITC and the Panel failed to give "real meaning to the term "increasing rapidly."[180] According to China, the Panel correctly defined the term "increasing rapidly" to mean that Chinese imports must be increasing "quickly," "swiftly," or "with great

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[174] Panel Report, para. 7.93.

[175] China Appellant Submission, paras. 129 - 134.

[176] USITC Report, pp. 11 - 12 and 22. Exhibit US-1

[177] Panel Report, para. 7.102.

[178] USITC Report, pp. 11-12, nn. 49-52 and 22, nn. 124-127. Exhibit US-1.

[179] USITC Report, p. 12. Exhibit US-1.

[180] China Appellant Submission, paras. 107 - 118 and 137-163.

speed."[181] China asserts, however, that the Panel failed to provide an "alternative" definition of this term that would give meaning to it.[182] In China's view, the USITC and the Panel should have adopted its preferred analytical approach, by assessing whether "imports {were} increasing faster than they once were" in the final year of the period.[183] If they were not, China states, the USITC was required to provide a "particularly compelling explanation" why increases in imports from China should be considered "rapid" in that year.[184] China's preferred approach has no foundation in the ordinary meaning of the term "increasing rapidly," as that term is used in the Protocol, and finds no support in any Appellate Body or WTO panel reports addressing similar issues.

i. The Ordinary Meaning of the Term "Increasing Rapidly" Does Not Support China's Position

60. The Panel correctly rejected China's transparent attempt to change the text of the Protocol. First, China's proposed standard has no actual foundation in the language of the Protocol.[185] As the Panel pointed out, the ordinary meaning of the term "rapid" is "progressing quickly" or "developed within a short time," while the ordinary meaning of the term "rapidly" is "with great speed" or "swiftly."[186] Thus, as the Panel stated, "for imports to be 'increasing rapidly', they need only be increasing with 'with great speed,' or 'swiftly.'"[187] Moreover, as the Panel correctly noted, the definition of the word "rapidly" in the *New Shorter Oxford English Dictionary* does not refer to the "rate" of increase, or indicate "that imports can only increase rapidly if there is an [actual] increase in the rate of increase in those imports."[188] Given this, the Panel correctly rejected China's argument that an increase can only be rapid under the Protocol if there continues to be a "swift progression in the *rate* of increase . . . of imports," or if the rate of increase in the final year does not lessen from the rate of increase in the prior year.[189]

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[181] China Appellant Submission, para. 107.

[182] China Appellant Submission, para. 107.

[183] China Appellant Submission, para. 118.

[184] China Appellant Submission, para. 118.

[185] It is worth noting that the Protocol itself does not define the words "increasing rapidly," nor does it state an authority should assess whether there has been an increase in the "rates of increase" of Chinese imports, as China asserts. Protocol of Accession, paragraphs 16.1 and 16.4. It simply requires the authority to assess whether Chinese imports are increasing rapidly, that is, swiftly or quickly.

[186] Panel Report, para. 7.92.

[187] Panel Report, para. 7.92.

[188] Panel Report, para. 7.92.

[189] Panel Report, para. 7.92.

61. Despite this, China seeks to read into the phrase "increasing rapidly" a requirement that imports be increasing not merely "swiftly" or "quickly," but at an accelerating rate of increase.[190] This reading of the phrase is, however, not borne out by the definition of the words used in it. As can be seen from the definitions cited by the Panel, the definitions of "rapid" and "rapidly" embody the concepts of "speed," "swiftness" or "quickness." They do not embody the notion of a continuing "acceleration" in this speed, swiftness or quickness, as China contends. In fact, the usage examples contained in the *New Shorter Oxford English Dictionary* for "rapid" make clear that the word does not necessarily connote an "accelerating rate" of speed or movement:[191]

J. Conrad:	*The scratch of rapid pens.*
G. Orwell:	*His . . . Adam's apple made a . . . rapid up-and-down movement.*
A. MacLean:	*For a man of his years . . . he made a remarkably rapid exit.*
E. Pawel:	*Rapid industrialization led to major dislocations.*
A. Cross:	*An extremely virulent cancer . . . often leads to rapid death.*

None of these examples indicate that the word "rapid" entails a concept of "accelerating" speed. China's linguistic gymnastic exercise overlooks this simple fact.

62. China also has no basis for the argument that the word "rapidly" necessarily involves a "relative concept," and is "often used to convey the idea that something is increasing, or has increased more quickly than something else."[192] The word "rapidly" means exactly what the New Shorter English Dictionary says it does: it means "with great speed" or "swiftly." These definitions do not embody a comparative or relative concept, since they do not suggest that the word "rapidly" actually means "more swiftly," "more quickly" or "with greater speed." China is simply seeking to read into the Protocol words and meanings that do not exist in the text of the agreement. The Appellate Body has cautioned against this.[193]

63. In sum, the Panel did give "real" meaning to the phrase "increasing rapidly." It correctly concluded that, as used in the Protocol, the phrase meant that imports from China needed to be increasing "swiftly" or "with great speed." Nothing more was required.

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[190] *E.g.*, China Appellant Submission, para. 139.

[191] *New Shorter Oxford English Dictionary*, Vol. 2, page 2463.

[192] China Appellant Submission, para. 113; see also China Appellant Submission, paras. 117 - 118.

[193] *US - Line Pipe (AB)*, para. 250

ii. China's Attempts to Compare the Protocol's "Increasing Rapidly" Standard to the Standards of Other WTO Agreements Are Misplaced

64. China also argues that a heightened interpretation of the Protocol's "increasing rapidly" standard is warranted because that standard reflects a more rigorous "import increase" standard than other WTO agreements, such as the Safeguards Agreement and the Antidumping Agreement.[194] According to China, a heightened definition of the phrase "increasing rapidly" is warranted because the Protocol uses the word "rapidly" to modify the increases required under the Protocol, while other WTO agreements do not define the level of import increases necessary for the imposition of a global remedy, or impose a different standard than the Protocol.[195]

65. China's arguments have no merit. First, China clearly recognizes that a number of significant distinctions exist between the Protocol and other WTO trade remedy agreements. However, China fails to appreciate that the existence of these differences makes it difficult to assess whether any WTO agreement should necessarily be read in a more or less strict fashion than any other agreement. As China recognizes, for instance, the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") differ from the Protocol because they provide that an authority should determine whether there were "significant" increases in imports as part of the requisite injury analyses under these agreements, while the Protocol provides for "rapid" increases in imports.[196] In seeking to compare the relative strictness of these standards, China fails to recognize that other significant differences between the agreements, such as the inclusion of a "non-attribution" analysis requirement in the Antidumping Agreement and the SCM Agreement, make it difficult, if not pointless, to determine whether the Protocol was intended to incorporate a more rigorous set of standards than these other agreements.

66. An analysis of the differences between the Protocol and the Safeguards Agreement highlights the difficulties entailed by China's approach. For example, China argues that the Protocol contains a more rigorous import increases standard than the Safeguards Agreement because the Protocol requires that import increases be "rapid" while the Safeguards Agreement does not. In making this argument, China fails to recognize the "increasing rapidly" standard of the Protocol must be understood in the light of the fact that the Protocol links an analysis of rapid increases to the existence of "material injury or threat of material injury." As the Appellate Body has emphasized in the context of the Safeguards Agreement, an agreement's explicit statement linking the import increases to a standard of injury has an impact on the nature of the authority's analysis of those import increases. Specifically, the Appellate Body explained:

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[194] China Appellant Submission, paras. 61 - 77.

[195] China Appellant Submission, paras. 61 - 77.

[196] China Appellant Submission, para. 69.

> We [have] underlined the importance of reading the requirement of "such increased quantities" in the context in which it appears in both Article XIX:1(a)of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*. That context includes the words "to cause or threaten to cause serious injury". Read in context, it is apparent that "there must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure." Indeed, in our view, the term "such", which appears in the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof.[197]

67. The use of a similar structure in the Protocol "clearly links" the relevant increases in imports to their ability to cause material injury or threat of material injury.[198] Therefore, the Appellate Body's reasoning in *US – Steel Safeguards* suggests that the rapid increases contemplated in the Protocol too must be linked with, and related to, the level of injury specified in the Protocol. Because the Appellate Body has confirmed that the "serious injury" standard contained in the Safeguards Agreement "connotes a much higher standard of injury" than the term "material injury,"[199] the Appellate Body's statements on this analytical issue suggest that China has no foundation for the argument that the Protocol itself necessarily imposes a more demanding "increasing imports" standard than the Safeguards Agreement.

68. Moreover, China overlooks the fact that the Appellate Body has rejected the idea that simply any increases in imports are enough to satisfy the Safeguard Agreement's requirements, as China suggests.[200] On the contrary, the Appellate Body has explained that, under the Safeguards Agreement, "the [requisite] increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury."[201] Moreover, the Appellate Body has also indicated that any such increases must be the result of "unforeseen developments."[202] In contrast, the Protocol does not contain the "serious injury" or "unforeseen developments" standards that would require that the subject imports from China be "sudden," "sharp," or "significant" enough to cause "serious injury," or that the increased imports be the result of "unforeseen developments" in the market. Again, the Appellate Body's statements run counter to China's

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[197] *US – Steel Safeguards (AB)*, para. 346 (footnotes omitted) (emphasis added).

[198] In particular, the Protocol uses the "such" in paragraph 16.1 and the phrase "so as to be" in paragraph 16.4 to link the rapidly increasing imports to the concept of material injury.

[199] *US–Lamb Meat (AB)*, para. 124.

[200] China Appellant Submission, paras. 63 - 65 and 68.

[201] *Argentina – Footwear (AB)*, para. 131.

[202] *US-Line Pipe (AB)*, para. 81.

argument that the Protocol's "increasing imports" standard were intended to be more rigorous or demanding than the standards of the Safeguards Agreement.

69. In other words, China's attempts to rely on the text of the Safeguards Agreement and other WTO trade remedy agreements as support for its theory are misplaced.

iii. Despite China's Claims to the Contrary, the USITC Evaluated the Rates of Increase In Recent Years Within the Context of Prior Years

70. China also argues that the USITC failed to adequately assess the "rates of increase" in Chinese imports over the period.[203] According to China, the Protocol requires that an authority assess how the "rate of increase" in imports was changing over the period, and that it assess whether the "rate of increase" of Chinese imports slowed in the final year of the period.[204] Moreover, China contends that the authority must analyze any lessening of this "rate of increase" in the final year of the period within the proper context by comparing the rate in the final year with the "rates of increase" in prior years.[205]

71. China's arguments are mistaken as a matter of law and fact. First, they are legally flawed because, as the Panel correctly indicated, the text of the Protocol requires simply that imports be "increasing rapidly," that is, increasing "swiftly" or "quickly," over the period.[206] As the Panel correctly concluded, the Protocol does not require that there be a continuing increase in the "rate of increase" of Chinese imports during the period.[207] Moreover, as the Panel stated, "there is no need for any swift progression in the rate of increase" for Chinese imports under the Protocol. Furthermore, as the Panel also noted, the Protocol does not suggest that a "decline in the rate of increase necessarily preclude{s} a finding that imports are 'increasing rapidly,'" nor does the Protocol suggest that the authority must provide a particularly compelling analysis of a conclusion that imports are increasing rapidly simply because there has a been a decline in the rate of imports growth, as China alleges.[208]

72. Second, the USITC did examine the rates of increase for the Chinese imports in the final years of the period. In its determination, the USITC emphasized that it "look{s} to ... rate of increase in subject imports," and "focus{es} on recent increases in imports" when performing

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[203] China Appellant Submission, paras. 86 - 91, 107 - 119, and 137 -163.

[204] China Appellant Submission, para. 118.

[205] China Appellant Submission, para. 90.

[206] Protocol of Accession, para. 16.4.

[207] Protocol of Accession, paras. 16.1 and 16.4.

[208] Panel Report, para. 7.92.

this analysis.[209] Moreover, it explicitly referenced the "rates of increase," in percentage terms, for the volumes and values of Chinese imports over the period, emphasizing in particular the individual rates of change for these metrics in 2007 and 2008.[210] The USITC also explicitly referenced the "rates of increase," in percentage terms, in the market share of the Chinese imports and their ratio to domestic production, again emphasizing that the "two largest year-to-year increases" in these metrics occurred in 2007 and 2008.[211]

73. Thus, the USITC referenced the "rates of increase" in imports over the period and specifically pointed to the percentage rates of change in the last two years of the period in its analysis. Moreover, the USITC placed these rates of increase within the context of prior years, noting that the "two largest increases" for the Chinese imports with respect to market share and ratio to domestic production occurred in 2007 and 2008, the final two years of the period of investigation.[212] Since these findings lay at the foundation of the USITC's finding that Chinese imports were increasing rapidly, it is clear that the USITC closely considered the "rates of increase" in Chinese imports during the period and reasonably analyzed them within the context of prior years.[213]

iv. The USITC Did Provide a Reasoned and Adequate Analysis of Rapidly Increasing Imports

74. Finally, China contends that the Panel failed to assess whether the USITC explained, in a reasoned and adequate manner, why imports of tires from China were rapidly increasing over the period of investigation.[214] China asserts that the USITC failed to address the "complexities" of the data relating to the increases in Chinese imports and therefore failed to provide a "reasoned and adequate" analysis of its conclusion that Chinese imports were increasing rapidly.[215]

75. Once again, China's arguments are unfounded. First, the USITC did provide a reasoned

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[209] USITC Report, p. 11. Exhibit US-1.

[210] USITC Report, p. 12. Exhibit US-1.

[211] USITC Report, p. 12. Exhibit US-1.

[212] USITC Report, p. 12. Exhibit US-1.

[213] Nor is it true, as China claims, that the Panel failed to consider the rates of increase or to place them in context. The Panel's analysis also considered this data, by citing the USITC's analysis, providing detailed charts setting forth the data underlying that analysis, and by explaining that this data showed rapid increases in absolute and relative terms over the period of investigation. Panel Report, paras. 7.83-7.86, 7.94-7.100, and 7.103 and 7.105.

[214] China Appellant Submission, paras. 121 - 126.

[215] China Appellant Submission, paras. 121 - 183.

and adequate explanation of the reasons for its determination and the facts underlying it. As we have discussed previously, the USITC explained that it "look{ed} to the increase and rate of increase" in imports and "focus{ed} on recent increases in subject imports."[216] Thus, the USITC focused on the increases in imports on a year-to-year basis, and the rates of increase in each year, emphasizing the rapid increases that occurred in the final two years of the period.[217] The USITC also discussed the data on import increases, both relative and absolute, on a year-to-year basis, and reasonably found, as the Panel held, that there was a rapid increase in Chinese imports, particularly in the final two years of the period.[218]

76. Moreover, the USITC addressed China's core claim on this issue that increases in Chinese imports over the period were "small" or "gradual," and had "abated" by 2008. [219] The USITC addressed and reasonably rejected this argument, noting the Chinese imports increased by significant amounts, on an absolute and relative basis, in each year of the period of investigation and were at their highest levels in 2008, the end of the period of investigation.[220] The USITC also pointed out that the increases in the Chinese imports were large, rapid, and continuing in 2007 and 2008, the final years of the period.[221] In sum, the USITC provided a reasoned explanation for its finding that subject imports were increasing rapidly, on an absolute and relative basis.[222]

77. China's argument is also unfounded because the import data did not contain any "complexities" that warranted more detailed analysis by the USITC or the Panel. As the Panel correctly stated, the record of the investigation established that "there was 'a clear and uninterrupted upward trend in import volumes' " during the period.[223] In fact, all of the possible metrics for measuring Chinese imports showed the same clear and rapid upward trends for Chinese imports over the period, as can be seen from the following charts:[224]

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[216] USITC Report, p. 11. Exhibit US-1.

[217] USITC Report, pp. 11 - 12. Exhibit US-1.

[218] USITC Report, pp. 11 - 12. Exhibit US-1.

[219] USITC Report, p. 12. Exhibit US-1.

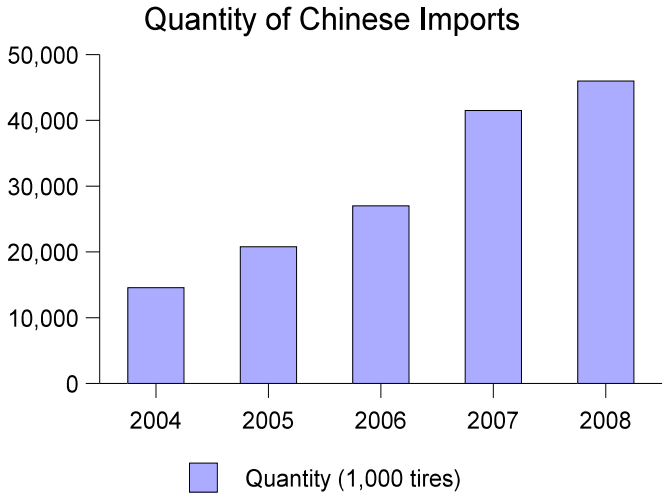
[220] USITC Report, p. 12. Exhibit US-1.

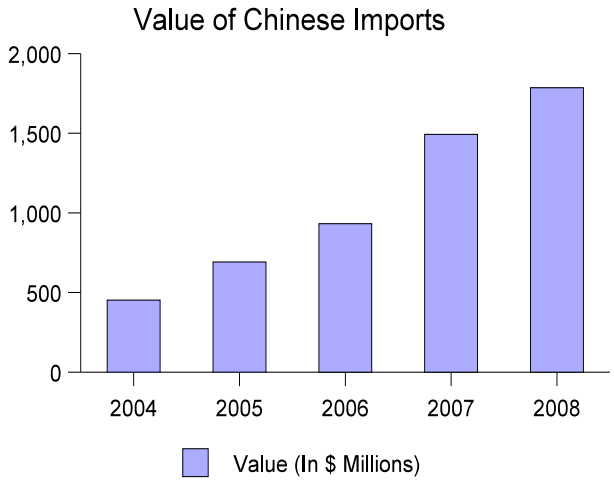
[221] *Id.*

[222] USITC Report, p. 12. Exhibit US-1.

[223] Panel Report, para. 7.103.

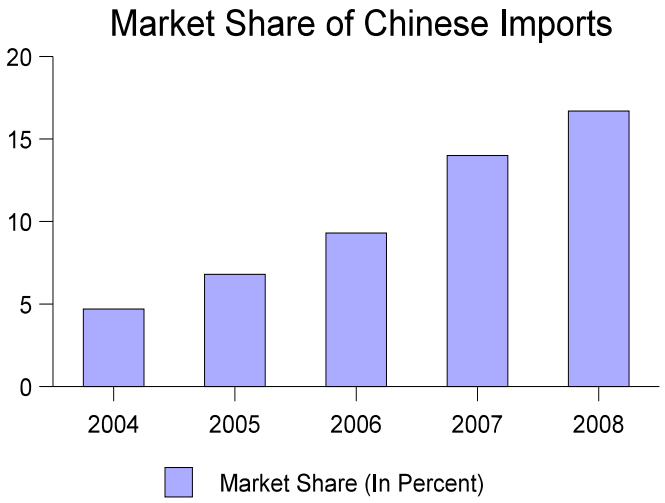
[224] The charts are based on data from the USITC Report. USITC Report at Table C-1. Exhibit US-1.

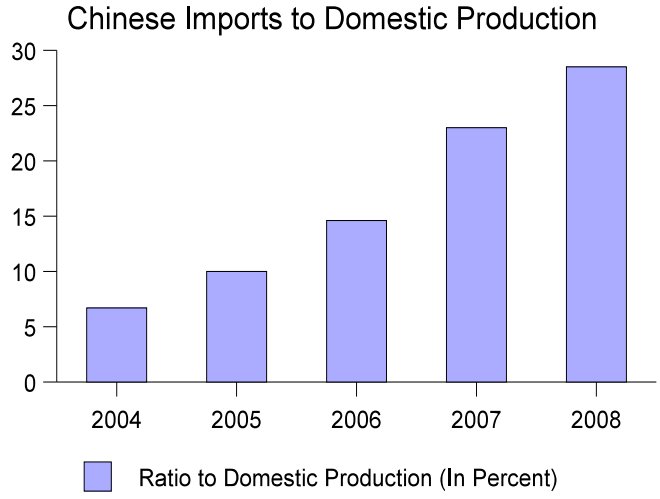




78. Similarly, the following charts[225] show the same clear and rapid increases in the Chinese imports' market share and in their ratio to domestic production:

[225] The charts are based on data from the USITC Report. USITC Report at Tables II-2 and C-1. Exhibit US-1.





79. In sum, the data relating to the increases in Chinese imports did not present the USITC or the Panel with an especially complex set of factual or analytical issues. As the Panel pointed out, the data does show a "clear and uninterrupted upward trend" for the Chinese imports that was rapid and continuing.[226] This data simply does not warrant the extraordinarily complex series of

[226] Panel Report, para. 7.103.

analytical steps that China would have the USITC perform under the Protocol.

80. Finally, a word on China's proposed methodology for reviewing the USITC's analysis. China repeatedly argues that, because there had been a decline in the "rate of increase" in Chinese imports in 2008, the USITC was required to provide a "particularly compelling explanation" of why it concluded that the increases in Chinese imports were rapid in that year.[227] China's argument misstates the applicable standard of review. As the Appellate Body has indicated, an authority need only provide a "reasoned and adequate" analysis of its findings, which includes its finding relating to rapidly increasing imports.[228] Thus, as long as the USITC explained in a reasoned fashion why the facts supported its analysis, and did so in a manner that addressed any complexities presented by that data,[229] nothing further was needed. And, here, the USITC did exactly that.

C. The Panel Correctly Concluded That The USITC's Causation Analysis Was In Compliance With the Protocol

81. China also argues that the Panel improperly found the USITC's causation analysis to be consistent with the Protocol.[230] Relying on the unfounded belief that the Protocol incorporates a more rigorous causation standard than any other WTO trade remedy agreement, China contends that the Panel applied an improperly loose causation standard when reviewing the USITC's causation findings.[231] Then, relying on this overly strict causation standard, China attacks the Panel's assessment of the USITC's causation findings, arguing that these findings were not consistent with the record evidence.[232]

82. The Panel reasonably chose not to adopt China's unfounded argument that the Protocol incorporates a higher causation standard than other WTO agreements. Instead, the Panel correctly gave meaning to the Protocol's causation language by adopting its ordinary meaning within the context of the Protocol.[233] Furthermore, after reasonably explaining the scope and nature of the Protocol's causation requirements, the Panel conducted a searching examination of the USITC's factual findings and China's challenges to those findings.[234] As a result of this

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[227] China Appellant Submission, para. 118.

[228] *US - Lamb (AB)*, para. 106.

[229] *US - Lamb (AB)*, para. 106.

[230] China Appellant Submission, paras. 184-555.

[231] China Appellant Submission, paras. 184-290.

[232] China Appellant Submission, paras. 291 - 555.

[233] Panel Report, paras. 7.37, 7.111-7.178, and 7.228-7.233.

