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

AB-2011-4

Report of the Appellate Body

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, 513
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011

Short Title	Full Case Title and Citation
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products, WT/DS76/AB/R*, adopted 19 March 1999, DSR 1999:I, 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755

Short Title	Full Case Title and Citation
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
US – Steel Safeguards	Panel Reports, *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, and Corr.1, adopted 10 December 2003, as modified by 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, DSR 2003:VIII, 3273
US – Tyres (China)	Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R, circulated to WTO Members 13 December 2010
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

LIST OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, WT/L/432
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1
COGS	Cost of goods sold
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
OEM	Original equipment manufacturers
Panel Report	Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R, 13 December 2010
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Subject imports	Imports of certain passenger and light truck tyres from China
Tyres measure	Safeguard measure imposed by the United States on imports of subject tyres in the form of a duty increase for three years, effective as of 26 September 2009
USITC	United States International Trade Commission
USITC Report	United States International Trade Commission, *Certain Passenger Vehicle and Light Truck Tires from China*, Investigation No. TA-421-7, Publication 4085 (July 2009) (Panel Exhibit