[234] Panel Report, paras. 7.179-7.379.

detailed examination, the Panel correctly concluded that the USITC had established that rapidly increasing imports of tires from China were, indeed, a "significant cause" of material injury to the industry.[235]

83. The Panel's analysis was not "biased" or "unobjective," as China declares. It was, instead, detailed, comprehensive, and measured. It considered all of China's voluminous arguments and, quite reasonably, found them to have no merit. It did not reject China's arguments because it "was simply in search of a rationale for a prejudged outcome."[236] It rejected them because they were not persuasive.

84. We discuss these issues in more detail below.

1. China Has No Basis for Arguing That the Panel Should Have Adopted a More Rigorous or Stricter Causation Standard

85. China first argues that the Panel applied an incorrect causation standard to assess whether the USITC's analysis was consistent with the Protocol. According to China, the Panel "misunderstood the Protocol's unique standard for assessing causation."[237] In China's view, the Panel failed to grasp that the Protocol embodies a more rigorous causation analysis than other WTO agreements.[238] By failing to recognize this, China argues that, "{f}or all practical purposes, the Panel read the term 'significant' out of the Protocol's causation standard."[239] China states that this "overarching error tainted the Panel's subsequent analysis under each of the three traditional causal analyses (conditions of competition, coincidence {of trends,} and non-attribution)."[240]

86. China's interpretation of the Protocol's requirements has no merit. The Panel properly chose not to accept China's invitation to impose a more strict or rigorous causation standard than warranted by the text of the Protocol.[241] Since nothing in the language of the Protocol suggests that its causation standard was intended to be more rigorous or demanding than the causation standards contained in other WTO agreements, the Panel reasonably chose to reject China's unique and unwarranted reading of the Protocol. Instead, the Panel correctly gave meaning to the

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[235] Panel Report, para. 7.379.

[236] China Appellant Submission, para. 571.

[237] China Appellant Submission, para. 19.

[238] China Appellant Submission, para. 20.

[239] China Appellant Submission, para. 20.

[240] China Appellant Submission, para. 20.

[241] Panel Report, para. 7.148.

Protocol's causation language by focusing on the actual language of the Protocol itself. The Panel did not commit error when interpreting the causation standards of the Protocol.

2. The Causation Requirements of the Protocol and the Panel's Approach

a. The Causation Requirements of the Protocol

87. Any analysis of China's argument must begin, of course, with the pertinent language of paragraphs 16.1, 16.3, and 16.4 of the Protocol. Under paragraph 16.1, a WTO Member "may request consultations with China with a view to seeking a mutually satisfactory solution" of the matter if:

> [P]roducts of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.

If these consultations do not result in a resolution of the matter within 60 days, the Protocol provides, the affected Member "shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption."[242]

88. Paragraph 16.4 of the Protocol then sets out the criteria to be used to determine whether "market disruption" exists. Paragraph 16.4 states that:

> Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry.[243]

Paragraph 16.4 further provides that, "[i]n determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products."[244]

89. The Protocol imposes no other specific substantive analytical requirements on the affected Member as a precondition to a finding that imports from China are causing market

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[242] Protocol of Accession, para. 16.3.

[243] Protocol of Accession, para. 16.4.

[244] Protocol of Accession, para. 16.4.

disruption.[245] The Protocol does not direct or require a competent authority to apply any particular methodology when it assesses whether the subject imports have been a significant cause of material injury or threat of material injury to an industry. Nor does the Protocol direct the authority to examine the volumes of imports, the effect of imports on domestic prices, or their effect on the industry in any particular manner.[246] Accordingly, a competent authority has discretion to develop and use an appropriate methodology that allows it to address these factors in a reasoned manner.[247]

90. Further, neither paragraph 16.1 nor paragraph 16.4 of the Protocol contain language specifying that a Member must be able to establish that imports from China are the "sole," "primary," or "most important" cause of injury to the domestic industry.[248] As the Panel correctly concluded, the absence of this sort of language confirms that the transitional mechanism under paragraph 16 is available when imports from China are one, but not the only, significant cause of material injury.[249] Moreover, as long as rapidly increasing imports from China are "a significant cause" of material injury to the industry, an authority need not perform a comparative or relative analysis to assess whether they are more important than other causes under the Protocol, as the Panel also explained.[250]

91. Moreover, unlike the Safeguards Agreement, the Antidumping Agreement, and Part IV of the SCM Agreement,[251] paragraph 16 of the Protocol does not direct a competent authority to consider the effects of other factors that may be causing injury to the industry, or direct the authority to ensure that it does not attribute the effects of these other factors to the subject imports.[252] Under the Protocol, therefore, a competent authority has the discretion to develop and use any reasonable analysis when addressing the injury caused by these factors in its analysis.[253]

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[245] *See generally* Protocol of Accession, para. 16.

[246] *See generally* Protocol of Accession, para. 16.

[247] *EC - Pipe Fittings (AB)*, para. 189 (in context of Antidumping Agreement, as long as an investigating authority complies with the specific requirements of the Agreement, "it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury"); *US - Hot-Rolled Steel (AB)*, para. 224 (same).

[248] *See generally* Protocol of Accession, para. 16.

[249] Panel Report, paras. 7.139-7.147.

[250] Panel Report, paras.7.158.

[251] Safeguards Agreement, Article 4.2(b)(second sentence); Antidumping Agreement, Article 3.5 (third sentence); SCM Agreement, Article 15.5 (third sentence).

[252] *See generally* Protocol of Accession, para. 16.

[253] *EC - Pipe Fittings (AB)*, para. 189; *US - Hot-Rolled Steel (AB)*, para. 229; *US – Upland Cotton (AB)*, paras. 436 - 438.

92. Finally, in terms of the reasoning that is required of the competent authority, the Protocol only provides that the "WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration."[254] The Working Party's Report elaborates on this, stating that the "competent authority would promptly publish notice of the decision to apply a measure, including an explanation of the basis for the decision and the scope and duration of the measure."[255] The Protocol does not, however, require that an authority to address all of the relevant arguments of the parties, nor does it require the authority to address, in its determination, alternative explanations that could reasonably be drawn from the evidence or data before it.[256] As the Panel properly indicated,[257] the Protocol simply requires the USITC to provide the "reasons" for its decision, and an explanation of the basis" for it.

b. The Panel's Interpretation of the Protocol's Causation Standards

i. The Panel's Explanation of "Significant Cause"

93. In its analysis, the Panel properly interpreted the meaning of "significant cause" by focusing primarily on the ordinary meaning of those words, as used within the context of the Protocol. Noting that China and the United States both agreed on the ordinary meaning of "significant," the Panel explained that, under the Protocol, a "significant cause" must be one that is "important," "notable" or consequential."[258] The Panel rejected the idea that any cause of injury could be a "significant cause," noting that the "significant cause" standard "requires more than a mere contribution" to material injury.[259]

94. The Panel added that, under the Protocol, the phrase "significant cause" did not require a comparison of the effects of imports "relative to other causal factors," explaining that "rapidly increasing imports might properly constitute a significant cause of market disruption even though their causal role is not as significant as other factors."[260] The Panel explained that China's request that the Panel perform a "relative comparison" of the effects of other factors was inconsistent with the plain language of the Protocol, which required that rapidly increasing imports be "a significant cause" of material injury, not that it be the sole or most important cause

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[254] Protocol of Accession, para. 16.5.

[255] Working Party Report, para. 246(e).

[256] Panel Report, para.7.18.

[257] Panel Report, para. 7.18.

[258] Panel Report, para. 7.158.

[259] Panel Report, para. 7.159, n.271.

[260] Panel Report, para. 7.158.

of injury.[261]

ii. The Panel's Approach When Reviewing the USITC's Conditions of Competition and Correlations Analyses

95. The Panel discussed the need to conduct a "conditions of competition" or "coincidence of trends" analysis. The Panel explained that, apart from the specific criteria set forth in paragraph 16.4, the Protocol did "not require the importing Member to apply any particular methodology for establishing market disruption, including causation."[262] The Panel stated that "{t}his suggests that an investigating authority is free to choose any methodology to establish causation, provided it addresses the objective factors set forth in Paragraph 16.4, and provided in particular it is sufficient to establish that rapidly increasing imports are a "significant cause of material injury."[263]

96. Nonetheless, the Panel explained that "an analysis of the conditions of competition and correlation will often be relevant, and may on the facts of a given case prove essential, to a consideration of 'significant cause.'"[264] "Indeed," the Panel said, "it might be very difficult to establish 'significant cause' without performing these types of analyses."[265] Ultimately, the Panel explained that its "task {was} to perform an objective assessment of the USITC's overall determination of 'significant cause' in light of the arguments of the parties."[266]

97. The Panel also explained that a correlation analysis was one "tool that an investigating authority might use to demonstrate causation (either alone, or in conjunction with other analytical tools)."[267] Although the Panel noted that a correlation of trends analysis was an appropriate approach under the Protocol, it rejected China's argument that, under the Protocol, the degree of increases in imports must correspond with the degree of declines in injury factors.[268] The Panel explained that:

> {C}orrelation between imports and injury factors is not an exact science, especially as there may be other causes of injury at work. As a result, it would be unrealistic to

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[261] Panel Report, para. 7.158.

[262] Panel Report, paras. 7.169-7.170.

[263] Panel Report, para. 7.170.

[264] Panel Report, para. 7.170.

[265] Panel Report, para. 7.170.

[266] Panel Report, para. 7.170.

[267] Panel Report, para. 7.228.

[268] Panel Report, paras. 7.228 - 7.229.

> expect, or require, a somewhat precise correlation between the degree of change in imports and the degree of change in the injury factors. While a more precise degree of correlation between the upward movements in imports and the downward movements in injury factors might result in a more robust finding of causation, and might indeed suffice on its own to show demonstrate causation, a finding of 'significant cause' is not excluded simply because an investigating authority relies on an overall coincidence between the upward movement in imports and the downward movement in injury factors, especially if that finding of overall coincidence is combined – as it was in the present case – with other analyses indicative of causation.[269]

98. The Panel noted that the Appellate Body and WTO panel reports in the contest of the Safeguards Agreement had concluded that a "coincidence of trends" analysis was founded on a temporal relationship between movements in imports and movements in the injury factors.[270] The Panel also explained that none of these reports suggested that, in a correlations analysis, "the orders of magnitude {in the changes} are key, or that changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors."[271] Instead, the Panel explained, the Appellate Body and WTO panels had found that "imports should increase at the same time as the injury factors decline."[272] Moreover, the Panel added, the Appellate Body and WTO panels had made clear that "'it is the overall coincidence ... that matters, and not whether coincidence or lack thereof can be shown in relation to a few select factors which the authority has considered.'"[273]

iii. The Panel's Approach With Respect to the USITC's Consideration of "Other Factors"

99. Finally, the Panel also explained that under the Protocol, an investigating authority was not required to separate and distinguish the injurious effects of other factors causing injury to the domestic industry.[274] Noting that the specific "separate and distinguish" analysis required under the Safeguards Agreement was not directly applicable to the Protocol because the Protocol does not contain the specific "non-attribution" requirement, the Panel nonetheless concluded that "this does not mean that the obligation to demonstrate that rapidly increasing imports are a significant cause of material injury should not entail some form of analysis of the injurious effects of other

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[269] Panel Report, para. 7.229.

[270] Panel Report, paras. 7.230-232.

[271] Panel Report, para. 7.232.

[272] Panel Report, para. 7.232.

[273] Panel Report, para. 7.233.

[274] Panel Report, paras. 7.171 and 7.175.

factors."[275]

100. In fact, the Panel stated that "(some form of) non-attribution is inherent in establishing a causal link" between imports and injurious effects.[276] Thus, the Panel stated, the "causal link between rapidly increasing imports and material injury must be assessed 'within the context of other possible causal factors.'"[277] Accordingly, the Panel explained that "a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors."[278]

3. The Panel Properly Concluded That It Should Not Adopt China's Unfounded View That the Protocol Contains Stricter Causation Requirements Than Other WTO Agreements

a. The Panel Correctly Chose Not To Adopt China's Theory that the Protocol Requires a More Rigorous or Demanding Causation Standard Than Other WTO Agreements

101. China spends an extraordinary amount of space and effort trying to establish that the Protocol contains a more demanding and more rigorous causation standard than other WTO agreements, such as the Safeguards Agreement, the Antidumping Agreement, and the SCM Agreement.[279] According to China, the Protocol's causation standard is more rigorous than the standard in these other WTO agreements because the Protocol requires that imports from China be a "significant" cause of injury to the industry, while the other WTO Agreements require that imports be only "a cause" of injury.[280] China also asserts that the Protocol must embody a more demanding causation standard because the transitional mechanism was intended to be an "extra-extraordinary" remedy.[281] Neither argument has merit.

102. First, China's argument that the Protocol contains a stricter causation standard than other WTO agreements has no foundation in the language of the Protocol itself. Neither the Protocol, nor the final report of the Working Party negotiating the Protocol, contains any language that

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[275] Panel Report, para. 7.176.

[276] Panel Report, para. 7.176.

[277] Panel Report, para. 7.177.

[278] Panel Report, para. 7.177.

[279] China Appellant Submission, paras. 184-257.

[280] China Appellant Submission, paras. 187-210.

[281] China Appellant Submission, paras. 211-214.

indicates, explicitly or implicitly, that the Protocol's causation standards were intended to be more rigorous, more strict, or more demanding than the causation standards set forth in the Safeguards Agreement or other WTO trade remedies agreements.[282] Given this, the Panel rejected China's unfounded assertion that the Protocol's causation standard was somehow intended to be more rigorous than the causation standards of other WTO agreements. The Panel's rejection of this approach was entirely proper, given that the Appellate Body has made clear that "words must not be read into {an} Agreement that are not there,"[283] and that a Panel's review of an authority's determination under Article 11 of the DSU must be made "in light of the obligations of the particular covered agreement at issue."[284]

103. Second, it is simply not the case that a more rigorous causation standard must be read into the Protocol because the Protocol, unlike other WTO agreements, modifies the word "cause" with the word "significant."[285] There is no merit to this argument because the Appellate Body has rejected the idea that the causation standards contained in other WTO agreements, like the Safeguards Agreement, incorporate the " a cause" standard proffered by China. For example, under the Safeguards Agreement, the Appellate Body has made clear that the covered imports do not satisfy the requisite causal link by being a "mere," "minimal," or "insignificant" cause of injury to an industry.[286]

104. Instead, the Appellate Body has stated that the causation language of the Safeguards Agreement requires an authority to find a "genuine and substantial relationship of cause and effect" between imports and the requisite level of injury.[287] The *New Shorter Oxford English Dictionary* defines "substantial" to mean "having solid worth or value, of real significance, solid, weighty; important, worthwhile."[288] Since the *New Shorter Oxford English Dictionary* also defines the word "significant" to mean "important, notable, {or} consequential,"[289] it seems clear that the causation standard contained in the Safeguards Agreement requires, at a minimum, an "important" or "significant" causal link between imports and the requisite level of injury. In light of this, China has no basis for claiming that the "significant cause" standard of the Protocol was intended to be more rigorous or demanding than the "genuine and substantial" causation standard

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[282] *See* Protocol of Accession, paras. 16.1 - 16.8; Report of the Working Party on Accession of China, dated Oct. 1, 2001, WT/ACC/CHN/49, at paras. 245-250.

[283] *US - Line Pipe (AB)*, para. 250.

[284] *US - DRAMS CVD (AB)*, para. 184.

[285] China Appellant Submission, paras. 187-210.

[286] *E.g.*, *US - Wheat Gluten (AB)*, para. 69.

[287] *E.g.*, *US - Wheat Gluten (AB)*, para. 69.

[288] *New Shorter Oxford English Dictionary (Sixth Edition)*, pp. 3088.

[289] *New Shorter Oxford English Dictionary (Sixth Edition)*, pp. 2833.

that is embodied in the Safeguards Agreement.

105. China also has no basis for claiming that the term "significant cause" requires an authority to determine that there is a "particularly strong, substantial, and important causal connection" between rapidly increasing imports from China and material injury.[290] As the Panel found and China agreed below,[291] the ordinary definition of the word "significant" is simply "important, notable, {or} consequential." Nothing in these definitions suggests that, under the Protocol, an authority must find that there is a "very," "highly" or "particularly" strong, substantial or important causal link between Chinese imports and material injury.

106. Furthermore, China's attempts to define the word "significant" in an overly strict manner are inconsistent with how prior WTO panels have defined the word "significant" under WTO trade remedy agreements.[292] WTO panels have consistently rejected the idea that the word "significant," when used in other WTO trade remedy agreements, connotes the very high degree of causal effect that China suggests. For example, in *EC – DRAMS*, a WTO panel considered the meaning of the word "significant," as that word was used to describe import volumes under the countervailing duty provisions of the SCM Agreement.[293] In its decision, the WTO panel noted that the "ordinary meaning of 'significant' encompasses 'important,' 'notable,' 'major', as well as 'consequential.'" The Panel then explained that the word "significant" simply "suggested something that is more than just a nominal or marginal movement" in import volumes, as used in the context of the SCM Agreement.[294]

107. In *Korea – Commercial Vessels*, the WTO panel interpreted "significant" in a similar manner. In that dispute, the Panel was called upon to assess the meaning of "significance," as used to describe the degree of price suppression and depression required under the serious prejudice provisions of the SCM Agreement.[295] In its report, the Panel noted that the ordinary meaning of the word "significant" was "important or consequential," but concluded that "a price suppression or price depression that is unimportant or inconsequential would not be 'significant' in the sense of Article 6.3(c)."[296] Moreover, the Panel added that "previous panels that have examined this issue have taken a similar approach."[297] Citing the panel report in *Indonesia* -

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[290] China Appellant Submission, para. 193.

[291] Panel Report, paras. 7.122 and 7.158.

[292] China Appellant Submission, paras. 190 and 193.

[293] *EC – DRAMS* , para. 7.307.

[294] *EC – DRAMS* , para. 7.307.

[295] *Korea – Commercial Vessels*, paras.. 7.567-7.571.

[296] *Korea – Commercial Vessels*, para. 7.570

[297] *Korea – Commercial Vessels*, para. 7.571.

Autos, the Panel concluded that the *Indonesia - Autos* panel had interpreted the word "significant," when used to describe price undercutting in the serious prejudice context, as being a "*de minimis* concept {that is} intended to screen out very small, unimportant price effects."[298]

108. Given these consistent statements by WTO panels, the use of this word "significant" to modify "cause" does not indicate that the Protocol requires the use of a higher standard of causation than other WTO agreements. Instead, as the Panel correctly concluded, the use of the phrase "significant cause" in the Protocol only requires the Panel to assess whether the USITC had established that rapidly increasing imports are an "important," "notable" or "consequential" cause of material injury.[299]

109. Finally, China has no basis for its argument that the "object and purpose" of the Protocol indicates that its causation standard contains a more demanding causation standard than other WTO agreements.[300] Relying on the Appellate Body's statements that global safeguards should be used as "extraordinary remedies" in "emergency" situations, China asserts that the transitional mechanism also should only be used in "extraordinary" situations, given that it is a safeguard remedy involving fairly traded imports.[301] Indeed, China goes so far as to suggest that the Protocol's transitional mechanism should be used in more restricted circumstances than the global remedies authorized under the Safeguards Agreement.[302]

110. Again, China's arguments are unfounded. China ignores that the Appellate Body's finding that global safeguard remedies are intended to be "emergency actions" was premised on the language contained in Article XIX of the GATT and the Safeguards Agreement indicating that global safeguard remedies are "emergency actions.[303] Moreover, the Appellate Body also made clear that the finding that global safeguards are "extraordinary remedies" is also premised on the fact that an authority can only impose a global safeguard if the import increases covered by the safeguard resulted from "unforeseen developments."[304] In contrast, the Protocol contains no language suggesting that the transitional mechanism is intended to be used only as an "emergency action," or language indicating that the increases in Chinese imports must be the result of "unforeseen developments." Given these critical distinctions between the Protocol and the Safeguards Agreement, China has no legal foundation for its arguments that the Protocol's

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[298] *Korea – Commercial Vessels*, para. 7.571

[299] Panel Report, para. 7.158.

[300] China Appellant Submission, paras. 211-214.

[301] China Appellant Submission, paras. 211-214.

[302] China Appellant Submission, para. 214.

[303] *Argentina – Footwear (AB)*, paras. 93-95; *US - Line Pipe* (AB), para. 81.

[304] *Argentina – Footwear (AB)*, paras. 93-95; *US - Line Pipe* (AB), para. 81.

transitional mechanism embodies the same "emergency action" characteristics as a global safeguard.

111. Furthermore, China's attempts to analogize between the transitional mechanism and the remedies allowed under the Safeguard Agreement overlooks another critical distinction between the Protocol and the Safeguards Agreement. Under the Safeguards Agreement, a competent authority can only impose a global safeguard if it concludes that increased imports have caused "serious injury" to the industry.[305] In contrast, the Protocol requires only that rapidly increasing imports from China be a significant cause of "material injury."[306] Since the Appellate Body has made clear the "material injury" standard is a lower standard of injury than the "serious injury" standard of the Safeguards Agreement,[307] the existence of a lower standard of injury in the Protocol critically undermines China's argument that the Protocol was intended to require a more rigorous or demanding causation standard.

112. In the end, China has no basis for its argument that the ordinary meaning, object or purpose of the Protocol establishes that the Protocol contains a more demanding and strict causation standard than other WTO agreements, like the Safeguards Agreement. Simply put, no language in the Protocol supports China's arguments. Further, China has offered no persuasive arguments or evidence to support its arguments that the Protocol must be read to embody a very strict standard of causation. China's arguments should be rejected by the Appellate Body.

b. The Panel Clearly Gave Full Meaning to The Term "Significant Cause" In Its Assessment of the USITC's Causation Analysis

113. China argues that the Panel failed to give meaning to the term "significant cause" when assessing whether the USITC's analysis complied with the causation requirements of the Protocol.[308] According to China, the Panel focused solely on whether the USITC has established that rapidly increasing imports from China were "a cause" of injury to the industry.[309] By allegedly failing to give the word "significant" its proper meaning, China claims, the Panel actually read the word out of the causation language of the Protocol.[310]

114. The Panel's own analysis belies these claims. The Panel did not read the word

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[305] *See* Safeguards Agreement, Articles 2.1 and 4.2.

[306] Protocol of Accession, para. 16.4.

[307] *US - Lamb Meat (AB)*, para. 124.

[308] China Appellant Submission, paras. 258-290.

[309] China Appellant Submission, paras. 262-273.

[310] China Appellant Submission, paras. 259-260.

"significant" out of the Protocol's causation language, nor did it focus its analysis solely on whether the Chinese imports were "a cause" of material injury. Instead, the Panel explained, quite clearly, that it rejected the idea that "any cause" of injury could constitute a "significant cause" of material injury under the Protocol. The Panel explained that, under the Protocol, a "significant cause" must be one that is "important," "notable" or "consequential."[311] Moreover, the Panel expressly rejected the idea that "any cause" of injury, even a minimal one, could constitute a "significant cause" of injury under the Protocol, noting that the "significant cause" standard "requires more than a mere contribution" to material injury.[312] In other words, the Panel very clearly rejected the notion that the Protocol required it to assess whether rapidly increasing imports from China were just "a cause" of injury.

115. Moreover, the Panel made clear that it was holding the USITC to a "significant cause" standard.[313] For example, in its analysis of the USITC's assessment of the coincidence between import trends and injury, the Panel concluded its comprehensive and detailed analysis of the issue by concluding that the USITC was "entitled to support its determination of significant cause with a finding of overall coincidence between an upward trend in subject imports and downward trends in the relevant injury factors."[314] Similarly, after comprehensively analyzing China's arguments that the USITC's pricing analysis was flawed, the Panel concluded the analysis with the statement that the "USITC's reliance on an overall coincidence between an upward movement in imports and a downward movement in injury factors ... support{s} its finding of 'significant cause" under the Protocol.[315] Finally, after analyzing China's arguments on demand, non-subject imports and the industry's business strategy in detail, the Panel concluded its analysis by stating that the "USITC did not fail to properly establish that rapidly increasing imports from China were a 'significant cause' of material injury to the domestic industry."[316] Given the Panel's analysis, it is difficult to understand how China can argue so vehemently that the Panel failed to give real meaning to the term "significant cause," or that the Panel "consistently read the term 'significant' out of the text of the Protocol" in its analysis.[317]

116. Furthermore, the Panel's conclusion that the Protocol did not require a "relative comparison" of causes of injury does not suggest the Panel was simply assessing whether rapidly

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[311] Panel Report, para. 7.158.

[312] Panel Report, para. 7.159, n. 271.

[313] E.g., Panel Report, paras. 7.158-7.159, 7.170, 7.176-7.178, 7.234, 7.261, 7.345, 7.379.

[314] Panel Report, para. 7.234 (emphasis added).

[315] Panel Report, para. 7.261 (emphasis added).

[316] Panel Report, para. 7.379 (emphasis added).

[317] China Appellant Submission, para. 262.

increasing imports from China were a "mere" cause of material injury.[318] Instead, the Panel was simply explaining that the Protocol does not require an authority to assess whether imports from China were the sole, primary or most important cause of injury, as China implied throughout the panel proceeding.[319] After correctly noting that China had not actually provided "evidence or explanation in support of" its arguments on this score, the Panel reasonably noted that, under the Protocol, "rapidly increasing imports might properly constitute a significant cause of market disruption even though their causal role is not as significant as other factors."[320]

117. Thus, the Panel's rejection of China's argument that the Protocol required a "comparative" assessment of the effects of all causal factors does not suggest that the Panel was simply looking to discern whether Chinese imports were "a cause" of injury. Even in its analysis of the "comparative" assessment issue, the Panel continued to emphasize that it must assess, under the Protocol, whether the USITC had established that Chinese imports were a "significant cause" of material injury to the industry. Nothing more was required of the Panel under the Protocol.

c. The Panel Took Into Account the Protocol's "Significant Cause" Standard When Analyzing the USITC's Conditions of Competition and Correlation of Trends Analyses

118. In its attack on the Panel's application of the Protocol's causation standard, China also argues that the Panel failed to give the phrase "significant cause" sufficient meaning when reviewing the USITC conditions of competition and correlation of trends analyses.[321] According to China, the Panel failed to grasp that, under the Protocol, it was required to view the "traditional approach" toward causation "with a new perspective."[322] Relying heavily on the fact that the Protocol requires that rapidly increasing imports from China be a "significant cause" of material injury to the industry, China argues that the Panel was required to "refine" its causation analysis by performing a more rigorous scrutiny of the USITC's conditions of competition and correlation of trends analysis than it would under other WTO agreements.[323] Since the Panel failed to do so, China argues that the Panel failed to apply the proper causation standard.

119. Once again, China's arguments have no merit. As previously noted, the Protocol itself does not contain any language indicating, explicitly or implicitly, that the Panel needed to apply a

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[318] China Appellant Submission, paras. 273-276.

[319] *See* Panel Report, paras. 7.119-7.153.

[320] Panel Report, para. 7.158 (emphasis added).

[321] China Appellant Submission, paras. 185, 219-234, and 277 - 280.

[322] China Appellant Submission, para. 217.

[323] China Appellant Submission, paras. 215 - 234.

higher standard of causation when reviewing the USITC's conditions and correlations analysis. In fact, even China seems to admit as much, expressly conceding that "the Protocol does not set forth any specific method for determining when the effects of subject imports rise to" the significant cause level.[324] Instead, the Protocol imposes a limited number of obligations on an authority when the authority performs its "market disruption" and causation analysis. Under the Protocol, an authority must assess whether rapidly increasing imports from China were a "significant cause" of material injury to the industry. Moreover, the authority must also assess certain objective factors, including the volume of the imports, their affect on prices, and their effect on the domestic industry.[325] Finally, the authority must provide the reasons for any measure it imposes.[326]

120. The Protocol imposes no other obligations on an authority when determining whether rapidly increasing imports are a significant cause of material injury. The Protocol does not, for example, provide that the authority must apply a greater degree of care when performing this assessment than it would in a global safeguards, antidumping or countervailing duty proceeding. Nor does the Protocol provide that a WTO panel should review the authority's determination with a higher degree of scrutiny, or impose a higher standard of causation on an authority, than it would when assessing a determination under the Safeguards Agreement, the Antidumping Agreement, or the SCM Agreement. Given this, China has no basis for its claim that the Panel should have applied a heightened degree of scrutiny when analyzing the USITC's conditions of competition or correlation of trends analyses.[327]

121. China argues that the Panel should not simply have assessed whether there was such a coincidence of trends between imports and the declines in the industry's condition on a year-to-year basis during the period of investigation.[328] Instead, China argues that the Panel was required to assess whether there was a specific correlation in the degree of magnitude between increases in imports and decreases in the domestic industry injury factors.[329] Only by doing so, China claims, could the Panel ensure that it met the more rigorous "significant cause" standard of the Protocol.[330]

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[324] China Appellant Submission, para. 254.

[325] Protocol of Accession, para. 16.4.

[326] Protocol of Accession, para. 16.5.

[327] China Appellant Submission, paras. 223 and 231.

[328] China Appellant Submission, paras. 236-239.

[329] China Appellant Submission, para. 237.

[330] China Appellant Submission, para. 239.

122. The Panel correctly rejected China's approach.[331] In a well-reasoned analysis of China's unusual approach, the Panel correctly explained that the Protocol itself did not specifically require a showing of correlation between material injury and rapidly increasing imports.[332] After noting that a correlation analysis was one "tool that an investigating authority might use to demonstrate causation (either alone, or in conjunction with other analytical tools),"[333] the Panel pointed out that, with respect to the Safeguards Agreement, the Appellate Body and WTO panels have consistently concluded that a "coincidence of trends" analysis was appropriately founded on a temporal relationship between movements in imports and movements in the injury factors,[334] that is, on an assessment of the year-by-year correlations between movements in import trends and the industry's condition factors. The Panel correctly pointed out that no Appellate Body or panel ruling has suggested that "the orders of magnitude {in the changes} are key" to a correlations analysis, or that "changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors."[335] Instead, the Panel explained, the Appellate Body and WTO panels simply have found that "imports should increase at the same time as the injury factors decline."[336]

123. Moreover, as the Panel explained, China's approach was not analytically sound.[337] The Panel correctly explained that:

> {C}orrelation between imports and injury factors is not an exact science, especially as there may be other causes of injury at work. As a result, it would be unrealistic to expect, or require, a somewhat precise correlation between the degree of change in imports and the degree of change in the injury factors.[338]

The Panel had a sound legal and analytical foundation for rejecting China's proposed "degrees of magnitude" assessment of the USITC's correlations of trends findings.[339]

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[331] Panel Report, paras. 7.228 - 7.228.

[332] Panel Report, para. 7.228.

[333] Panel Report, para. 7.228.

[334] Panel Report, paras. 7.230-232.

[335] Panel Report, para. 7.232.

[336] Panel Report, para. 7.232.

[337] Panel Report, paras. 7.228-7.229.

[338] Panel Report, para. 7.229.

[339] China states that, under the Protocol, the Panel and the USITC were required to analyze the correlations between imports and industry trends on a year-to-year basis, suggesting that the Panel and the USITC failed to perform a year-to-year assessment of the movement in these trends. China Appellant Submission, paras. 234-235. To the extent that China is arguing

124. Finally, China argues that the Protocol requires a more exacting comparison of trends than does the Safeguards Agreement because the Protocol ties the issue of causation of material injury to "rapid increases" in Chinese imports.[340] This claim is unfounded in two significant respects. First, under the Safeguards Agreement, it is not enough for imports to have simply "increased," as China asserts when making this argument.[341] Instead, under the Safeguards Agreement, the Appellate Body has stated that the increases in imports must be "sudden and recent,"[342] a standard that is not necessarily lower than that embodied in the "rapidly increasing imports" standard of the Protocol. Additionally, the Safeguards Agreement ties the requisite increases in imports to a standard of injury, "serious injury," that is higher than the Protocol's "material injury" standard.[343] Given these considerations, China's argument that the Protocol's "rapidly increasing imports" requirement necessarily requires a more exacting comparison of trends than the standards contained in the Safeguards Agreement has no basis.

125. In sum, the Panel reasonably rejected China's arguments that, under the Protocol, it was required to perform a more rigorous analysis of the USITC's conditions of competition and correlations analyses than is required under other WTO agreements. The Panel also reasonably rejected China's argument that, when reviewing the USITC's correlations findings, the Panel was required to determine whether there was a correspondence between the magnitude of the changes in import trends and the magnitude of changes in the factors showing the industry's condition. The Panel's analysis was consistent with the language of the Protocol, and findings of the Appellate Body and WTO panels in other trade remedy contexts.

d. The Panel Also Took Into Account the Protocol's "Significant Cause" Standard When Analyzing The Effects of Other Injury Factors on the Industry

126. Finally, China contends that the Panel did not conduct a sufficiently rigorous examination of the USITC's analysis of other factors allegedly causing injury to the domestic tires industry.[344] According to China, the Appellate Body has made clear that, "'[i]n a situation where several factors are causing injury 'at the same time,' a final determination about the injurious effects

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that the Panel and the USITC failed to perform this assessment, that is incorrect. As can be seen from the Panel's detailed analysis of the USITC's findings, Panel Report, paras. 7.228 - 7.238, both the Panel and the USITC examined whether there were "year-to-year" correlations between import trends and the industry's condition.

[340] China Appellant Submission, para. 231.

[341] China Appellant Submission, para. 231.

[342] *Argentina Footwear (AB)*, para. 131.

[343] *US - Lamb Meat (AB)*, para. 124.

[344] China Appellant Submission, paras. 240 - 257 and 281-290.

caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated.'"[345] Relying on the Appellate Body's analysis in *US - Upland Cotton*, China contends that, in the WTO context, such an analysis is required whenever an authority determines whether imports are causing injury to an industry, even if the WTO agreement in question does not contain language specifically requiring such an analysis.[346]

127. Once again, China's argument disregards the actual text of the Protocol, and the context and scope of the Appellate Body's findings under other trade remedies agreements. First, unlike the Safeguards Agreement,[347] the Antidumping Agreement,[348] and the SCM Agreement,[349] the Protocol does not contain language specifically requiring a competent authority to consider the possible effects of other factors causing material injury or threat of material injury as part of its causation analysis. Nor does it instruct the competent authority to ensure it does not attribute the effects of such other factors to the subject imports.[350]

128. As a result, China relies heavily on the Appellate Body's reports in disputes arising under the Safeguards and Antidumping Agreements, such as *US - Lamb (AB)* and *US - Hot-Rolled Steel (AB)*.[351] It is true that, in these disputes, the Appellate Body has stated that, when "several factors are causing injury 'at the same time,' a final determination about the injurious effects caused by imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated.'"[352] However, the Appellate Body grounded these finding on express language in Article 4.2(b) of the Safeguards Agreement and Article 3.5 of the Antidumping Agreement that specifically requires an authority not to attribute to imports the injury caused by other factors.[353] Given the lack of a similar requirement in the Protocol, there is

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[345] China Appellant Submission, para. 242 (*citing US - Lamb Meat (AB)*, para. 179).

[346] China Appellant Submission, paras. 242-253.

[347] Safeguards Agreement, Article 4.2(b)(second sentence).

[348] Antidumping Agreement, Article 3.5.

[349] SCM Agreement, Article 15.5.

[350] *See generally* Protocol of Accession, para. 16.

[351] China Appellant Submission, paras. 242 and 248.

[352] *US - Lamb Meat (AB)*, para. 179); *US - Hot-Rolled Steel (AB)*, para. 223.

[353] *US - Lamb Meat (AB)*, paras. 162-181. Article 4.2(b) of the Safeguards Agreements provides that, "[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Moreover, under the Antidumping Agreement, the Appellate Body has found a similar "non-attribution" analysis on an investigating authority with respect to the possible effects of other factors, in that case relying on the language of Article 3.5 of the Antidumping Agreements, which directs an investigating authority to "examine any known factors" that are causing injury to the industry and

no basis for China's assertion that the Appellate Body's statements that in *US - Lamb Meat (AB)* and *US - Hot-Rolled Steel (AB)* establish that the USITC was required to perform the same "separate and distinguish" analysis required by the Appellate Body under the Safeguards and Antidumping Agreements.

129. China also mistakenly interprets the meaning of the Appellate Body and Panel's findings in *US – Upland Cotton*.[354] China argues that these findings indicate an authority must "separate and distinguish" the effects of other factors causing injury when performing a causation analysis under a WTO agreement.[355] This is not the case. In *US - Upland Cotton*, which involved the "serious prejudice" provisions of the SCM Agreement, the Appellate Body and the panel acknowledged that some form of analysis of other injury factors was appropriate when analyzing causation under these provisions of that agreement, even though they contained no "non-attribution" language.[356] Neither the Appellate Body nor the panel concluded, however, that there was a requirement to perform the precise "separate and distinguish" analysis that has been found to be embodied in the Safeguards and Antidumping Agreements.[357]

130. On the contrary, the Appellate Body and the panel both made clear that the absence of specific "non-attribution" language in the SCM Agreement indicated that the panel need not conduct the same "separate and distinguish" analysis found to be embodied in the Safeguards Agreement, the Antidumping Agreement and the countervailing duty provisions of the SCM Agreement.[358] As the Appellate Body pointed out, the "serious prejudice" provisions of the SCM Agreement do not contain the same "elaborate and precise 'causation' and non-attribution language" as the causation provisions of these other agreements.[359] As a result, the panel had "a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression under Article 6.3(c)" of the SCM

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ensure that it does not attribute such effects to the subject imports. *US - Hot-Rolled (AB)*, paras. 216-236.

[354] China Appellant Submission, paras. 242-245.

[355] China Appellant Submission, paras. 242-245.

[356] *US – Upland Cotton (AB),* paras. 436-438; *US – Upland Cotton (Panel)*, paras. 7.1343-44.

[357] *US – Upland Cotton (AB),* paras. 436-438; *US – Upland Cotton (Panel)*, paras. 7.1343-44.

[358] *US – Upland Cotton (AB),* paras. 436-438; *US – Upland Cotton (Panel)*, paras. 7.1343-44.

[359] *US – Upland Cotton (AB)*, para. 436.

Agreement.[360] Moreover, the Appellate Body cautioned that, although all of these agreements required the performance of a causation analysis, the specific causation requirements of the Safeguards and Antidumping Agreements, such as their specific non-attribution requirement, "must not be automatically transposed into" the "serious prejudice" provisions of the SCM Agreement.[361]

131. Moreover, the Panel's analysis of the USITC's causation finding was consistent with the panel's approach in *US – Upland Cotton*. Like the panel in *US - Upland Cotton*, the Panel here explained that the USITC's findings on the "causal link between rapidly increasing imports and material injury must be assessed 'within the context of other possible causal factors.'"[362] Moreover, like the panel in *US – Upland Cotton*, the Panel examined China's arguments concerning the causal effects of other factors to determine whether these arguments seriously undermined the USITC's conclusion that rapidly increasing imports were a significant cause of material injury to the industry.[363] In the end, the Panel made clear that it was analyzing these factors to assess whether they broke the causal link between Chinese imports and injury, just as the panel did in *US - Upland Cotton*.[364] Nothing more was required of the Panel.

132. Finally, the United States is not arguing that the USITC was not required to perform an assessment of other injury factors under the Protocol. As the Panel correctly concluded,[365] the USITC was required to perform some analysis of the effects of other factors that have caused injury to the industry. Nonetheless, as the Appellate Body indicated in *US - Upland Cotton*,[366] when an agreement does not contain specific non-attribution language, an authority has the discretion to adopt an appropriate and reasonable analysis to assess the effects of other factors.[367]

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[360] *US – Upland Cotton (AB),* para. 436. The Panel noted that the "absence of such detailed language, which exists elsewhere in the covered agreements, ... may be taken as a demonstration that the drafters knew how to craft a precise causation standard when they deemed it appropriate." *US – Cotton (Panel)*, para. 7.1343.

[361] *US – Upland Cotton (AB)*, para. 438.

[362] Panel Report, para. 7.177 (*citing US - Upland Cotton (Panel)*), para. 7.1344.

[363] Panel Report, paras. 7.333, 7.345, 7.354, 7.359, 7.367, 7.371.

[364] *Compare* Panel Report, para. 7.371 (the relevance of the other factors analysis is to assess their "potential to break the causal link between the subject imports and the material injury to the domestic industry") with *US - Upland Cotton (Panel)*, para. 7.1363 (other factors "do not attenuate the genuine and substantial causal link" between subsidies and prices suppression).

[365] Panel Report, para. 7.176 and 7.177.

[366] *US – Cotton (AB)*, para. 436.

[367] *US – Cotton (AB)*, para. 436.

133. In the United States view, the approach taken by an authority when addressing other possible injury factors under the Protocol will depend on the facts and circumstances of the particular case. In some cases, a factor might arguably be so significant a cause of injury to the industry that the competent authority will need to perform a detailed and reasoned explanation of the effects of that factor. In other cases, the factor may be contributing to injury in a considerably less significant fashion. In those circumstances, the competent authority could reasonably reference the factor and indicate in a reasonable fashion why the factor does not explain the injury caused to the pertinent industry. In still other cases, the authority could simply find that there was no evidence establishing that a particular factor caused injury to the industry, or that the parties have not presented sufficient evidence to establish that the factor causes any injury at all. In such cases, the authority would have little or nothing to investigate and no need to analyze the effects of the factor.[368] In this dispute, the analyses of the USITC and the Panel complied with these standards.

2. The Panel Reasonably Concluded that the USITC's Causation Analysis was In Compliance with the Protocol

134. China challenges the USITC's causation analysis on several grounds. First, China argues that the USITC "{f}ailed to analyze the conditions of competition analysis with sufficient care to assess whether subject imports were in fact capable of being a 'significant cause' of injury."[369] According to China, the USITC had no basis for finding that there was significant competition between Chinese imports and U.S. tires in the market.[370] Second, China asserts that the USITC failed to adequately assess whether there was a correlation of import trends and industry declines. According to China the USITC should have, but allegedly failed to, assess whether the changes in imports corresponded "in the degrees of relative magnitude" on a year-to-year basis with the declines in the industry's condition.[371] Third, China argues that the USITC failed to adequately analyze other causes of injury to ensure that the effects of these other causes were not being improperly attributed to the injury caused by subject imports.[372] Finally, China argues that in upholding the USITC's findings on these issues, the Panel failed to adequately carry out its review responsibilities.

135. China's arguments are unfounded. The Panel examined China's claims on these issues

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[368] Under the Antidumping Agreement and the Subsidies Agreement, for example, an investigating authority is required only to consider other "known" factors causing injury to the industry. Antidumping Agreement, para.. 3.5; Subsidies Agreement, para. 15.5.

[369] China Appellant Submission, para. 297.

[370] China Appellant Submission, paras. 307-348.

[371] China Appellant Submission, para. 297.

[372] China Appellant Submission, para. 297.

in a comprehensive manner, provided a detailed set of reasons for its rejection of these claims, and properly upheld the USITC's causation findings. We discuss these issues below.

a. Overview of the USITC's Causation Analysis

i. The USITC's Analysis of Conditions of Competition

136. To place China's claims in perspective, it is best to briefly describe the USITC's causation analysis. The USITC examined conditions of competition in the market[373] and found the following conditions of competition affected the market for tires:

- During the period of investigation, the Chinese and U.S. producers manufactured a broad range of tire sizes and styles with varying performance characteristics.[374]

- The large majority of market participants reported that Chinese and U.S. tires were always or frequently "interchangeable" in the U.S. market.[375]

- The U.S. tires market consists of two basic sectors: the original equipment manufacturers (OEM) market and the replacement market. Chinese imports and U.S. tires are sold in both sectors, with the replacement market being the more important sector for both sets of producers in terms of the volume of sales.[376]

- Tires sold in the replacement market are often perceived to fall into three categories (or "tiers") of tires, which reflect brand and price considerations. There is, however, no clear dividing lines among the tiers, and there is no consensus among market participants as to how to define the categories.[377]

- During the period of investigation, there were significant shipments of U.S.

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[373] USITC Report, pp. 15, 20 - 23, 25 - 28. Exhibit US-1.

[374] USITC Report, p. 21. Exhibit US-1.

[375] USITC Report, p. 21 *citing* USITC Report , V-15-16 (showing that at least 80 percent of responding producers, importers, and purchasers indicated that subject tires produced in the United States and imported from China are at least "frequently" interchangeable.). Exhibit US-1. Additionally, all tires sold in the U.S. market, whether imported or produced domestically, must meet the same National Highway Traffic Safety Administration standards. USITC Report, p. 8. Exhibit US-1.

[376] USITC Report, p. 21. Exhibit US-1. In 2008, 82.3 percent of U.S. producers' U.S. shipments and 95.0 percent of subject imports from China were to the replacement market.

[377] USITC Report, p. 21. Exhibit US-1.

produced tires into all three tiers of the U.S. replacement market.[378] Shipments of the subject tires from China were also made into all three tiers of the replacement market, with significant levels of shipments being made in two of these tiers.[379]

- Demand for tires "fluctuated during the period examined."[380] In 2008, demand declined as the economy weakened.[381]

- Imports of tires from China increased significantly in each year of the period examined. The quantity of Chinese imports was 215.5 percent higher in 2008 than in 2004.[382]

- In contrast to subject imports, the quantity of U.S. imports from countries other than China declined in each year since 2005, and was 5.4 percent lower in 2008 than in 2004.[383]

By taking these conditions of competition into account, the USITC was able to assess the manner in which the Chinese imports and U.S tires competed within the overall market during the period of investigation.

ii. The USITC's Volume, Price and Effect Analysis

137. Consistent with the Protocol[384], the USITC considered the volume of imports, the effect of imports on prices, and the effect of such imports on the domestic industry.[385] After analyzing these factors, the USITC found that the significant increases in the volume of Chinese imports over the period of investigation coincided with significant underselling of the domestic like product by the subject imports.[386] It also found that the rising volumes of subject imports coincided with the decline in the domestic industry's performance indicators. As imports from China displaced domestic sales in the market, the USITC explained, this displacement resulted in significant declines in the industry's production, shipments, capacity utilization, employment,

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[378] USITC Report, p. 21. Exhibit US-1.

[379] USITC Report, p. 21, Exhibit US-1.

[380] USITC Report, p. 15. Exhibit US-1.

[381] USITC Report, p. 22. Exhibit US-1.

[382] USITC Report, p. 22. Exhibit US-1.

[383] USITC Report, p. 22. Exhibit US-1.

[384] *See*, paragraph 16.4 of the Protocol.

[385] USITC Report, pp. 22-29. Exhibit US-1.

[386] USITC Report, p. 29. Exhibit US-1.

and profitability.[387] Thus, the USITC determined that rapidly increasing imports from China were a significant cause of material injury to the domestic industry.

138. The record fully supported the USITC's findings. In terms of volume, the USITC noted that Chinese imports increased in each year of the period and were at their highest levels in 2008.[388] Chinese imports increased by 215.5 percent over the period, with the largest and most significant increases occurring after 2006.[389] Moreover, as their volumes grew, Chinese imports increased their share of the U.S. market more than three-fold over the period of investigation, growing from 4.7 percent of the U.S. market in 2004 to 16.7 percent in 2008, with more than half of this increase occurring in 2007 and 2008.[390]

139. The USITC also noted that there was nearly universal underselling by the Chinese merchandise.[391] In 119 of the 120 possible price comparisons for domestic tires and subject imports, the Chinese imported products were priced below the domestic product, with average margins of underselling of 18.9 percent.[392] The underselling margins for all six products increased by their greatest amount in 2007, the year in which the volume of rapidly increasing imports rose by their greatest amount. In 2008, the average margin of underselling for the six products remained at nearly the same level as in 2007 and was significantly greater than the average margin of underselling for the six products in the years 2004, 2005, and 2006.[393]

140. Furthermore, the record showed that the majority of responding U.S. producers, importers, and purchasers indicated that domestically produced tires and the subject imports are "always" used interchangeably.[394] At least 80 percent of these market participants reported that the domestically produced tires and the subject imports are at least "frequently" used interchangeably. Accordingly, the USITC stated:

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[387] USITC Report, p. 29. Exhibit US-1.

[388] USITC Report, p. 22. Exhibit US-1. The volume of subject imports increased from 14.6 million tires in 2004 to 20.8 million tires in 2005, to 27 million tires in 2006, to 41.5 million ties in 2007, and to a period high 46.0 million tires in 2008. USITC Report at Table C-1. Exhibit US-1.

[389] USITC Report, p. 22. Exhibit US-1.

[390] USITC Report, p. 22. Exhibit US-1.

[391] USITC Report, p. 23. Exhibit US-1.

[392] USITC Report, Table V-17. Exhibit US-1. As previously noted, the USITC uses the term "underselling" to refer to price "undercutting."

[393] USITC Report, p. 23. Exhibit US-1. The average margin of underselling was 23.6 percent in 2008 as compared to 25.4 percent in 2007.

[394] USITC Report, p. 23. Exhibit US-1.

> The close substitutability of the domestic product and the subject imports combined with pervasive underselling by significant and growing margins enhanced the ability of subject imports to displace domestically produced tires in the U.S. market.[395]

Given the foregoing, the USITC concluded that pervasive and growing underselling by the large and rapidly increasing volume of subject Chinese tires eroded the domestic industry's market share, and led to a sharp decline in virtually all of the domestic industry's performance indicators.[396]

141. The USITC also found the Chinese imports had other price effects. The record showed that continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs, and thus suppressed prices.[397] The 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.[398] The USITC found that the "sharp increase in this ratio in 2008, when the volume of subject imports was highest and the margin of underselling was nearly at its greatest, indicate[d] that U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw material costs on to their customers."[399]

142. The USITC then considered the effect of these rapidly growing, low-priced imports on the domestic industry. The USITC noted that, as the Chinese imports entered the market in rapidly increasing volumes, almost all of the industry's performance and financial indicators deteriorated during the period. Specifically, the record showed:

- A decline in the domestic producers' market share in every year of the period resulting in an overall decline in market share of 13.7 percentage points.[400]

- A continuous decline in the U.S. industry's net sales volume throughout the

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[395] USITC Report, p. 23. Exhibit US-1.

[396] USITC Report, p. 23. Exhibit US-1.

[397] USITC Report, p. 24. Exhibit US-1.

[398] USITC Report, Table C-1. Exhibit US-1.

[399] USITC Report, p. 24. Exhibit US-1. Three domestic producers reported that they either had to reduce prices or roll back announced price increases to avoid losing sales to competitors selling subject tires from China. USITC Report, p. V-36. Exhibit US-1.

[400] USITC Report, p. 25. Exhibit US-1.

period, which were also reflected in declining production and shipments.[401]

- A significant decline in the industry's capacity, which fell by 17.8 percent over the period examined.[402]

- A significant decline in the industry's employment-related factors in every year of the period, including production workers, hours worked, and wages paid.[403]

- A worsening of the domestic producers' ratio of cost of goods sold to net sales volume, from 84.7 percent in 2004 to 90.1 percent in 2008,[404] indicating that by 2008, U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw material costs on to their customers.

- The domestic industry's operating income fell throughout the period, with the exception of 2007, and the industry had its worst one-year performance of the period in 2008.[405]

Based on this record, the USITC found that "there [was] a direct and significant connection between the rapidly increasing imports of subject tires from China and the domestic industry's deteriorating financial performance and declining capacity, production, shipments, and employment."[406] Indeed, as the USITC pointed out, the market share of the Chinese imports increased by 12.0 percentage points over the period, while the domestic industry's market share declined by 13.7 percentage points, thus reflecting an almost a one-to-one direct displacement by subject imports of domestic production.[407]

143. Additionally, the record showed that, as imports of low-priced Chinese tires obtained a more significant share of the U.S. tire market over the period, U.S. producers were forced to reduce capacity in the lower-priced segment of the market which was where the most significant amounts of subject tires were sold. As the USITC found, the record showed that:

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[401]USITC Report, pp. 23-24. Exhibit US-1.

[402]USITC Report, p. 24 and Table C-1. Exhibit US-1.

[403]USITC Report, p. 17. Exhibit US-1.

[404]USITC Report, p. 24. Exhibit US-1.

[405]USITC Report, p. 23. Exhibit US-1.

[406]USITC Report, pp. 24-25. Exhibit US-1. China has not challenged the USITC's finding of material injury. China First Submission, para. 185 n.185.

[407]USITC Report, p. 24. Exhibit US-1.

> the substantial reduction in domestic capacity and the closures of U.S. plants during the period examined were largely in reaction to the significant and increasing volume of subject imports from China, and were not, as respondents argue, part of a strategy by domestic tire producers to voluntarily abandon the low-priced, 'value' segment of the U.S. market.[408]

In coming to this conclusion, the USITC rejected respondents' claims that "domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market and that the subject imports simply filled the void left by their departure."[409] The USITC explained that imports of tires from China were rapidly increasing before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006.[410] Moreover, the USITC explained that these "companies confirmed in statements issued at the time of the announcements [of the closings] that low-price competition from Asia, including China," was an important factor in the decisions.[411]

144. Further, the USITC noted, contemporaneous articles in the trade press made clear to the industry that the Chinese industry was in the process of significantly expanding its capacity to produce and export tires.[412] Finally, the USITC pointed out that the U.S. producers had not been the reason Chinese tires had grown so rapidly, noting that they accounted only for less than a quarter of Chines imports in 2008. As a result, the USITC concluded that a more reasonable explanation for the industry's capacity reductions in the latter years of the period was as a "reaction to increases in subject imports from China," as well as those that were likely to continue.[413]

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[408]USITC Report, pp. 24-25. Exhibit US-1.

[409]USITC Report, p. 26. Exhibit US-1.

[410]USITC Report, p. 26 and Table C-1. Exhibit US-1. In particular, as the USITC noted, the record showed that the total quantity of the subject imports had increased by 42.7 percent between 2004 and 2005, by an additional 29.9 percent by 2006, and by an additional 53.7 percent in 2007. USITC Report, p. 26, n.146. Exhibit US-1.

[411]USITC 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. USITC Report, p. 26, n. 147. Exhibit US-1.

[412] USITC Report, pp. 26-27, nn. 148 and 150. Exhibit US-1.

[413] USITC Report, pp. 26-27, nn. 148 and 150. Exhibit US-1. For example, an industry periodical reported in March 2006 that China had exported an estimated 21 million tires to the

145. The USITC also considered, and rejected, respondents' argument that competition in the U.S. market was so attenuated that subject imports could not have been a significant cause of material injury to the domestic industry.[414] Based on information obtained through supplemental questionnaires, the USITC found that the record did not support the Chinese respondents' claim that subject imports did not compete significantly with U.S. tires in the three tiers of the replacement market and the OEM market.[415] The USITC found that, in 2008, shipments of U.S. tires and Chinese imports were sold in all three tiers of the replacement market.[416]

146. As the USITC pointed out, significant volumes of U.S. tires were shipped into all three tiers of the replacement market in 2008, while Chinese tires were shipped into all three tiers, with significant volumes of Chinese imports being shipped into tiers 2 and 3 of the replacement market.[417] Moreover, as the USITC stated, U.S. tires and Chinese tires were both sold in the OEM market.[418] After noting that "U.S. produced tires and subject imports from China both have a significant presence in the Tier 2 and Tier 3 (category 2 and category 3) segments of the replacement market" and that "both are also present in the Tier 1 segment (category 1) and the OEM market", the USITC concluded that "there is significant competition between the subject imports and domestic tires in the U.S. market."[419]

147. The USITC also explained that, although many market participants agreed that the U.S. replacement market could generally be segmented into three tiers of tires, there were "no clear dividing lines among categories," and "no consensus among producers, importers, and purchasers as to how to define the categories, particularly as to the tires that fall into categories 2 and 3."[420] Confirming this lack of a clear dividing line between the three tiers, market participants provided a wide range of estimates of the share of U.S. producers and subject Chinese tire shipments that

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United States in 2005. That periodical stated that the "overall effect [of Chinese imports] on domestic supply [had been] 'profound.'" The article predicted that the impact of China on the market was "likely to remain so as imports increase. USITC Report, p. 27, n. 150. Exhibit US-1.

[414] USITC Report, pp. 26-27. Exhibit US-1.

[415] USITC Report, p. 27. Exhibit US-1.

[416] USITC Report, pp. 21 and 27. Exhibit US-1.

[417] USITC Report, pp. 21 and 27. Exhibit US-1.

[418] USITC Report, pp. 21 and 27. Exhibit US-1. The record showed that 5 percent of Chinese tires and 17.7 percent of U.S. tires were shipped to the OEM market in 2008.

[419] USITC Report, p. 27. Exhibit US-1.

[420] USITC Report, p. 21 and 27. Exhibit US-1.

fall into each category.[421] As a result, the USITC concluded that the record did not support the Chinese respondents' claim that "competition between U.S.-produced tires and the subject imports is attenuated, with the subject imports competing primarily in the Tier 3 segment of the replacement market but not in the Tier 1 and Tier 2 segments of the replacement market or the OEM market."[422]

148. Finally, the USITC considered whether demand fluctuations over the period, especially during the demand decline in 2008, actually caused the declines in the industry's condition.[423] The USITC noted that demand, as measured by apparent U.S. consumption, "fluctuated" over the period.[424] Responding to the Chinese respondents' primary contention relating to demand, which was that demand declines in 2008 were the cause of the industry's problems,[425] the USITC pointed out that, even though apparent consumption declined by 6.1 percent in that year, Chinese imports had "increased by 4.5 million tires in 2008," even as shipments of U.S. and non-subject imported tires both fell.[426] As a result of the continued increase in Chinese tires in 2008, the USITC concluded that the industry was essentially forced to "absorb{} virtually all the decline in U.S. apparent consumption that year."[427] As a result, the USITC concluded that the demand declines in 2008 did not explain the significant declines in the industry's condition over the period.[428]

b. The Panel Properly Upheld The USITC's Finding of Significant Competition Between the Chinese Imports and U.S. Tires in the Market

149. China challenges only one aspect of the USITC's condition of competition findings: the USITC's conclusion that there was a significant degree of competition between the Chinese imports and U.S. tires during the period.[429] China contends that the Panel erred when it upheld this finding, arguing that the USITC and the Panel both ignored the fact that the "majority of U.S.

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[421] USITC Report, p. 27. Exhibit US-1.

[422] USITC Report, p. 27. Exhibit US-1.

[423] USITC Report, pp. 15, 22, 25 - 26, and 29. Exhibit US-1.

[424] USITC Report, p. 15. Exhibit US-1.

[425] *See* USITC Report, p. 20 (one of the four main arguments made by Chinese respondents was that factors other than subject imports, including the "recent state of the economy," had adversely affected U.S. tire production).

[426] USITC Report, p. 26. Exhibit US-1.

[427] USITC Report, p. 26. Exhibit US-1.

[428] USITC Report, pp. 26 and 29. Exhibit US-1.

[429] China Appellant Submission, paras. 307 - 348.

tires faced virtually no competition from subject imports" from China.[430] According to China, competition between the Chinese imports and U.S. tires was "highly attenuated" in the overall market because there was extremely limited competition between the Chinese and U.S. tires in the OEM market and in the tier 1 segment of the replacement market, which China describes as the two "key" segments of the market.[431]

150. China has no basis for its claim that there was only "attenuated" competition between the Chinese and U.S. tires during the period. Instead, the record showed there was significant competition between Chinese and U.S. tires within the market as a whole. [432] As the chart below establishes and as the Panel found, the USITC correctly concluded that significant quantities of Chinese and U.S. tires were shipped into tiers 2 and 3 of the replacement market in 2008:

A. *Quantity*:

	Tier 1 Shipments (000's)	Tier 2 Shipments (000's)	Tier 3 Shipments (000's)	"Other" Shipments[433] (000's)
U.S. Industry	69,619	**21,937**	**25,430**	19,539
Chinese Imports	836	**10,817**	**16,823**	11,165
Other Imports	30,061	12,736	7,925	28,083

[430] China Appellant Submission, para. 318.

[431] China Appellant Submission, paras. 28 and 336 - 348.

[432] USITC Report, pp. 21 and 27. Exhibit US-1; Panel Report, paras. 7.195 and 7.196.

[433] The shipments included in the "unreported" category reflect shipments made by two classes of producers and importers. The first class of producer and importer included any producer or importer who reported that the market could not be segmented into tiers. This class included a major U.S. producer that reported "there was no consensus in the marketplace on how to divide the U.S. market," as well as five importing firms that reported that the market could not be segmented into three tiers. Since these producers stated that they could not divide the market into tiers, they did not provide any estimates of the percentage of their shipments that were made into the alleged tiers. Because the USITC could not include shipments for these producers in any of the reported tiers, the USITC included these shipments in the "unreported" category. The second class of producers and importers included in the "unreported category" consisted of companies that submitted a response to the USITC's original questionnaire but did not respond to the USITC's supplemental questionnaire.

B. *Share of Total Shipments, By Source*:[434]

	Tier 1 Shipments (%)	Tier 2 Shipments (%)	Tier 3 Shipments (%)	"Unreported" Shipments (%)
U.S. Industry	51.1 %	**16.0 %**	**18.6 %**	14.3 %
Chinese Imports	2.1 %	**27.3 %**	**42.4 %**	28.2 %
Other Imports	38.1 %	16.2 %	10.1 %	35.6 %

Source: USITC Questionnaires.

Given this data, it was reasonable for the USITC to find that there was a significant degree of competition between Chinese and U.S. tires in the market.[435] As the Panel itself pointed out after reviewing this evidence, "even if tiers 2 and 3 could be clinically isolated from tier 1, {this} record evidence demonstrates that there remained significant competition between domestic tyres and subject imports in tiers 2 and 3."[436] Moreover, because the data in this chart "relates to 2008, after the U.S. industry closed plant{s} producing lower-value (i.e., tier 2 and 3) tyres," the record also indicated that "competition between the U.S. industry and subject imports would have been even greater earlier in the period of investigation."[437] Given this evidence, the Panel reasonably upheld the USITC's finding that there was a significant degree of competition between Chinese and U.S. tires, both within these tiers and the overall market. The Panel's findings on this score

[434] The percentages reported in the chart are the estimated percentage of each supply source's total shipments in the overall market that were sent into either Tier 1, Tier 2, or Tier 3 in 2008. For example, the chart shows that the U.S. industry estimated, in the aggregate, that 51.1 percent of its total shipment in 2008 were Tier 1 shipments, 16.0 percent were Tier 2 shipments, and 18.6 percent were Tier 3 shipments. The remainder of the industry's shipments could not be classified as being shipped into any category because those shipments were made by producers and importers who did not break out their shipments as being made into any of the three tiers.

[435] Panel Report, para. 7.195. Moreover, this competitive overlap is further emphasized by the market share calculations that China prepared using the quantity data contained in this chart. As China reports in its appellant submission, the data shows that, in 2008, U.S. tires held 48.2 percent of the tier 2 market segment, while China held 23.8 percent of that segment. China Appellant Submission, para. 316 (Table). Similarly, in 2008, U.S. tires held 50.7 percent of the tier 3 market segment, while China held 33.5 percent of that segment. Moreover, as the Panel pointed out, in tier 3, there was a larger number of U.S. tires than Chinese tires in 2008.

[436] Panel Report, para. 7.195.

[437] Panel Report, para. 7.195.

were not in error.

151. Nonetheless, China argues that the USITC and the Panel failed to recognize "that there were three tiers acknowledged by all," and "that a majority of domestic shipments faced virtually no competition from subject imports."[438] The problem with China's argument is that it is simply not borne out by the record. Although market participants generally agreed the replacement market could be divided into three broad categories or tiers,[439] the record also established that there were no "clear dividing lines" among the tiers, and no consensus among producers, importers and purchasers on which tire brands belonged in the different tiers.[440] In fact, several importers reported that the replacement market could not be segmented, and one major U.S. producer reported that "there was no consensus in the marketplace on how to divide the U.S. market."[441] Given that market participants themselves were unable to define the scope or content of these categories consistently, there was no reason for the USITC, and the Panel upon reviewing the evidence, to find that the products sold in the various tiers were so distinct from one another that they were unlikely to compete in a meaningful way across the tiers that characterized the replacement market.

152. Moreover, other data showed that the distinctions between the tiers were not particularly meaningful in competitive terms. For example, when asked to estimate the size of each tier of the replacement market, market participants "provided a "wide range of estimates" of the shares of U.S. and Chinese shipments falling in each tier.[442] Specifically, producers and importers' estimates of the size of these tiers ranged from 21 percent to 78 percent of the total market for tier 1, from 7 percent to 52 percent of the total market for tier 2, and from 10 percent to 50 percent of the total market for tier 3.[443] Furthermore, respondents themselves did not appear to agree that there were significant competitive distinctions between the tiers. One witness for the respondents at the USITC's hearing stated that:

> Les Schwab sells tires in the third segment of the market, which includes private brand tires. Within this third tier, our tires cover the same broad spectrum of size and

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[438] China Appellant Submission, para. 325.

[439] USITC Report, pp. 15 and 27. Exhibit US-1.

[440] USITC Report, pp. 15 and 27. Exhibit US-1. As the USITC stated in its decision, "counsel for one respondent observed at the Commission's public hearing that there are no bright lines among the categories, and there was disagreement among respondents's witnesses at the hearing about which brands fell in which category." USITC Report, p. 21 and n. 121. Exhibit US-1.

[441] USITC Report, pp. V-5-V-6. Exhibit US-1.

[442] USITC Report, pp. 27. Exhibit US-1.

[443] USITC Report, p. 52 (dissenting Commissioners). Exhibit US-1.

> performance as are offered in the first two segments. When all the advertising and marketing is stripped away, our tires are just as well made, just as safe, and just as carefully inspected as brand names. Our tires simply do not have a flag or secondary brand name on their sidewall.[444]

Similarly, during the investigation, a Chinese producer reported that:

> {W}hile there is certainly a real distinction between Tier 1 and Tier 2 tiers, it is often useful to group Tier 1 and Tier 2 tires together in the category of "higher-end" tires, since both of these segments are ones in which brand equity is an important element.[445]

Given the fact that most market participants could not agree on the types or brands of the tires that belonged in each tier, the size of the tiers, or how distinct the tiers were from one another, the USITC correctly found the record did not support Chinese respondents' argument that Chinese imports "present in one market segment have little, if any, effect on the volume and price of U.S.-produced tires in the other market segments."[446] The Panel reviewed this evidence in light of China's arguments and reasonably concluded that the USITC's rejection of the argument that competition between the Chinese and U.S. tires was attenuated in the market was proper.

153. China argues that the USITC and the Panel missed China's major point on this matter. China argues that it was simply pointing out that the "mere presence" of imports in a market or market segment does not establish the existence of a significant degree of competition between imports and domestic products.[447] It is China that misses the point. In their detailed analyses of this issue, the USITC and the Panel were not simply looking for "mere presence" by imports and U.S. tires in the market. Instead, the USITC and the Panel both made clear that they were seeking to determine whether there was "significant" competition between the Chinese imports and U.S. tires during the period.[448] In its analysis, for example, the USITC emphasized that it concluded that there was "significant competition between the subject imports and domestic tires in the U.S. market" because, among other things, "U.S.-produced tires and subject imports from

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[444] USITC Hearing Tr. at 246 (Borgman) (emphasis added). Exhibit US-30.

[445] Panel Report para. 7.192 *citing* Posthearing brief of GITI, p. 6.

[446] USITC Report, p. 27. Exhibit US-1. It is important to add that the record showed that the large majority of producers, importers and purchasers reported that the Chinese and U.S. tires were always or frequently interchangeable, USITC Report, p. 23 Exhibit US-1, which provides additional strong support for the USITC's finding that there were likely to be competitive effects across the tiers in the replacement market.

[447] *See e.g.*, China Appellant Submission, paras. 29, 313 and 323.

[448] USITC Report, p. 27 Exhibit US-1; Panel Report, para. 7.195.

China both have a significant presence" in tiers 2 and 3 of the replacement market.[449] Similarly, the Panel examined the evidence before it and explained that, even apart from the issue of competition in the OEM and tier 1 segments of the market, the evidence relating to competition in tiers 2 and 3 "demonstrates that there remained significant competition" between the domestic and Chinese tires during the period.[450] China has no basis for arguing that the USITC or the Panel missed its "major point" on this matter.

154. China also argues that the USITC inappropriately relied on the presence of Chinese imports' in the OEM market because there was only a small volume of Chinese tires in this market segment.[451] China's interpretation of the USITC's analysis and the record is wrong. It was reasonable for the USITC to cite China's growing presence in the OEM market as support for its finding of significant competition between the Chinese and U.S. tires in the overall market. As the USITC found, the "share shipped to the OEM market by U.S. producers declined each year during the period examined, while the share of subject imports from China shipped to the OEM market increased irregularly and was at it highest in 2006 at 7.3 percent."[452] As a result, Chinese imports increased their share of the OEM market consistently over the period, growing from a minimal 0.8 percent of the market in 2004 to a no longer minimal level of 5.0 percent in 2008, a growth that occurred at the same time that the industry consistently lost market share in this market segment.[453] Because these changes in relative market share in the OEM segment were consistent with the changes in Chinese and domestic market share seen in the overall market, the USITC reasonably relied on import trends in the OEM market as support for its competition analysis.[454]

155. China argued before the Panel that because subject imports into the OEM market "are extremely small . . . competition between Chinese and domestic OEM tires is thus negligible, and cannot support a finding of a significant causal link."[455] The Panel properly reviewed the record evidence to determine whether competition between Chinese and domestic tires was in fact negligible and should have therefore been dismissed by the USITC. The record evidence established that Chinese imports grew from 121,000 tires at the start of the period in 2004, or less than one-tenth of one percent of the market to a period high 2.3 million tires in 2008, or

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[449] USITC Report, p. 27. Exhibit US-1. (Emphasis added).

[450] Panel Report, para. 7.195.

[451] China Appellant Submission, paras. 326 - 335.

[452] USITC Report, p. 21. Exhibit US-1.

[453] USITC Report, p. V-3, Table V-2. Exhibit US-1.

[454] USITC Report, p. 27. Exhibit US-1.

[455] China First Written Submission, para. 226.

approximately five percent of the market.[456] Accordingly, the Panel was correct to reject China's argument that the USITC was required to dismiss competition in the OEM sector as "negligible."

156. Finally, China argues that the Panel was only able to uphold the USITC's analysis by creating its "own, new analysis" of the data.[457] The Panel did nothing of the sort. The Panel performed a detailed and thorough analysis of the USITC's findings, in light of the arguments of the parties, and concluded that the USITC had reasonably determined that:

- There was significant competition between Chinese imports and U.S. tires in the overall market, with significant amounts of competition in tiers 2 and 3 of the replacement market.[458]

- The Chinese and U.S. tires were also present in the OEM market, with the Chinese imports taking up a growing, though smaller, share of that market segment.[459]

- Market participants agreed that the replacement market could be divided into three tiers or categories, but there was no consensus on what types or brands of tires were sold in the tiers, how large the tiers were, and whether there were significant dividing lines between the tiers. [460]

- Because of the lack of consensus about the scope and size of the tiers in the replacement market, there was no clear dividing line between the tiers. As a result, the record did not indicate that Chinese imports in one tier could not have an adverse impact on domestic volumes and prices in another tier of the market.[461]

In addition, the Panel evaluated the data that was supplied by the United States in answer to a question from the Panel. This data was part of the record evidence before the USITC. On the one hand, China accuses the Panel of being overly deferential to the USITC and of not conducting "its own searching review of whether the USITC conclusions were correct."[462] However, when the Panel uses evidence that was properly before it to conduct a detailed analysis

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[456] Panel Report, para. 7.203.

[457] China Appellant Submission, paras. 321 - 324.

[458] USITC Report, pp. 21 and 27 Exhibit US-1; Panel Report, para. 7.195.

[459] USITC Report, pp. 21 and 27 Exhibit US-1; Panel Report, paras. 7.201 - 7.205.

[460] USITC Report, pp. 21 and 27 Exhibit US-1; Panel Report, paras. 7.185 - 7.194.

[461] USITC Report, pp. 21 and 27 Exhibit US-1; Panel Report, paras. 7.185 - 7.194.

[462] China Appellant Submission, para. 325.

of the USITC's conclusions, China accuses the Panel of overreaching. The Panel reviewed the USITC's analysis in detail in light of all the evidence and the arguments made by the parties. By doing so, the Panel complied fully with its obligations as a reviewer of an investigation by a competent authority.

c. The Panel Reasonably Found that the USITC 's Correlations Analysis Was Consistent with the Protocol

157. The USITC found that subject imports were increasing rapidly during each year of the period of investigation, including the final two years of the period.[463] Having done so, the USITC then evaluated in detail the trends for these rapid increases in Chinese volumes as well as the price trend data for these imports, and compared them to the factors showing the domestic industry's overall condition, including its capacity, production, sales, shipment, employment, cost, profitability and market share data.[464] At the end of this detailed analysis, the USITC determined that there was a clear coincidence between the rapid increases in Chinese volumes and declines in the industry's condition.[465] As the USITC succinctly concluded:

> The significant increase in the volume of such imports coincided with significant underselling of the domestic products by the subject imports. It also coincided with the sharp decline in the domestic industry's performance indicators. The rising volume of subject imports from China has displaced domestic sales, and this displacement has led to declining domestic production, shipments, capacity utilization, employment, and profitability.[466]

As we discuss below, the USITC's analysis was reasoned and adequate, and fully consistent with the record data. As a result, the Panel reasonably found that it was not in error.

158. China challenges the Panel's decision to uphold the USITC's findings on several grounds. First, China argues that the Panel applied an improper standard to the USITC's coincidence findings, stating it failed to assess whether there was a close correspondence between the degrees of "relative magnitude" for year-to-year changes in trends for the Chinese tires and the industry.[467] Second, China argues that the USITC and the Panel failed to appreciate that there was a "fundamental disconnect" between the increases in Chinese imports and the industry's

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[463] USITC Report, p. 12. Exhibit US-1.

[464] USITC Report, pp. 22-29. Exhibit US-1.

[465] USITC Report, pp. 22-29. Exhibit US-1.

[466] USITC Report, p. 29. Exhibit US-1.

[467] China Appellant Submission, paras. 30 - 32 and 350 - 353.

declines in 2007 and 2008.[468] In China's view, the trend data for 2007 and 2008 showed that there was not a close connection between the declines in the industry's condition and the increases in import volumes in those two years.[469] Third, China contends that the Panel incorrectly upheld the USITC's conclusion that there was a coincidence between Chinese underselling over the period and the general deterioration in the industry's cost structure and profitability.[470] China argues that the USITC's analysis was flawed because the industry's cost structure and profitability improved in 2007, when imports increased by the largest amount.[471]

159. China's arguments have no merit. The record provides strong support for the USITC's finding that there was a coincidence of trends between Chinese imports and the industry's declines, as the USITC and the Panel both found.[472] In addition, China's arguments rely heavily on the assumption that the Panel was required to apply a heightened standard of review when reviewing the USITC's correlations analysis. As it did before the Panel, China argues that the Panel should not merely have assessed whether there was an overall correlation of trends between imports and the industry's condition over the period, but should have instead assessed whether there was a strong correlation in the "degrees of relative magnitude" of the changes in imports and industry trends.[473]

160. The Panel correctly rejected China's proposed approach. As we have previously noted, the Panel correctly concluded that, to the extent that a correlations analysis is used by the authority to assess causation,[474] the Appellate Body and WTO panels have made clear that a "coincidence of trends" analysis requires only an assessment of the "temporal relationship between movements in imports and movements in the injury factors,[475] that is, an assessment of year-by-year correlations between movements in import trends and the industry's condition factors. Moreover, as the Panel itself correctly stated, no Appellate Body or panel report has suggested that "the orders of magnitude {in the changes} are key" to a correlations analysis, or that "changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors."[476] Instead, the Panel explained that these reports simply found that

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[468] China Appellant Submission, paras. 30-31 and 354 - 369.

[469] China Appellant Submission, paras. 30-31 and 354 - 369.

[470] China Appellant Submission, paras. 32 and 370 - 380.

[471] China Appellant Submission, paras. 32 and 370 - 380.

[472] USITC Report, pp. 22–29. Exhibit US-1.; Panel Report, paras. 7.227-7.261.

[473] China Appellant Submission, paras. 30 and 297.

[474] Panel Report, para. 7.228.

[475] Panel Report, paras. 7.230 - 7.233 (*citing Argentina Footwear (Panel)*, para. 8.229; *Argentina Footwear (AB)*, para. 145; *U.S. - Steel Safeguards (Panel)*, paras. 10.299 and 10.302.)

[476] Panel Report, para. 7.232.

"imports should increase at the same time as the injury factors decline."[477]

i. The USITC Correctly Found a Coincidence of Trends Between Chinese Imports and Industry Declines

161. If one reads the record in this investigation, rather than China's descriptions of it, it is perfectly clear that China has no basis for asserting that there was not a "coincidence in trends" between rapidly increasing imports from China and the significant declines in the industry's condition. As the USITC and the Panel both found,[478] there was a clear overall "coincidence" in trends between the rapidly increasing imports and their effects on the domestic industry.[479] During a five year period in which Chinese import volumes increased rapidly in every year of the period the record showed that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;[480]
- The domestic industry's production declined in every year of the period, resulting in an overall decline of 26.6 percent;[481]
- The domestic industry's capacity declined in every year of the period, for an overall decline of 17.8 percent;[482]
- The domestic industry's U.S. shipments declined in every year of the period, for an overall decline of 29.7 percent;[483]
- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 percent;[484]
- The domestic industry's production-related workers fell by 14.2 percent;

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[477] Panel Report, para. 7.232.

[478] USITC Report, p. 29. Exhibit US-1; Panel Report, paras. 7.228 - 7.261.

[479] USITC Report, p. 29. Exhibit US-1.

[480] USITC Report, pp. 25-26. Exhibit US-1.

[481] USITC Report, Table C-1. Exhibit US-1.

[482] USITC Report, Table C-1. Exhibit US-1.

[483] USITC Report, pp. 15-18 and 24. Exhibit US-1.

[484] USITC Report, pp. 23-24. Exhibit US-1.

- The number of hours worked by the industry's employees fell by 17.0 percent; and
- Wages paid to the industry's employees fell by 12.5 percent over the period.[485]

Moreover, all of these factors were at their lowest levels in 2008, while Chinese tire imports were at their highest levels in 2008.[486]

162. Furthermore, as the USITC 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.[487] For example:

- 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.[488]

These data provided clear evidence of a coincidence between imports and declines in the industry's condition over the period of investigation.

163. Furthermore, China has no basis for arguing that there was not a significant degree of correlation between rapid increases in Chinese imports and continued significant declines in the industry's overall condition in 2007.[489] Although certain indicia of the industry's condition improved in 2007, such as the industry's profitability, productivity, and capacity utilization levels, there remained a coincidence in trends between the very rapid growth in Chinese imports in 2007 and the declines in the industry's overall condition in 2007.[490] Specifically, as increasing volumes of subject imports continued to undersell the domestic product by its largest margins in 2007:

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[485] USITC Report, pp. 17 and 24 and Table C-1. Exhibit US-1.

[486] USITC Report, pp. 17 and 24 and Table C-1. Exhibit US-1.

[487] USITC Report, Table C-1. Exhibit US-1.

[488] USITC Report, pp. 17 and 24 and Table C-1. Exhibit US-1.

[489] China Appellant Submission, paras. 354 - 362.

[490] China Appellant Submission, paras. 354 - 362.

- The industry's market share fell by 3.6 percent;
- The industry's capacity level declined by 8.8 percent;
- The industry's production levels fell by 2.4 percent;
- The industry's U.S. shipments fell by 5.0 percent;
- The industry's net sales quantities fell by 5.5 percent;
- The number of production workers employed by the industry fell by 6.4 percent;
- The number of hours worked by the industry's employees fell by 3.7 percent; and
- Wages paid to the industry's employees fell by 12.5 percent.[491]

Furthermore, even though certain factors, such as the industry's capacity utilization, profitability and productivity levels, improved somewhat in 2007, they 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.[492]

164. Next, China argues that there was no correlation in 2008 between rising imports and the deteriorating condition of the domestic industry.[493] This argument is 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.[494] At the same time, virtually every injury factor that the USITC examined fell to its lowest level for the period. 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 11.7 percent;

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[491] USITC Report, Table C-1. Exhibit US-1.

[492] USITC Report, Table C-1. Exhibit US-1.

[493] China Appellant Submission, paras. 354 - 362.

[494] USITC Report, Table C-1. Exhibit US-1.

- 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.[495]

In light of this record evidence, China's argument that there was an absence of correlation in 2008 is entirely without foundation.

165. China points to a comparatively small number of indicia for the year 2007, such as the improvements in the industry's profitability and productivity, in support of its notion that there was not a correlation of trends between the rapid increases in Chinese imports and the consistent declines in the industry's condition. As the Panel reasonably found, however, small year-to-year variations in trends do not establish that there is no "coincidence of trends" between increasing imports and material injury. The Panel noted that, "overall coincidence [in trends] is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered."[496] Applying the correct standard to the facts, the Panel correctly found that there was an overall coincidence in trends for 2007, even though certain industry indicia improved in that year.[497]

166. China also argues that the Panel conducted a "simplistic end-point-to-end-point analysis" of the USITC's correlations analysis.[498] This is simply not correct. It is readily apparent that the

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[495] USITC 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. USITC Report, Table C-1. Exhibit US-1. As the USITC noted, this "sharp increase in the ratio in 2008, when the volume of subject imports was highest and the margin of underselling was nearly at its greatest, indicate[d] that U.S. producers were experiencing a cost-price squeeze and unable to pass increasing raw material costs on to their customers." USITC Report, p. 24. Exhibit US-1.

[496] Panel Report, para. 7.233 *citing US – Steel Safeguards (Panel)*, para. 10.320.

[497] *See, e.g., US– Wheat Gluten (Panel)*, para. 8.102; *US – Steel Safeguards (Panel)*, para. 10.302.

[498] China Appellant Submission, para. 363.

Panel examined the year-to-year trends for imports and indicia of the industry's condition, and then reasonably concluded that the USITC had properly found a year-to-year correlation of trends over the period of investigation.[499] For example, the Panel highlighted a set of charts provided by the United States that demonstrated, quite plainly, that there was a direct correlation between year-to-year upward movements in import volumes and year-to-year downward movements in important indicators of the industry's condition, such as production capacity, production, U.S. shipments and net sales.[500] Similarly, the Panel highlighted the fact that various indicia of the industry's condition, such as market share, production, capacity, U.S. shipments, net sales quantities, and labor factors, all declined in every year of the period as the Chinese imports volumes grew.[501] Obviously, the Panel did consider the year-to-year trends for imports and the industry during the period, and reasonably affirmed the USITC's determination that the year-to-year data confirmed a coincidence of trends during the period.

167. China also asserts that the USITC and the Panel relied heavily on volume-based indicators of the industry's condition, such as the industry's production, production capacity, U.S. shipments, and net sales levels.[502] According to China, such an approach was flawed because any decline in volume-based indicia of the industry's condition simply reflects the domestic industry's business strategy of ceding the low-end replacement market to subject imports.[503] This argument is unfounded in several respects. First, the Protocol itself directs an authority to consider the "volume of imports" and their effect on the industry when assessing whether "market disruption exists.[504] Given this, it was entirely reasonable for the USITC and the Panel to consider volume-based factors in their analysis. Second, neither the USITC nor the Panel focused solely on volume-based factors in their analysis. Instead, the USITC and the Panel considered such other factors as the impact of imports on the industry's pricing, productivity, and profitability levels during the period.[505]

168. Finally, the Panel specifically considered and rejected China's argument that the USITC had erred when it found that the domestic industry did not voluntarily cede the low-end of the replacement market to imports from China.[506] The Panel explained that it was therefore

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[499] Panel Report, para. 7.234.

[500] Panel Report, para. 7.236.

[501] Panel Report, para. 7.234.

[502] China Appellant Submission, paras. 355-359.

[503] China Appellant Submission, paras. 355-358.

[504] Protocol of Accession, para. 16.4.

[505] USITC Report, pp. 23-24; Panel Report, paras. 7.235 and 7.239 - 7.261.

[506] Panel Report, para. 7.237. The Panel reviewed and rejected China's business strategy argument in paras. 7.285-7.322 of its report.

reasonable for the USITC to consider volume-based metrics when analyzing correlation. The Panel added that the domestic industry suffered declines in operating income, operating margins, capacity utilization, and productivity in three out of the four years of the period, and all of these factors were at their lowest levels for the period in 2008 when subject imports were at their highest levels. The Panel determined that it was entirely appropriate for the USITC to consider these factors in its analysis.[507]

169. In sum, the Panel properly concluded, that the USITC's analysis more than adequately satisfied its obligations under the Protocol.

ii. The USITC Also Reasonably Found That Chinese Imports Had Adverse Effects on Domestic Prices

170. China also attacks the USITC's finding that the Chinese imports had an adverse effect on the industry's prices and profitability during the period of investigation.[508] For example, China argues that the Panel simply accepted the USITC's finding that, on an overall level, the record showed the industry was experiencing a "cost-price" squeeze during the period, and failed to consider the fact that the industry's costs of goods sold to sales ratio improved in 2007.[509] This misstates the Panel's analysis. The Panel did not simply accept the USITC's finding without analysis, as China indicates. Instead, the Panel expressly considered and rejected China's argument that the improvement in the industry's costs of goods sold to sales ratio in 2007 indicated there was not a coincidence in trends between growing import volumes and changes in the industry's cost structure.[510] As the Panel explained, the USITC's finding of an overall coincidence was not invalidated merely because "annual movements in every single injury factor did not precisely track annual movements in the subject imports."[511] The record showed the industry's ratio of costs of goods sold to sales increased in three of four years of the period, providing a sound basis for finding an overall coincidence between changes in the industry's cost of goods sold to sales ratio and increases in imports.[512]

171. Moreover, despite China's arguments to the contrary, the sharp increase in the cost of goods sold to sales ratio that occurred in 2008 supports this conclusion.[513] As the USITC and the

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[507] Panel Report, para. 7.238.

[508] China Appellant Submission, paras. 368-380.

[509] China Appellant Submission, para. 368.

[510] Panel Report, paras. 7.246 - 7.247.

[511] Panel Report, para. 7.244.

[512] Panel Report, para. 7.244.

[513] China Appellant Submission, para. 368.

Panel both found, the increase in this ratio in 2008 clearly correlated with a significant increase in the volumes of the Chinese imports in 2008, which was the year that Chinese imports reached their highest levels both absolutely and relatively for the period. Given that underselling margins for the Chinese imports were at very high levels in 2008, the corresponding deterioration in the industry's cost structure in that year provided additional support for the USITC's conclusion that domestic producers were experiencing a "cost-price squeeze" in 2008.[514] Indeed, as the Panel confirmed, the record showed that increases in the industry's unit costs over the period far outstripped the increases in its prices for a typical price product.[515] Given these considerations, the Panel properly found that the USITC established that the industry was experiencing a "cost-price squeeze" through the period, including 2008.

172. China also argues that the Panel simply accepted the USITC's finding that the consistent levels of underselling by the Chinese imports had an adverse effect on the industry's prices.[516] Once again, China is mistaken. The Panel reviewed the USITC's findings so as to be satisfied that the USITC had conducted a thorough evaluation of pricing in the tires market and reasonably explained how the persistent and significant underselling by subject imports contributed to the deteriorating condition of the domestic industry.[517] To perform its underselling analysis, the USITC collected quarterly pricing for six specific products, which were defined by their specific dimensions, load indexes, and speed ratings of each to ensure compatibility.[518] As the USITC explained, the price comparisons for these products showed that the Chinese imports undersold the U.S. tires in 119 out of 120 comparisons, and that the average margins of underselling were at their highest in 2007 and 2008, which coincided with the largest volumes of subject imports.[519] Moreover, as the Panel found, the record did show that persistent underselling by the Chinese

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[514] USITC Report, p. 24. Exhibit US-1. The USITC noted that it had received information from three domestic producers that they either had to reduce prices or roll back announced price increases in order to avoid losing sales to competitors selling subject tires from China. *Id.*

[515] Panel Report, para. 7.245. In fact, U.S. cost increases far outpaced the increase in U.S. prices for pricing products 1-4, the most voluminous products. USITC Report, Tables V-9-V-12. Exhibit US-1.

[516] China's Appellant Submission, para. 370.

[517] Panel Report, paras. 7.254 - 7.260.

[518] USITC Report, V-23-24. . Exhibit US-1. Despite China's argument that different speed ratings cause the USITC data to be unreliable, one of respondent's own witnesses testified in this case that product 3 (which is the only passenger vehicle price product to have three speed ratings) "is a commodity tire size and that there is little difference in the S, T, and H speed ratings in that particular size." *Id.* at V-35 *citing* Hearing Transcript, p. 304 (Berra). Exhibit US-1.

[519] USITC Report, Tables V-9-V-14 and Table C-1. Exhibit US-1.

tires correlated with an significant erosion in the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment.

173. Nonetheless, China claims that the Panel failed to assess whether these margins of underselling coincided with changes in the industry's profitability levels.[520] This is not correct. The Panel specifically addressed China's assertion that there was no correlation between underselling and profitability because the industry's profitability levels improved in 2007.[521] The Panel explained that the USITC was not required to address the lack of coincidence between underselling and profitability trends in that one year.[522] Moreover, the Panel reasonably pointed out that, although the industry's profitability may have improved in 2007, this fact did not undermine the USITC's finding that there was otherwise a coincidence of trends between rapidly increasing imports and declines in the industry's conditions, because the industry's operating margins fell by 4.8 percentage points over the period and declined in three out of four years.[523] In sum, the Panel reasonably rejected China's attempt to transform the overall coincidence standard into a perfect coincidence standard.

174. China also argues that the USITC failed to explain "how U.S. producers were able to consistently raise their prices {over the period} if underselling by imports from China was truly a competitive obstacle."[524] As the Panel explained, however, China's argument reflects a fundamental misunderstanding of the USITC's price effects findings.[525] As the Panel noted, the USITC did not conclude that the Chinese imports had depressed U.S. prices during the period of investigation. Instead, the USITC found that the pervasive underselling by Chinese imports suppressed price increases that would have occurred in the absence of such price competition.[526] As the USITC stated, "continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs and thus suppressed prices."[527] To take the example cited by China, while it is true that the price of U.S. tires for pricing product no. 1 increased by about $4.00 from 2007 to 2008, that increase was not, enough to offset the corresponding increase in the industry's cost of goods sold, which increased by

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[520] China's Appellant Submission, paras. 371-372.

[521] Panel Report, para. 7.258.

[522] Panel Report, para. 7.258.

[523] Panel Report, para. 7.258.

[524] China Appellant Submission, para. 373.

[525] Panel Report, para. 7.245.

[526] USITC Report, pp. 23-24. Exhibit US-1.

[527] USITC Report, p. 24. Exhibit US-1.

almost $9.00 over the same period.[528] The USITC reasonably found that consistent large margins of underselling by the Chinese imports were a significant factor in the industry's inability to pass on its increasing costs to its customers.

175. China also argues that the Panel should not have affirmed the USITC's underselling analysis because the USITC "ignored the effects of attenuated competition on underselling."[529] As discussed above, China's argument is unavailing because the record did not show that competition in the marketplace between Chinese and U.S. tires was attenuated. Instead, as the USITC and the Panel both concluded, the record data showed a significant degree of competition between Chinese imports and U.S. tires in the market.[530] In addition, the large majority of market participants reported that tires from China and domestically produced were "always" or "frequently" interchangeable.[531] Thus, as the Panel explained, the record did not show "that any differentiation in the replacement market, was so clearly defined, or pronounced, that it should have been incorporated into the pricing analysis undertaken by the USITC."[532] Given the foregoing, it was entirely reasonable for the USITC to conclude that the levels of pervasive underselling by Chinese imports in the market actually reflected significant pricing competition in the market. The Panel did not commit error by upholding this finding.

176. Finally, China argues that the Panel "dismissed the implications of the much larger volumes of non-subject imports that were also underselling the U.S.-produced tires."[533] We address the issue of the impact of non-subject imports more specifically below in our discussion of China's claims relating to "other causes" of injury. We would simply note, however, that China has no basis for blaming non-subject imports for any price suppression in the market. As the Panel pointed out, the average unit values for non-subject imports were significantly higher than the average unit values for subject imports during the period of investigation.[534] Moreover, although the average unit values of subject imports increased by $7.80 during the period of investigation, the average unit values of the non-subject imports increased by $14.87 over the same period, twice as much as subject imports[535] Furthermore, unlike subject imports which gained market share in every year of the period, the market share of non-subject imports

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[528] USITC Report, Table C-1. Exhibit US-1. The domestic industry's selling, general, and administrative expenses also increased during this period by over $1.00.

[529] China Appellant Submission, paras. 375, 377.

[530] USITC Report, pp. 21-27 Exhibit US-1; Panel Report, paras. 7.185 - 7.197.

[531] USITC Report, p. 23. Exhibit US-1.

[532] Panel Report, para. 7.258.

[533] China Appellant Submission, para. 379.

[534] Panel Report, para. 7.364.

[535] Panel Report, para. 7.364.

remained steady for most of the period. Given these facts, the Panel reasonably rejected the idea that non-subject imports had a more significant competitive effect on the industry than the Chinese imports.[536]

177. In sum, the USITC's findings on price were supported by the record and, as the Panel found, fully in accordance with the requirements of the Protocol. The evidence showed that rapidly increasing volumes of highly substitutable subject imports from China pervasively undersold the domestic like product and were therefore able to gain market share from the domestic industry. This displacement of market share by subject imports had a negative effect on the domestic industry as it was forced to adapt to recover costs on a reduced volume of sales.

d. The Panel Reasonably Found that the USITC's Consideration of "Other Factors" Was Consistent with the Protocol

178. Finally, China contends that the Panel erroneously concluded that the USITC reasonably considered and addressed the effects of other factors that were allegedly causing injury to the industry, including non-subject imports, alleged demand declines in the market, and the industry's alleged business strategy of shifting to higher value products.[537] According to China, the USITC failed to adequately "separate and distinguish" the effects of these three factors in its analysis and failed to provide a "reasoned and adequate" discussion.[538]

179. Specifically, China argues that the USITC did not have an adequate factual foundation for its finding that the industry chose to reduce its capacity, in significant part due to the growing volumes of low-cost Chinese imports in the market.[539] China also asserts that the USITC did not adequately analyze the impact of demand changes in the market on the industry, which China claims were a more significant cause of injury to the industry than Chinese imports.[540] Further, China contends, the USITC failed to analyze non-subject imports at all, even though these imports were, in China's view, a much more significant competitive factor in the market than the Chinese imports.[541] Finally, China argues that the Panel erred in "accepting these conclusions of the USITC, claiming that the Panel simply deferred to them and often substituted its own findings for those of the USITC."[542]

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[536] Panel Report, para. 7.367

[537] China Appellant Submission, paras. 381 - 531.

[538] China Appellant Submission, paras. 240 - 257, 281-290, and 381 - 385.

[539] China Appellant Submission, paras. 403-435.

[540] China Appellant Submission, paras. 436 - 469.

[541] China Appellant Submission, paras. 470 - 479.

[542] China Appellant Submission, paras. 381 - 531.

180. The Appellate Body should reject these arguments, just as the Panel did below. The Panel considered and rejected each of these arguments after performing a thorough analysis of the USITC's findings and the record underlying them. We discuss these issues in more detail below. However, we would note that China's arguments are based on the erroneous premise that the USITC was required by the Protocol to perform an analysis "separating and distinguishing" the effects of these factors in detail, as might be expected of an authority conducting an investigation under the Safeguards or Antidumping Agreements.[543] The Panel properly rejected this notion.[544] As we explained previously, in contrast to these WTO agreements, the Protocol does not contain an explicit requirement that an authority must ensure that it not attribute the injury caused by these factors to the subject imports.[545]

181. Thus, in the absence of such an explicit requirement, the USITC was not required to perform the same detailed "separate and distinguish" analysis of these alleged other factors that is required under these other WTO agreements.[546] Instead, the USITC has a degree of discretion with respect to the analytical approach that is used to address the effects of these factors under the Protocol.[547] Accordingly the Panel explained that the issue here is not whether the USITC provided a detailed analysis that specifically "separates and distinguishes" the alleged effects of these other factors from the injurious effects from the Chinese imports. Rather, the issue is whether the USITC properly concluded that the Chinese imports have significant injurious effects that "cannot be explained by the existence of other causal factors."[548] And here, as the Panel concluded, the USITC did so.[549]

i. The USITC Reasonably Determined that the Industry Shut Down Capacity Due in Significant Part to Low-Cost Chinese Imports

182. China first argues that the USITC had no factual basis for its conclusion that several U.S. producers closed production facilities in 2006 in response to the rapid increase in Chinese

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[543] China Appellant Submission, paras. 240 - 257, 281-290, and 381 - 385.

[544] Panel Report, paras. 7.174 - 7.178.

[545] Compare the Safeguards Agreement, Article 4.2(b) and Antidumping Agreement, Article 3.5, with the Protocol, paras. 16.1 and 16.4.

[546] *US – Upland Cotton (AB)*, paras. 436-438; *see also US – Upland Cotton (Panel)*, paras. 7.1343 -44.

[547] *US – Upland Cotton (AB)*, paras. 436-438; *see also US – Upland Cotton (Panel)*, paras. 7.1343 - 44.

[548] Panel Report, para. 7.177.

[549] Panel Report, paras. 7.262 - 7.379.

imports.[550] China argues that none of these producers stated specifically that Chinese imports were an important factor in the closure of these facilities.[551] China asserts that the record showed that producers voluntarily "chose to withdraw their domestic production from the low-value segments of the replacement market and focus instead on the high-value segments."[552] In China's view, Chinese imports merely "filled a 'supply gap' left by the retreating domestic industry."[553]

183. The USITC correctly concluded that Chinese imports played an "important part" in these closures.[554] As the Panel explained, the USITC properly treated this as a "serious issue that had to be addressed,"[555] and reasonably rejected China's claim that "domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market and that the subject imports simply filled the void left by their departure."[556] Moreover, the USITC had an ample factual foundation for this conclusion. As the USITC explained, imports of tires from China had been increasing rapidly before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006 and 2008.[557] Further, the record showed that these "companies confirmed in statements issued at the time of the announcements [of the closings] that low-priced competition from Asia, including China," was an important factor in the decisions.[558]

184. In addition, the record contained contemporaneous articles in the trade press reporting

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[550] China Appellant Submission, paras. 387 - 435.

[551] China Appellant Submission, paras. 403 - 427.

[552] China Appellant Submission, para. 383.

[553] Panel Report, para. 7.285.

[554] USITC Report, p. 26. Exhibit US-1.

[555] Panel Report, para. 7.286; *see* USITC Report, pp. 24-25 and 26. Exhibit US-1.

[556] USITC Report, p. 26. Exhibit US-1.

[557] USITC Report, p. 26 and Table C-1. Exhibit US-1. In particular, the USITC noted that the record showed that the total quantity of the subject imports had increased by 42.7 percent between 2004 and 2005, by an additional 29.9 percent by 2006, and by an additional 53.7 percent in 2007. USITC Report, p. 26, n.146. Exhibit US-1.

[558] USITC 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. USITC Report, p. 26, n. 147. Exhibit US-1.

that the Chinese industry was significantly expanding its capacity to produce and export tires.[559] Indeed, one article stated that growing Chinese imports were having a "profound" impact on the U.S. market during the very point in time that these closures occurred.[560] Finally, the record did not indicate that U.S. producers themselves were the primary reason Chinese tires had grown so rapidly during the period.[561] On the contrary, the record showed that imports by U.S. tire producers accounted for less than a quarter of Chinese imports in 2008.[562] Accordingly, the USITC found that the industry's capacity reductions in the latter years of the period were, in significant part, a "reaction to increases in subject imports from China," as well as those that were likely to continue.[563] As the Panel concluded, the USITC had a firm factual foundation for its conclusion that the industry had not simply made a strategic decision to shift their production to higher end products.

185. China argues that the USITC mistakenly found that Chinese imports were an "important part" of the decisions of the three U.S. producers to shut down certain facilities in the middle of the period.[564] According to China, two of the three producers, Bridgestone and Goodyear, did not actually state that they were shutting down these facilities because of imports from China. Instead, China argues that they merely stated that they were shutting down the facilities because of low-cost" import competition.[565] As the Panel correctly concluded, however, the USITC reasonably concluded that Chinese imports were an "important part" of these producers' decisions to close their facilities.[566]

186. First, the record showed clearly that Bridgestone closed its Oklahoma City facility due, in significant part, to "low-cost" competition from Chinese imports.[567] In its press release

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[559] USITC Report, p. 27, nn.148 and 150. Exhibit US-1.

[560] USITC Report, p. 27, n.150. Exhibit US-1.

[561] USITC Report, p. 26.

[562] USITC Report, p.26

[563] USITC Report, pp. 26-27, nn.148 and 150. Exhibit US-1. For example, an industry periodical reported in March 2006 that China had exported an estimated 21 million tires to the United States in 2005. That periodical stated that the "overall effect [of Chinese imports] on domestic supply [had been] 'profound.'" The article predicted that the impact of China on the market was "likely to remain so as imports increase. USITC Report, p. 27, n. 150. Exhibit US-1. (Emphasis added).

[564] China Appellant Submission, paras. 405-427.

[565] China Appellant Submission, paras. 408 - 427.

[566] Panel Report, paras. 7.298 - 7.308.

[567] USITC Report, p. 26 and n. 147 and p. III-16, n. 62. Exhibit US-1; Panel Report, para. 7.300.

announcing the closure, which was the largest single such closure of a U.S. tire facility during the period,[568] Bridgestone stated that "fierce competition from low-cost producing countries" was a significant factor in its decision to shut down the Oklahoma City facility in 2006.[569] The USITC's record also contained a news article, issued at the time of the closing, in which a Bridgestone official stated that:

> But the reality is, this plant produces tires in the low-end segment of the market where demand is shrinking and fierce competition from low-cost producing {sic} is increasing . . . . Even with substantial new investment, global market forces make it virtually impossible to restore the plant to a competitive position and stem the huge losses.

Moreover, the article specifically stated that the official explicitly cited "low-cost Korean and Chinese-made tires flooding the U.S. market as one of the reasons for the plant's economic troubles."[570] Obviously, given this article, China has no basis for arguing that Bridgestone did not shut down this facility due, in significant part, to the adverse influence of rapidly increasing Chinese imports in 2006.[571]

187. The USITC also had a firm basis for finding that Goodyear announced the closure of its tire facility in Tyler, Texas because of significant competition from Chinese imports.[572] As the USITC explained, at the time of the closure announcement of the Tyler plant in 2006,[573] Goodyear reported that it was closing the plant because of "pressure from low-cost imports which competed with the plant's small-diameter passenger car tires."[574] Although Goodyear did not specifically identify China as one of the "low-cost" sources of these imports, the record

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[568] USITC Report, Table I-3. Exhibit US-1.

[569] USITC Report, p. 26 and n.147 and p. III-16, n. 62. Exhibit US-1.

[570] Panel Report, para. 7.303; "Dayton Tire Plant to Close," Exhibit US-37. (Emphasis added). This article was attached as an exhibit to petitioners' pre-hearing brief during the USITC's the investigation.

[571] China attempts to prove, for reasons that are not clear to the United States, that the Panel mistakenly thought the article directly quoted the official. China Appellant Submission, paras. 410 - 411. Like many of China's points, this is a meaningless quibble. The fact remains that the article shows that an official at Bridgestone reported to the press, at the time of the closure announcement, that the closure was due, in significant part, to adverse competition from China. That much is very clear.

[572] USITC report, pp. 26 and n. 147 and I-16. Exhibit US-1.

[573] The closure of the Tyler facility by Goodyear was the second largest closure announced in the period. USITC Report, Table I-3. Exhibit US-1.

[574] USITC report, pp. 26 and n.147 and I-16. Exhibit US-1.

showed that, by 2006, China had become the single largest foreign source of tire imports in the U.S. market,[575] and the second lowest-priced source of imported tires in the U.S. market.[576] Moreover, in 2006, Chinese imports were underselling U.S. tires by significant amounts.[577] Given that the volumes and market share of Chinese imports nearly doubled between 2004 and 2006, and that the Chinese imports reached a market share level of 9.3 percent in 2006,[578] it was clear that the USITC had a reasonable basis to conclude the "low-cost imports" that led to the closure of the Tyler plant included imports from China.

188. Furthermore, it is telling that China ignores a contemporaneous trade journal article, which emphasized the extraordinary impact Chinese tires were having on the U.S. market in 2006.[579] In that article, which the USITC cited in its determination, the trade journal estimated that China had exported an estimated 21 million tires to the United States in 2005. The article stated that the "overall effect [of these Chinese imports] on domestic supply [had been] 'profound.'"[580] Moreover, the article predicted that the impact of China on the market was "likely to remain so as imports increase."[581] In light of these reports, and the other data showing the increasing impact of Chinese imports on the U.S. market, the USITC had a reasonable basis for concluding that U.S. producers had made capacity and production decisions in response to the growing influence of Chinese imports in the market. The Panel reviewed the evidence and the arguments of the parties and properly concluded that the USITC finding was supported by the evidence.[582]

189. Despite the evidence, China argues that it "makes no sense" for the USITC to blame Chinese imports for these closures.[583] According to China, the "low cost imports" causing these closures were more likely to be non-subject imports since they occupied a larger share of the market than Chinese imports in 2006.[584] This argument overlooks several critical facts. First, by 2006, China had become the largest single-foreign country source of imports in the U.S. market and its average unit prices were then the lowest of any single exporting country in the U.S.

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[575] USITC Report, at p. II-2 (Table II-1). Exhibit US-1.

[576] USITC Report, at p. II-3 (Table II-1). Exhibit US-1.

[577] USITC Report, p 23, n. 130. Exhibit US-1.

[578] USITC Report, Table C-1. Exhibit US-1.

[579] USITC Report, p. 27, n. 150. Exhibit US-1.

[580] USITC Report, p. 27, n. 150. Exhibit US-1.

[581] USITC Report, p. 27, n. 150. Exhibit US-1. (Emphasis added).

[582] Panel Report, paras. 7. 317 - 7.319.

[583] China Appellant Submission, paras. 426, 414 - 415 and 423 - 424.

[584] China Appellant Submission, paras. 414 - 415 and 423 - 424.

market, with the exception of Indonesia.[585] By definition, China was one of the two "low-price" sources for tire imports in the market in 2006.

190. Further, the Chinese imports gained approximately 4.6 percentage points of market share between 2004 and 2006, which compares with a 2.6 percentage points market share gain by non-subject imports during the same period. As the Panel found, the larger growth in market share for the Chinese imports further suggests that Chinese imports were having a more significant impact on the industry, in market share terms, than the non-subject imports in 2006. Finally, as noted, an industry trade journal reported that Chinese imports were having a "profound" impact on the U.S. tires market in 2006.[586] All of these facts supported the USITC's reasonable conclusion that the "low-cost imports" that caused the closure of several U.S. production facilities in 2006 included Chinese imports. China has no real basis for asserting otherwise.

191. Finally, China criticizes certain aspects of the Panel's decision to uphold the USITC's findings. For example, China claims that the Panel's assessment of the evidence supporting the USITC's findings "suggests bias" because the Panel did not give weight to evidence concerning other factors affecting the closures.[587] China has no basis for attacking the Panel's objectivity in this manner. The issue presented to the Panel for review on this issue was not whether the USITC should have concluded that Chinese imports were the "sole" or "primary" reason for the closures of these facilities. As we have already pointed out, the Protocol does not require that Chinese imports be the "sole" or "primary" cause of material injury to the industry. Instead, the Protocol requires that Chinese imports be a "significant," that is, "important" or "notable," cause of such injury.

192. As a result, it was appropriate for the USITC – and the Panel – to assess whether the Chinese imports were an "important part" of the closure decisions in 2006.[588] Since the record showed that Chinese imports did, in fact, play an important role in the decisions to close at least two of these facilities, the USITC and the Panel reasonably concluded that the decision to close these facilities reflected, in a significant manner, the adverse impact of Chinese imports on the industry during the period. Thus, even if other factors had some impact on these decisions, this does not undermine in any significant way a conclusion that the Chinese imports played an "important part" in these decisions.[589]

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[585] USITC Report, at pp. II-2, II-3 (Table II-1). Exhibit US-1. The Panel noted that Indonesian imports "represented only 3.4 per cent of total imports in 2006, compared to subject imports' 21.2 per cent share." Panel Report, para. 7.364.

[586] USITC Report, p. 27, n. 150. Exhibit US-1.

[587] China Appellant Submission, para. 421.

[588] USITC Report, p. 26. Exhibit US-1.

[589] Panel Report, paras. 7.287 - 7.311.

193. Similarly, China argues that the Panel committed error when it rejected the USITC's finding that Chinese imports played a role in the closure of Continental's Charlotte, North Carolina facility but then failed to assess whether this conclusion undermined the USITC's finding that Chinese imports played a part in other plant closures.[590] Although the United States disagrees with the Panel's conclusion that Continental did not close its plant as a result of competition from Chinese imports,[591] the United States believes the Panel reasonably concluded that this finding did not undermine the USITC's overall conclusion that Chinese imports were an "important part" of the closure decisions. As the Panel concluded, the record showed that Chinese imports played a significant role in the facility closures announced by Bridgestone and Goodyear in 2006.[592] The closure of these two facilities were the two largest closures announced during the period, and represented a reduction in the industry's capacity of approximately 30.1 million tires,[593] which represented more than ten percent of the industry's capacity in 2006.[594] In light of this, the Panel was entitled to find that the Bridgestone and Goodyear closures provided ample support for the USITC's finding that the reductions in the industry's capacity in 2006 were significantly affected by Chinese imports.[595]

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[590] China Appellant Submission, paras. 405 - 407 and 432.

[591] As the United States explained to the Panel, at the time of its announcement of the closure, Continental explained that the closure was attributable to "global competition putting pressure on us as our manufacturing costs are cheaper overseas." USITC Report, p. I-15. Exhibit US-1. While it was true that Continental emphasized that it was moving facilities overseas in order to get the benefit of its lower cost facilities there, it was also true that market observers reported imports from China were having a "profound" effect on domestic supply in 2006, and that domestic producers were publicly acknowledging that low-cost imports were putting significant pricing pressure on their low-end facilities in 2006, the year that Continental closed its tires production facility in Charlotte, North Carolina. USITC Report, p. 26. Exhibit US-1. As a result, when Continental attributed the closure of its Charlotte facility to "global competition," the USITC reasonably concluded this statement indicated that Continental, like Bridgestone and Goodyear, chose to close its Charlotte facility as a result of significant pricing pressure coming from low-cost global competitors, including imports from China. The United States continues to believe that it is more reasonable to read the release in this manner, as opposed to reading it to mean that Continental's overseas operations were competing so aggressively with their Charlotte facility that Continental was forced to shut down its own Charlotte facility.

[592] Panel Report, paras. 7.298 - 7.310.

[593] USITC Report, p. I-13 (Table I-3). Exhibit US-1.

[594] USITC Report, Table C-1. Exhibit US-1. The industry had a capacity of 215.2 million tires in 2006. *Id.* Exhibit US-1.

[595] Moreover, the record showed that two other producers reported that they shut down facilities or reduced production during the period of investigation, due in significant part to

ii. China's Criticism of the Panel's General Observations Are Also Unfounded

194. China also criticizes a series of "general observations" made by the Panel about China's arguments before the Panel proceeded to review the USITC's "business strategy" analysis.[596] As an initial matter, the United States would note that the Panel's "general observations" were not a necessary component of its conclusion that the USITC reasonably found that Chinese imports played an important role in the plant closures that occurred in 2006. The United States does, however, believe that the Panel's general observations do highlight the inherent weaknesses of China's assertion that the industry voluntarily chose to withdraw from the low end of the tires market and that Chinese imports simply filled the void left by this departure.[597] Accordingly. the United States briefly addresses China's criticisms of these "general observations" below.

195. First, the Panel observed that it could not agree that Chinese imports were entering the market in increasing volumes simply because they were filling the void left by the industry when it "voluntarily" left the low-end of the market during the period.[598] The Panel reasonably questioned why the Chinese imports would continue to undersell the industry at significant levels if they were simply filling a void left by the industry.[599] China argues that the Panel's observation was flawed because it did not take account of the fact that these underselling levels merely reflected the significant "brand distinctions" that existed between U.S. and Chinese tires because they were primarily in different tiers of the replacement market.[600] China's criticism is not consistent with the underlying evidence. As the USITC and the Panel both concluded, the record did not establish that there are clear competitive distinctions between the tiers in the replacement market or that products sold in one tier did not have effects on the prices or volumes of products sold in another tier.[601] Given this, China's criticism of the Panel's observation does

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competition from low-priced imports. For example, Michelin reported that, in 2006, it reduced production by 30 to 40 percent at its plant in Opelika, Alabama, due to "'shrinking demand in the mass market tire market and to intense cost pressure due to imports from competitors in lower-cost countries.'" USITC Report, p. I-17. Exhibit US-1. Similarly, in December 2008, Cooper announced the closure of its Albany, Georgia plant, citing "'increased lower-priced imports and the softening domestic demand for {its} products.'" USITC Report, p. I-16. Exhibit US-1.

[596] China Appellant Submission, paras. 391 - 402 (addressing Panel Report, paras. 7.291 - 7.297).

[597] Panel Report, paras. 7.291 - 7.297.

[598] Panel Report, para. 7.292.

[599] Panel Report, para. 7.292.

[600] China Appellant Submission para. 393.

[601] USITC Report, p. 27, Panel Report, paras. 7.185 - 7.197.

not undermine the validity of the Panel's observation.

196. Similarly, China contends that the Panel's observation overlooked the fact that the prices of Chinese and U.S. tires were increasing throughout the period.[602] According to China, the domestic industry's ability to increase its prices in the face of consistent underselling by subject imports indicates that the domestic industry's tires were, in fact, competing in different market segments than the Chinese products.[603] As the United States pointed out in its discussion of China's price effects arguments, China fails to appreciate that, while it is true that the industry was able to raise its prices, the industry was suffering price suppression during the period, and could not raise its prices significantly enough to cover the increases in its costs of goods sold.[604] Moreover, the record showed that, as the growing volumes of Chinese imports continued to undersell the domestic tires, the ratio of the industry costs of goods sold to its net sales revenues increased from 84.7 percent in 2004 to 90.1 percent in 2008, resulting in an overall decline of 4.8 percentage points in the industry's operating income margins.[605] In other words, the domestic industry's ability to raise its prices during the period was not a sign of health. Instead, when compared to the industry's more significant growth in costs, the price increases actually show the industry was losing ground over the period on price.

197. As its second general observation, the Panel pointed out that, if the domestic industry's voluntary withdrawal had really left a void in the low end of the market, "one would have expected that both subject and non-subject imports would have benefitted from the domestic industry's withdrawal."[606] In a puzzling argument, China claims that the non-subject imports did, in fact, benefit from the industry's "voluntary withdrawal" from this market because the volumes of the non-subject import "drop{ped} by only 5 million tires across the period of investigation."[607] China's argument that the non-subject imports "held up quite well" during the period only makes sense if one overlooks the fact that, during the period of investigation, the Chinese imports increased by more than 31 million tires.[608] In other words, when the industry "voluntarily withdrew" from the low end of the market, the quantities sold of U.S. and non-subject tires dropped significantly while the quantities sold of the Chinese imports increased significantly.[609] There is no doubt that the Chinese imports were the only real beneficiaries of the

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[602] China Appellant Submission para. 394.

[603] China Appellant Submission para. 394.

[604] USITC Report, p. 23 -24. Exhibit US-1.

[605] USITC Report, Table C-1. Exhibit US-1.

[606] Panel Report, para. 7.293.

[607] China Appellant Submission, para. 397.

[608] USITC Report, Table C-1. Exhibit US-1; China Appellant Submission, para. 397.

[609] USITC Report, Table C-1. Exhibit US-1.

domestic industry's allegedly "voluntary" departure from the low end market, just as the Panel found.

198. Third, the Panel rejected China's argument that the industry had benefitted from its own importations of Chinese tires over the period.[610] The Panel pointed out that, during the period, there was no apparent "positive connection between the volumes of subject imports and the profitability of the domestic industry."[611] China now argues that the Panel's comment was misplaced because the issue was not whether Chinese imports benefitted the industry but rather whether they were a significant cause of material injury to the industry. In fact, it is China's argument that is misplaced. The Panel made clear that this general observation was a direct response to China's argument before the Panel that the industry had benefitted from its importations of Chinese imports over the period, which included improved profitability levels.[612] The Panel pointed out, however, that there was correlation between the increases in Chinese tires and the industry's profitability levels during the period.[613] In three of four comparison years, the industry's profitability levels dropped as Chinese imports increased.[614] Thus, the Panel's observation did correctly undermine yet another of China's unfounded assumptions.

199. Finally, the Panel observed that, if the domestic industry had adopted a strategy of shifting production from the United States to China, as China claimed, then the Panel would have expected the industry to account for a higher percentage of the Chinese imports in 2008, when it accounted for only 23.5 percent of those imports.[615] China asserts that the Panel has again missed the point, arguing that the Panel should have recognized that these imports frm China could not be injurious because they were imported by the domestic industry itself.[616] As the USITC and the Panel both concluded, the record showed that the domestic industry was not turning to Chinese imports because it had made a voluntary decision to shift some production to China.[617] Instead, the domestic industry was turning to these imports because it concluded that it could no longer compete with low cost imports from China.[618] The act that the domestic industry was required to turn increasingly to Chinese imports does, therefore, reflect the injurious adverse effects of the rapidly growing Chinese imports.

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[610] Panel Report, para. 7.294.

[611] Panel Report, para. 7.294.

[612] Panel Report, para. 7.294.

[613] Panel Report, para. 7.294.

[614] USITC Report, Table C-1. Exhibit US-1.

[615] Panel Report, para. 7.295.

[616] China Appellant Submission, paras. 400-401.

[617] USITC Report, pp. 26 - 27. Exhibit US-1; Panel Report, paras. 7.298 - 7.311.

[618] USITC Report, pp. 26 - 27. Exhibit US-1; Panel Report, paras. 7.298 - 7.311.

iii. The USITC Reasonably Analyzed the Impact of Demand Trends on the Industry

200. China also argues that the USITC and the Panel both failed to evaluate seriously demand declines in the U.S. market as a possible alternative cause of injury to the domestic industry.[619] China asserts that there was a significant contraction in apparent U.S. consumption of tires over the entire period of investigation, and argues that neither the USITC nor the Panel properly evaluated whether this contraction caused the industry's declines.[620] China asserts that the USITC failed to discuss many of these issues at all and that the Panel improperly substituted its own analysis on these issues.[621]

201. The USITC did, however, properly address the issue of demand, and did properly find that subject imports had injurious effects independent of any injury caused by changes in demand.[622] In its analysis, the USITC addressed the factors that affect demand in the market and how demand, as measured by apparent U.S. consumption changed over the period. The USITC then evaluated whether any demand changes impacted the domestic industry's condition during the period.[623] In its analysis of the industry's condition, for example, the USITC explained:

> Demand for passenger vehicle and light truck tires depends on changes in the number of new passenger vehicles and light trucks produced in the United States, changes in the numbers of existing passenger vehicles and light trucks that need replacement tires, and changes in the total number of miles driven. U.S. apparent consumption fluctuated during the period examined, but was highest in 2004 and lowest in 2008. Demand for OEM tires declined during 2008 due to decreased passenger car production. Demand for replacement market tires also declined during 2008 because of a decrease in miles traveled, consumers' desire to get more miles out of existing tires, and the weak economy.[624]

The USITC also addressed these demand changes in its causation analysis, and again emphasized changes over the entire period of investigation, demand changes between 2007 and 2008,

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[619] China Appellant Submission, paras. 4336 - 469.

[620] China Appellant Submission, paras. 437 - 446.

[621] China Appellant Submission, paras. 438 - 440.

[622] Panel Report, para. 7.333.

[623] USITC Report, pp. 15, 22, 26 and 29. Exhibit US-1.

[624] USITC Report, p. 15. Exhibit US-1.

demand changes in the OEM and replacement markets.[625] The USITC found that demand "fluctuated" from 2004 to 2007 but then fell considerably in 2008 in response to the recession.[626]

202. The USITC also expressly considered whether that demand decline in 2008 affected the existence of a significant causal link between the increased imports and injury and concluded that it did not.[627] In particular, the USITC examined the impact of the recession in 2008 on the increasing volumes of the subject imports, and on the volumes trends for the U.S. industry and non-subject imports.[628] After noting that rapid increases in the market share of the Chinese imports correlated with declines in the industry's market share between 2004 and 2007, the USITC found that:

> {I}mports continued to increase rapidly even in 2008 when U.S. apparent consumption was falling. Subject imports increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires. Imports from third countries declined by 6.0 million tires in 2008, or by 6.1 percent, roughly consistent with the 6.9 percent decline in U.S. apparent consumption in 2008. Meanwhile, domestic production of subject tires declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.[629]

As a result, the USITC rejected the claims of Chinese respondents that the recession in 2008 explained all or most of the declines in the industry's production and shipment levels during that year.[630] Accordingly, the USITC also reasonably concluded that the recession did not indicate that the subject imports were not a significant cause of material injury to the industry.[631]

203. China challenges the USITC findings relating to demand changes in the market on a number of grounds. At its core, however, China's demand argument relies heavily on the mistaken notion that there was a consistent demand decline in the U.S. tires market during the

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[625] USITC Report pp. 15, 22, and 32. Exhibit US-1. Prior to 2007, the record showed that apparent U.S. consumption declined slightly by 0.8 percent from 2004 to 2005, 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 form 2007 to 2008. USITC Report, Table C-1. Exhibit US-1.

[626] USITC Report, p. 15; see also USITC Report, pp. 22 and 32. Exhibit US-1.

[627] USITC Report, pp. 25 - 26 and 29. Exhibit US-1.

[628] USITC Report, p. 26. Exhibit US-1.

[629] USITC Report, p. 26. Exhibit US-1.

[630] USITC Report, pp. 26 and 29. Exhibit US-1.

[631] USITC Report, p. 29. Exhibit US-1.

period. This is simply not true.[632] As the USITC and the Panel correctly noted,[633] the record showed that demand, as measured by apparent consumption, "fluctuated" over the period. In this regard, the record showed that demand remained relatively stable between 2004 and 2005, increasing by 0.8 percent, decreased by 4.4 percent in 2006, increased by 1.5 percent in 2007, and declined by 6.9 percent in 2008.[634] In other words, between 2004 and 2007, apparent consumption fell at a moderate level of only 3.7 percent.[635] As the Panel pointed out, the "bulk" of the overall decline in consumption during the period of investigation occurred in 2008,[636] when the recession hit the tires market.

204. Given these fluctuations in demand trends over the period, China has no foundation for the contention that the USITC, and the Panel, should have examined more closely the demand changes in the market that occurred prior to 2008 to assess whether they were the main, or even significant, cause of changes in the industry's condition during these years.[637] As the Panel pointed out,[638] the record established that demand changes during the period did not explain, to any significant degree, the significant declines in the industry's condition. The following chart establishes that the record showed that the volumes and market share of Chinese tires both increased at a rapid and consistent rate and that the industry's production, shipment, sales and market share levels all fell at a consistent and significant rate, whether or not demand declined,

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[632] China argues that the USITC did not address the longer term trend in demand other than its consideration of the effects of the recession of 2008. China Appellant's Submission, paras. 436-438. To support the same arguments it made before the Panel that there was a "broad decline" or a "prolonged" contraction in demand across the entire period of investigation, China asserts that consumption declines averaged "about 2.6 percent each of the four year-over-year periods." China Appellant's Submission, paras 437 n. 360, 443. This argument is misleading. As the United States has previously pointed out, the record did not show that there was a "prolonged contraction" or a "broad decline" in the U.S. tires market over the period of the investigation. Instead, as the USITC found, the record showed that demand, as measured by apparent consumption, "fluctuated" over the period, with there being a slight decline in consumption in 2005, a larger decline in 2006, and an increase in consumption in 2007. USITC Report at pp. 15 and 32, and Table C-1. Exhibit US-1. The Panel reviewed this issue and found that the record evidence did not demonstrate a "prolonged contraction" in demand over the period. Panel Report, para. 7.339.

[633] USITC Report, p. 15; Panel Report, paras. 7.339.

[634] USITC Report, Table C-1. Exhibit US-1.

[635] USITC Report, Table C-1. Exhibit US-1.

[636] Panel Report, para. 7.339.

[637] China Appellant Submission, paras. 437 - 446.

[638] Panel Report, paras. 7.333 - 7.345.

increased or remained relatively stable:[639]

Period	2004-05	2005-06	2006-07	2007-08
Change in Apparent Consumption	-0.8 %	-4.4 %	+1.6 %	-6.9 %
Increase in Chinese Imports	+42.7 %	+29.9 %	+53.7 %	+10.8 %
Increase in Chinese Market Share	+2.1 %	+2.4 %	+ 4.8 %	+ 2.7 %
Decline in U.S. Market Share	-3.7 %	-3.4 %	-3.6 %	-2.9 %
Decline in U.S. Production	-4.8 %	-11.0 %	-2.4 %	-11.1 %
Decline in U.S. Shipments	-6.7 %	-9.9 %	-5.0 %	-12.1 %
Decline in U.S. Net Sales Quantity	-5.7 %	-8.9 %	-5.5 %	-11.7 %

Source: USITC Report, Table C-1. Exhibit US-1.

As the Panel pointed out, although there was a clear correlation between the rapid increases in Chinese imports and the significant declines in the industry's condition, there was obviously a much less significant degree of correlation between demand trends and changes in the industry's conditions.[640]

205. Given these trends in demand, the domestic industry's condition, and import increases, the USITC reasonably concluded that the evidence on demand trends between 2004 and 2007 did not undermine the evidence establishing that increasing imports from China were a significant cause of material injury to the industry.[641] As the Panel indicated, the record made clear that the demand changes in 2005, 2006, and 2007 were simply not significant enough or consistent enough to explain the significant declines in the industry's condition during the period, or to undermine the USITC's finding that rapidly increasing imports from China were a significant cause of material injury to the industry. The Panel reasonably concluded that the USITC was

[639] The data in the chart is contained USITC Report, Table C-1. Exhibit US-1.

[640] Panel Report, paras. 7.340 - 7.342.

[641] USITC Report, p. 29. Exhibit US-1.

correct that demand fluctuated during this period.[642] In the end, the Panel concluded that the USITC's finding that injury should be attributed to subject imports rather than demand was compelling.[643] Thus, the Panel found that the USITC's analysis complied with the Protocol.[644]

206. As to 2008, China concedes that the USITC considered and evaluated the impact of the recession in 2008. China asserts, however, that the USITC did not perform this analysis in a meaningful way.[645] As the Panel noted, [646] the USITC did evaluate the recession's effect on the industry's condition in a meaningful way and reasonably concluded that the recession did not cause the significant injurious effects that were attributed to rapidly increasing Chinese imports.[647] Specifically, the USITC explained that, even though demand declined by 6.9 percent in 2008, the Chinese imports continued to increase rapidly in volume, which stood in direct contrast to the volumes of non-subject imports and domestic tires, which fell by 6.1 and 11.1 percent respectively. [648]

207. Because Chinese imports grew at a rapid rate in 2008 while non-subject imports essentially fell at the same rate as consumption, the USITC concluded that the U.S. industry essentially "absorbed virtually all the decline in U.S. apparent consumption."[649] Since there was no reason that the industry should have absorbed more than its pro rata share of the market declines in that year, as the Panel noted,[650] it was reasonable for the USITC to find that the increasing volumes of Chinese imports were necessarily having a considerable effect on the industry's production, market share, sales and other condition metrics in 2008 that went well beyond the effects that could be attributed to any demand decline in that year.[651] The Panel did

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[642] Panel Report, para. 7.339.

[643] Panel Report, para. 7.345.

[644] *See also US – Upland Cotton (AB),* paras. 436-438; *US – Upland Cotton (Panel)*, paras. 7.1343-44. As discussed previously, the Protocol does not contain a non-attribution requirement. Thus, a competent authority may perform an analysis of the possible effects of other factors in any reasonable manner so long as that approach is reasonably designed to ensure that the causal link between the subject imports and material injury is not broken. The Panel found that the USITC's analysis in this case was reasonable and compelling.

[645] China Appellant's Submission, paras. 448 - 469.

[646] Panel Report, paras. 7.337 and 7.343.

[647] USITC Report, pp. 26 and 29. Exhibit US-1.

[648] USITC Report, p. 26. Exhibit US-1.

[649] USITC Report, p. 26. Exhibit US-1.

[650] Panel Report, paras. 7.343 - 7.345.

[651] USITC Report, p. 26. Exhibit US-1.

not commit error when it upheld this finding.

208. Because the data for 2008 was also "compelling,"[652] China contends the Panel improperly assumed that "China had a WTO-based legal obligation to decline by the same amount as the overall market."[653] The Panel simply did not draw such a conclusion. Instead, the Panel was simply acknowledging the basic economic principle that, all else being equal, one would expect suppliers of interchangeable products to share market-wide demand declines in a generally proportional manner. As the Panel explained, there was "no reason why the domestic industry should have absorbed more than its pro rata share ... of the decline in demand that year."[654] The Panel also pointed out the "fact that subject imports continued to increase significantly during that recession, forcing the domestic industry to absorb virtually all of the resultant fall in demand, indicates that subject imports were having an adverse impact on the domestic industry independent of the effects of the fall in demand during the 2008 recession."[655] This discussion was more than sufficient to establish that injury should be attributed to subject imports rather than demand.

209. China also contends that the Panel sought to correct the supposed flaws in the USITC's analysis by substituting its own evaluation of demand changes and market share trends for the USITC's analysis.[656] China itself acknowledges, however, that the Panel's analysis relied heavily on the USITC's own findings concerning relative changes in market share in the U.S. market.[657] As the Panel points out, the USITC discussed in detail how the rapidly increasing Chinese imports displaced U.S. market share throughout the period of investigation, without regard to whether apparent consumption was increasing or decreasing. It can hardly be said that the Panel was substituting its analysis for that of the USITC. Instead, the Panel simply cited to the USITC's own findings and the underlying record evidence to show the USITC "clearly found ... that the ratio of subject imports to U.S. apparent consumption increased throughout the period of investigation."[658]

210. China also contends that demand was "shifting to all imports in general, not just imports from China."[659] This is not correct. Although the record showed that non-subject imports

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[652] Panel Report, para. 7.344.

[653] China Appellant Submission, para. 457.

[654] Panel Report, para. 7.343.

[655] Panel Report, para. 7.354.

[656] China Appellant Submission, para. 440.

[657] See Panel Report, paras. 7.333 - 7.338.

[658] Panel Report, para. 7.336.

[659] China Appellant Submission, para. 441.

increased by approximately 4.2 million tires from 2004 to 2005, an amount that was significantly smaller than the 6.2 million tire increase exhibited by the Chinese imports during the same period, the volumes of non-subject imports declined in every other year of the period. For example, between 2005 and 2006, the volumes of the Chinese imports increased by more than 6 million tires but the volumes of the non-subject imports declined by more than 2 million tires.[660] Similarly, between 2006 and 2007, the Chinese imports increased by more than 14 million tires but the volumes of the non-subject imports declined by approximately 1.5 million tires.[661] Finally, between 2007 and 2008, the volumes of the Chinese imports increased by almost 4.5 million tires but, once again, the non-subject imports declined by more than 6 million tires.[662] As a result, the record shows that demand was not shifting towards all imports, as China contends; it was shifting clearly and indisputably to China, the predominant low price supplier of tires in the market.

211. China argues that the USITC failed to appreciate that 61 percent of the declines in the industry's shipment volumes between 2007 and 2008, or approximately 11.5 million tires, were attributable to the decline in demand in 2008.[663] The United States notes that, even if China's theory is correct, it would mean that 39 percent of the decline in U.S. shipments in 2008, that is, 7.3 million tires, would be attributable to the significant growth in the market share of subject imports in that year. This is obviously a significant number of tires lost to the subject imports. Moreover, China's argument simply ignores the significant market share shifts that occurred during the rest of the period, when Chinese imports managed to gain 7.1 percentage points of market share from the industry. Because these declines occurred during periods of fluctuating demand, it is obvious that they cannot be attributed to changes in apparent consumption in these years.

212. China next argues the USITC should have analyzed the decline in consumption "more carefully" by focusing not merely on year-to-year variations in data, but by focusing on the overall change in demand over the entire period of investigation.[664] According to China, the record shows that consumption contracted "significantly" over the period.[665] China asserts that, by failing to take the overall decline on demand into account, the USITC ignored a decline in consumption of 31.8 million tires between 2004 and 2008,[666] which is an amount that China

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[660] USITC Report, Table C-1. Exhibit US-1.

[661] USITC Report, Table C-1. Exhibit US-1.

[662] USITC Report, Table C-1. Exhibit US-1.

[663] China Appellant Submission, para. 461.

[664] China Appellant Submission, para. 443.

[665] China Appellant Submission, para. 446.

[666] USITC Report, Table C-1. Exhibit US-1.

believes must have had a significant impact on the industry.[667] In making this argument, however, China ignores several other aspects of the market that bear directly on the issue of whether Chinese imports were a significant cause of material injury to the industry between 2004 and 2008.[668] Specifically, at the same time that apparent consumption was falling by 31.8 million tires, the industry's U.S. shipments fell by 57.9 million tires, which is a decline exceeding the decline in demand by 26.1 million tires.[669] The reason for the difference? China, whose imports increased by 31.4 million.[670] As the USITC concluded, any examination of trends in demand, the volumes of Chinese imports and the industry's indicia show that increases in the volumes of Chinese imports correlate more closely with the declines in the industry's condition than demand changes.

213. Finally, China asserts that the Panel and the USITC failed to consider that the domestic industry was likely to be affected disproportionately by the recessionary demand declines in 2008 because it had shifted to higher value-added tires as a business strategy prior to the recession.[671] In China's view, "due to consumer price-sensitivity during economic downturns, branded, more expensive tires likely disproportionately bore the effect of the 2008 recession."[672]

214. China's argument appears to concede a point that is fatal to its primary argument in this case. At its core, China asserts that, during the recession in 2008, price-sensitive consumers were likely to shift purchases from higher-end branded tires sold in the tier 1 portion of the replacement market to lower-end non-branded tires sold in tier 3 of that market. If this is the case, and the United States believes that it is, then China appears to have conceded that consumers can and do readily shift purchases between the various tiers of the replacement market in response to price. As a result, China has conceded that tires sold in tiers 1, 2 and 3 of the replacement market compete directly with each other on the basis of price. And that is exactly what the USITC found in its analysis.[673] This concession undermines the core argument in China's case, which is that there is limited competition between the U.S. tires sold in tier 1 of the replacement market and the Chinese tires sold in tier 3 of that market.

iv. The USITC Reasonably Found That Non-Subject Imports Did Not Sever the Causal Link

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[667] China Appellant Submission, para. 444.

[668] USITC Report, Table C-1. Exhibit US-1.

[669] USITC Report, Table C-1. Exhibit US-1.

[670] USITC Report, Table C-1. Exhibit US-1.

[671] China Appellant Submission, para. 466.

[672] China Appellant Submission, paras. 466-467.

[673] USITC Report, p. 27. Exhibit US-1.

between Chinese Imports and Injury

215. In its final argument concerning other factors that allegedly caused injury to the domestic industry during the period, China contends that the USITC "never seriously addressed the competitive significance of non-subject imports."[674] According to China, the USITC failed to address in any manner the competitive effect of non-subject imports in the market, despite the fact that the non-subject imports held a larger share of the U.S. market than Chinese imports and were lower priced than the domestic industry.[675] China also argues that the Panel acted improperly by upholding the USITC's determination despite the USITC's failure to provide a reasoned and adequate explanation of its analysis.[676]

216. China's attacks on the USITC's consideration of this issue are unfounded. As an initial matter, we note that China's concern about the effects of non-subject imports on the industry is a newly developed one. Before the Panel, China discussed in detail only two factors that China believed were "other factors" that had allegedly had a significant injurious effect on the industry during the period of investigation: changes in demand and the industry's alleged business strategy of shifting production from low- to high-value products.[677] China did not identify non-subject imports as possible "other" factors causing injury that the USITC should have addressed in its analysis.[678] Given that China itself thought that this issue was not significant enough to raise seriously before the Panel, China's new-found belief that non-subject imports were a major factor causing injury the domestic industry during the period examined deserve little attention. In fact, given this failure, it is inappropriate for China to raise this issue on appeal.

217. Furthermore, China's newly-developed arguments on the non-subject imports are legally flawed. China argues that the USITC failed to provide a "reasoned and adequate" analysis of the effects of non-subject imports on the domestic industry.[679] In China's view, such an analysis is required by the Protocol.[680] China mistakenly assumes, however, that, under the Protocol, an

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[674] China Appellant Submission , para. 470.

[675] China Appellant Submission, paras. 470 - 479.

[676] China Appellant Submission, para. 471.

[677] China's First Written Submission (Panel), paras. 326 - 356; China's Second Written Submission, paras. 318 - 344. In the United States view, the Panel looked at this issue primarily because China addressed the issue of non-subject imports in the context of its arguments on demand changes in the OEM market.

[678] China's First Written Submission (Panel), paras. 326 - 356; China's Second Written Submission, paras. 318 - 344.

[679] China Appellant Submission, paras. 385 and 471 - 472.

[680] China Appellant Submission, paras. 385 and 471 - 472.

authority is required to specifically identify the possible effects of non-subject imports in its analysis and then "separate and distinguish" these effects from the effects of Chinese imports.[681] As we have previously explained, the causation provisions of the Protocol do not contain the same "non-attribution" requirement that is set forth in the Safeguards Agreement, the Antidumping Agreement and the countervailing duty provisions of the SCM Agreement.

218. As we have also noted, the Appellate Body has made clear that, when a WTO trade remedy agreement does not contain such language, the entity performing the injury and causation analysis has some discretion with respect to the manner in which it addresses other factors that supposedly cause injury to an industry.[682] Thus, the issue here is not whether the USITC provided a detailed analysis that specifically "separates and distinguishes" the alleged effects of these other factors from the injurious effects from the Chinese imports. Instead, as the Panel explained correctly, the issue for is whether the USITC properly concluded that the Chinese imports had significant injurious effects that "cannot be explained by the existence of other causal factors," such as non-subject imports.[683]

219. Moreover, as the Panel concluded, the USITC specifically addressed the issue of the presence of non-subject imports in the market and reasonably found that they did not sever the causal link between Chinese imports and material injury.[684] Specifically, in its discussion of conditions of competition in the U.S. market, the USITC pointed out that the "quantity of U.S. imports from China rose each year during the period examined and was 215.5 percent higher in 2008 than in 2004."[685] The USITC explained that these trends stood "in contrast" to trends for non-subject imports, whose quantity level "declined in each year since 2005 (after increasing initially in 2005), and was 5.4 percent lower in 2008 than 2004."[686]

220. Then, in its causation analysis, the USITC again compared the trends for the volumes of the Chinese and non-subject imports, pointing out that, as the subject imports increased rapidly in the final years of the period, "subject imports took market share away from both domestic producers and third country sources."[687] Finally, the USITC focused on the changes in Chinese and non-subject imports and domestic tires in 2008, and explained that:

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[681] China Appellant Submission, paras. 385 and 471 - 472

[682] *US – Upland Cotton (AB)*, paras. 436-438; *see also US – Upland Cotton (Panel)*, paras. 7.1343-44.

[683] Panel Report, para. 7.177.

[684] Panel Report, para. 7.367.

[685] USITC Report, p. 22. Exhibit US-1.

[686] USITC Report, p. 22. Exhibit US-1.

[687] USITC Report, p. 26. Exhibit US-1.

> Subject imports increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires. Imports from third countries declined by 6.0 million tires in 2008, or by 6.1 percent, roughly consistent with the 6.9 percent decline in U.S. apparent consumption in 2008. Meanwhile, domestic production of subject tires declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.[688]

Given that the non-subject imports had generally been declining over the period, and were at their lowest levels for the period in 2008, while subject imports were increasing in every year of the period and were at their highest levels in 2008, it is not particularly surprising that the USITC and the Panel both concluded that the non-subject imports were not a significant cause of injury to the industry that could sever the link between Chinese imports and material injury.[689]

221. Moreover, the USITC's analysis was also supported by the record pricing data, which also indicated that non-subject imports were not a particularly significant cause of the industry's declining condition over the period. Although the record showed that the average unit values of non-subject imports were generally lower than the average unit values of domestic tires,[690] it also showed that the average unit values of the non-subject imports were 22 to 25 percent higher than the average unit values of Chinese imports.[691] As the Panel pointed out, these pricing differentials "suggest{} that non-subject imports would have had considerably less price effect on the domestic industry than subject imports."[692] Moreover, the record showed that Chinese imports had the lowest average unit values of any other single country exporting to the United States, with the exception of Indonesia.[693] Finally, Chinese imports became an increasingly significant component of total import to the U.S. market, with imports from other sources falling from 87.1 percent of total imports in 2004 to 66.9 percent of total imports in 2008.[694] In the end, while it is true that non-subject imports were larger in volume than the Chinese imports and were lower-priced than domestic tires, the record clearly established that the "dominant feature of the

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[688] USITC Report, p. 26. Exhibit US-1.

[689] USITC Report, p. 29. Exhibit US-1; Panel Report, paras. 7.364 - 7.367. Moreover, given these discussions, China has no basis for its claim that the USITC failed to address these issues in any manner in its determination. China Appellant Submission, paras. 471 - 472.

[690] Panel Report, para. 7.364; USITC Report, Table C-1. Exhibit US-1.

[691] Panel Report, para. 7.364; USITC Report, Table C-1. Exhibit US-1.

[692] Panel Report, para. 7.364.

[693] Panel Report, para. 7. 364 (*citing* USITC Report, p. II-3 (Table II-1)). As the Panel pointed out, Indonesia's market share remained considerably below that of China throughout the period, reaching only 4.3 percent by the end of the period. *Id*.

[694] USITC Report, Table II-1. Exhibit US-1.

U.S. market was the rise of subject imports from China at the expense of both nonsubject imports and the domestic industry."[695] As can be seen, the USITC did not improperly attribute injury caused by nonsubject imports to the Chinese imports.[696]

222. Despite China's arguments, the Panel did not impermissibly substitute its own judgment for that of the USITC in its analysis. In its analysis, the Panel specifically relied on the USITC's own findings and report,[697] emphasizing the USITC's own findings on the market shares and pricing levels of the Chinese, non-subject and U.S. tires on this issue.[698] Indeed, the United States would add, China's attacks about the insufficiencies of the USITC's and the Panel's findings are surprising, given that China did not itself feel it was necessary to argue before the Panel that non-subject imports broke the causal link between Chinese imports and injury. In the United States' view, the Panel's analysis demonstrates that the Panel was ensuring that it actively engaged with the evidence before it in light of the arguments of the parties, even those arguments to which the parties themselves, in this case China, gave less importance.

223. China also seeks to establish that non-subject imports had a more significant impact on the industry's prices that subject imports in tier 1 of the replacement market, pointing out that the lower-priced Chinese imports had a significantly smaller presence in that market than non-subject imports.[699] China asserts that Chinese imports could not have been a cause of adverse price effects in the tier 1 segment,[700] theorizing that one $40 tire from China in the tier 1 segment could not have had a more significant impact on prices than the thirty-nine $55 tires from non-subject countries in that tier.[701] There are several flaws with this argument. First, because of the strong degree of substitutability between the Chinese, domestic and non-subject tires, the sale of significantly lower-priced tires by one source in that part of the tires market can, indeed, have a significant adverse effect on prices of other competitors in that segment, since purchasers can use the lower price of the Chinese tire to negotiate down prices of other tires in the market.

224. Second, China's arguments focuses exclusively on one segment of the overall market. Under the Protocol, the issue for the USITC was not whether Chinese imports in tier 1 of the replacement market had significant effects on domestic prices in that tier alone. Instead, the issue for the USITC was whether all of the Chinese imports in the U.S. market, including the

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[695] Panel Report, para. 7.367.

[696] Panel Report, para. 7.367.

[697] China Appellant Submission, para473.

[698] Panel Report, paras. 7.364 - 7.365.

[699] China Appellant Submission, para. 477.

[700] China Appellant Submission, para. 477.

[701] China Appellant Submission, para. 477.

significant volumes sold in tiers 2 and 3 of the replacement market, were having significant effects on domestic prices for tires in the entire U.S. market. And as the USITC and the Panel both found, the record showed that the Chinese imports were indeed having such effects.[702]

225. Third, China overlooks the fact that the USITC did not agree that price effects were limited to intra-tier competition. Instead, the USITC found, and the Panel agreed, that there were no clear competitive dividing lines between the tiers of the replacement market, which meant that the price of tires sold in one tier could affect the prices in other tiers.[703] As a result, the USITC also concluded, the low prices of Chinese tires in tier 2 and tier 3 of the market were likely having effects not only on tires on those tiers, but also on tires sold in tier 1 of the market as well.[704] China's argument is misplaced because it ignores the manner in which price competition was occurring in the entire market, which was not a matter that was lost on the USITC or the Panel.[705]

226. Finally, according to China, the USITC failed to recognize that changes in demand in the overall market "masked" significant changes in demand for the domestic, subject and non-tires in individual market segments, such as the OEM market.[706] The Panel properly rejected this argument below. As the Panel reasonably found, the USITC was not obligated to perform a more detailed analysis of demand changes within the OEM market because the OEM market represented a significantly smaller portion of the overall market and therefore accounted for a less significant portion of the industry's shipments.[707] Moreover, even within the OEM market, the record showed that Chinese imports increased their market share, just as they had in the

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[702] USITC Report, pp. 23-24. Exhibit US-1; Panel Report, para. 7.195.

[703] USITC Report, p. 27.

[704] USITC Report, p. 27.

[705] China essentially argues that the presence of non-subject imports is sufficient to break the causal link between Chinese imports and material injury. China Appellant Submission, paras. 478 - 479. The mere presence of non-subject imports alone is not sufficient to break the causal link found by the ITC. In its analysis, the ITC emphasized that the rising volume of significantly undersold subject imports displaced domestic sales, and this displacement led to a decline in the domestic industry's performance indicators. *E.g.*, ITC Report, p. 29 (the "rising volume of subject imports from China has displace domestic sales, and this displacement has led to declining domestic production, shipments, capacity utilization, employment, and profitability."). In light of these facts, the declining volumes and steady market share of non-subject imports did not displace domestic sales, and therefore it was the rise of subject imports from China at the expense of both non-subject imports and the domestic industry that was, indeed, the "dominant feature" in the U.S. market, as the Panel stated. Panel Report, para. 7.367.

[706] China Appellant Submission, para. 478.

[707] Panel Report, para. 7.348 - 7.350.

overall market, and took market share from the domestic industry, whose market share declined in that segment.[708] Given these factors, the USITC was not obliged to perform a more specific analysis of non-subject import competition in the OEM market than it otherwise did.

v. The USITC Was Not Required to Perform A Cumulative or Comparative Analysis of the Effects of Other Factors

227. China also argues that, under the Protocol, the USITC was required to perform a "cumulative" analysis of the effects of demand declines, non-subject imports and the industry's business strategy, before it could find that the Chinese imports were a significant cause of material injury to the industry.[709] Relying on the Appellate Body's statement in *EC - Pipe Fittings* that a "collective" analysis of the effects of other factors may be required under the Antidumping Agreement in certain circumstances,[710] China argues that it provided the Panel with "the unique circumstances by which other causes worked in an interrelated manner in this case to sever or diminish the magnitude of any causal link" between Chinese imports and material injury.[711] According to China, the USITC and the Panel should have assessed whether the "cumulative" effects of other factors were significant enough to break the causal link between Chinese imports and the injury being suffered by the domestic industry, but failed to do so.[712]

228. The Panel correctly rejected China's request. As the Panel noted, even under the Antidumping Agreement,[713] the Appellate Body has not required an authority to examine the collective impact of other causal factors in every case.[714] Although that Agreement, unlike the Protocol, includes language contemplating that an authority should consider the injurious effects of other causal factors in its analysis, the Appellate Body stated that this specific language:

> does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused

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[708] USITC Report, p. 26, and Table II-2, Figure II-1. Exhibit US-1.

[709] China Appellant Submission, paras. 493 - 501.

[710] *EC - Pipe Fittings (AB),* paras. 191-192.

[711] China Appellant Submission, para. 494.

[712] China Appellant Submission, paras. 493 - 501.

[713] The Protocol does not contain any language requiring an analysis of other factors, much less a "collective" analysis of those factors. Protocol of Accession, paras. 16.1 and 16.4.

[714] *EC – Pipe Fittings (AB)*, para. 192.

by those imports and not by other factors.[715]

Moreover, although the Appellate Body did state in that report that "there may be cases where, because of the *specific factual circumstances* therein, the failure to undertake an examination of the collective impact of other causes would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports,"[716] its analysis makes clear that a complainant needs to identify the "specific factual circumstances" that warrant the use of a "cumulative analysis in any particular case.[717]

229. The Panel correctly concluded that China failed to make the necessary showing. [718] After the Panel acknowledged that there may be cases whose unique factual circumstances would necessitate the use of a "collective" analysis of the effects of other factors,[719] the Panel correctly pointed out that China had entirely failed to demonstrate that the specific factual circumstances of the case warranted a collective consideration of the three factors (demand declines, non-subject imports and the industry's alleged business strategy) that China argued were the main causes of injury to the industry.[720] Although China asserts here that it did provide the Panel with a description of the "specific factual circumstances" warranting a cumulative analysis,[721] China did no such thing. In its submissions, China's arguments concerning the need for a "cumulative" analysis consisted of a brief statement setting forth its position on the issue, and two broad assertions about the need for such an analysis.[722] As can be seen, China certainly did not attempt to provide the Panel with the more detailed factual discussions that are included in its Appellant Submission.[723] Because China failed to provide the Panel with the factual basis needed to establish that such an analysis was necessary, the Panel reasonably rejected China's request.

230. Moreover, the United States would add, there is no factual basis for China's request. As the USITC and the Panel both concluded, the record of the USITC's investigation showed that

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[715] *EC – Pipe Fittings (AB)*, para. 191.

[716] *EC – Pipe Fittings (AB)*, para. 192.

[717] Panel Report, para. 7.377.

[718] Panel Report, para. 7.377.

[719] Panel Report, para. 7.377.

[720] Panel Report, para. 7.377.

[721] China Appellant Submission, para. 494.

[722] China's First Written Submission (Panel), paras. 235 - 238; China's Second Written Submission, paras. 345 - 347.

[723] *Compare* China's First Written Submission (Panel), paras. 235 - 238 & China's Second Written Submission, paras. 345 - 347 *with* China Appellant Submission, paras. 495 - 500.

the industry's alleged "business strategy" was not a cause of injury to the industry because the industry's decision to shift supply from the United States to China was taken in response to price competition from the Chinese imports.[724] Similarly, as the USITC and the Panel also concluded, the record did not indicate that the non-subject imports were a significant cause of the declines in the industry's condition over the period. Finally, as the USITC and the Panel both concluded, the record did not show that demand declines caused the significant declines in the industry's condition that were caused by Chinese imports. Given these facts, there was simply nothing for the USITC and the Panel to collectively assess.

231. Finally, China contends that the USITC should have performed a comparative analysis of the effects of the Chinese imports and the injurious effects of the three other factors allegedly causing injury to the industry.[725] China itself acknowledges, however, that the Protocol does not itself require that an authority compare or "weigh" the causal effects of various injury factors against one another.[726] As China appears to concede, the Protocol does not require an authority to establish that Chinese imports are the "sole," "primary," or "most important" cause of injury to the domestic industry as a condition for a "market disruption" finding,[727] rather, the Protocol requires that Chinese imports be "a significant cause" of injury."[728] As the Panel correctly concluded, the absence of language requiring such a comparative analysis confirms that the transitional mechanism under paragraph 16 is available when imports from China are one, but not the only, significant cause of material injury.[729] Thus, under the Protocol, the issue for the USITC and the Panel was not whether Chinese imports were a more important or more significant cause of injury than any other alleged causes. Instead, the issue was whether the Chinese imports were a significant, that is, an important, cause of material injury to the industry. And, in this case, they were.[730]

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[724] USITC Report, pp. 26 - 27. Exhibit US-1.

[725] China Appellant Submission , paras. 480-482.

[726] China Appellant Submission, para. 480.

[727] *See generally* Protocol of Accession, para 16.

[728] Protocol of Accession, para. 16.4.

[729] Panel Report, paras. 7.139-7.147.

[730] China also contends that the USITC acted improperly by not performing an "integrated" analysis of the relationship between the Protocol's criteria when conducting its analysis. China Appellant Brief, paras. 502 - 531. China's argument has no merit. The USITC's entire causation analysis explained exactly the rapid increases in the Chinese imports were a significant cause of material injury to the industry. USITC Report, p. 22 - 29. As the Panel's report made clear, the USITC's entire analysis was designed to establish the clear link between these imports and injury.

D. The Panel Did Not Fail to Make an Objective Assessment of the Matter

232. China alleges that the "Panel acted inconsistently with Article 11 of the DSU in conducting its analysis of whether imports from China were a "significant cause" of injury by failing to conduct an objective assessment of the matter."[731] China's arguments regarding its Article 11 claim are merely a repetition of its arguments in respect of the Panel's interpretation of the substantive requirements of the Protocol regarding causation. The United States has demonstrated above, that the Panel's analysis of the requirements of the relevant covered agreement - the Protocol - and its application of those requirements to the USITC's determination on the issue of causation was correct, thorough, and well-reasoned.

233. The Appellate Body has explained, most recently in *EC – Large Civil Aircraft*, that "a claim under Article 11 of the DSU 'must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements'."[732] In that dispute, the Appellate Body declined to address the European Union's claims under Article 11 of the DSU regarding the interpretation and application of various articles of the SCM Agreement that the Appellate Body had already addressed.[733]

234. In addition, the Appellate Body has also made clear that an Article 11 claim "is a *very serious allegation*",[734] and requires a demonstration of 'egregious error'."[735] To rise to the level of an Article 11 violation, a mistake on the part of the Panel must constitute a *deliberate* disregard of evidence or *gross* negligence amounting to bad faith.[736] This Panel undertook a very thorough examination of the evidence before it and the arguments of the parties. China's assertion that the "Panel discussion of the USITC determination *egregiously* violated the standards for an objective assessment of the matter"[737] is unfounded and should be rejected.

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[731] China Notice of Appeal, para. 9 and Appellant Submission para. 556.

[732] *EC – Measures Affecting Trade in Large Civil Aircraft (AB)*, para. 761, citing to *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238 (referring to *US – Steel Safeguards (AB)*, para. 498). See also *China – Publications and Audiovisual Products (AB)*, para. 189.

[733] *EC – Large Civil Aircraft (AB)*, para. 761.

[734] *US- Zeroing (AB)*, para. 253.

[735] *US – Wheat Gluten (AB)*, para. 186; *Japan – Apples (AB)*, para. 224.

[736] *EC – Hormones (AB)*, paras. 133 and 138.

[737] China Appellant Submission, para. 565. (Emphasis added).

235. China presents four arguments in support of its Article 11 claims.[738] We address each argument in more detail below. However , we note as a general matter that each discussion is linked to and dependent on China's arguments regarding its other substantive claims. Even if the Appellate Body were to agree with China that the Panel had committed an error of law with respect to China's other claims, the Appellate Body need not address the Article 11 claim as China's Article 11 claims do not stand by themselves and are merely subsidiary to its other substantive claims.

1. The Panel did not fail to consider the totality of the evidence in violation of Article 11 of the DSU

236. China argues that the Panel erred in failing to consider the totality of the evidence in its causation analysis because it approached individual arguments and pieces of evidence in isolation instead of addressing the ways in which the arguments and supporting evidence interrelated.[739] China argues that the Panel failed to "explain why different factors needed to be considered together given the specific facts of this dispute" and that the Panel "ignored" China's arguments.[740]

237. China barely presents an argument supporting its Article 11 claim, instead it cross-references its discussion in Section III.D.1.(c)(iv) of its submission.[741] The Appellate Body need not entertain China's argument. China seeks support from the Appellate Body report in *US – DRAMS*, arguing that the Panel failed to embrace a holistic approach to causation, as the USITC had done, and instead addressed each causation issue in isolation. However, it should be clear that the Panel was addressing the entirety of the evidence and the arguments before it, and in doing so, conducted a proper assessment as required by Article 11 of the DSU.[742]

2. The Panel conducted a balanced assessment of the evidence

238. China alleges that the Panel engaged in an "egregious breach" of the standard of review by allegedly citing evidence that supported the USITC conclusion while ignoring evidence that

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[738] China Notice of Appeal, para. 9 and China Appellant Submission paras. 556 - 583.

[739] China Notice of Appeal, para. 9

[740] China Appellant Submission, para. 567.

[741] China Appellant Submission, para. 567, n. 503.

[742] In addition, the reference to *US – DRAMs* is inapposite. In that report, the Appellate Body found that the panel had examined whether certain pieces of circumstancial evidence were sufficient to establish certain conclusions that the investigating authority had not sought to draw, at least based solely on those pieces of evidence. *US – DRAMs (AB)*, para. 188. This is not case here.

didn't.[743] China takes issue with the Panel's analysis of the plant closures, even accusing the Panel of bias,[744] a very serious accusation. In fact, this is a curious accusation given that the Panel disagreed with United States with respect to its analysis of the Continental plant closure. However, as we explained above,[745] the Panel's disagreement with the United States on this point in no way undermines the overall conclusion by the USITC regarding this issue and the Panel was correct to so conclude.

239. The Appellate Body has recognized that a panel cannot realistically refer to all pieces of evidence and must be allowed a substantial margin of discretion in how it assesses the evidence before it.[746] It is clear from the analysis by the Panel, that it did not deliberately disregard evidence or engage in gross negligence as required for a finding of a violation of Article 11. China's accusations are not supported by the record.

3. The Panel did not go beyond the USITC's determination and did not rely on *post hoc* clarifications

240. Again, China's arguments are a mere recitation of its arguments on causation, with cross-references to the various sections of its submission addressing conditions of competition, demand, and non-subject imports.[747] The United States has discussed above why China's arguments must fail. The Panel conducted an objective assessment of the facts before, in light of the arguments of the parties. In addition, with respect to the alleged use of *post hoc* rationalization regarding non-subject imports, the United States has explained that the USITC did address the issue of the presence of non-subject imports, reasonably found that they did not sever the causal link, and the Panel based its analysis on the USITC record.[748]

4. The Panel did not err in how it considered the arguments of the parties

241. China argues that the Panel erred in failing to consider all the arguments of the parties by failing to consider China's arguments about how other causes interacted with each other and had a broader cumulative effect, how the more detailed data on the different suppliers to the aftermarket affected attenuated competition, and how it was necessary to distinguish the Protocol's "significant cause" requirement from the mere "cause" requirement of other WTO

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[743] China Appellant Submission, paras. 569 - 570.

[744] China Appellant Submission, para. 571.

[745] Paragraph 194.

[746] *EC – Hormones (AB)*, para. 138

[747] China Appellant Submission, paras. 573 - 577.

[748] See discussion in para. 223 above.

agreements. The Appellate Body need not address these arguments, as they are merely subsidiary to China's argument that the Panel failed to apply the correct substantive standard.

242. In sum, the Appellate Body should disregard China's Article 11 claim in its entirety.

IV. CONCLUSION

243. For the foregoing reasons, the United States respectfully requests that the Appellate Body affirm the findings and conclusions of the Panel listed in China's Notice of Appeal and dismiss China's appeal in all respects.

244. In the event the Appellate Body were to reverse certain findings or conclusions of the Panel, China invites the Appellate Body to complete the analysis. Given that completion of the analysis would, as it appears from China's appellant submission, require the review of a number of contested facts or the weight to be ascribed to those facts, the Appellate Body should decline to do so.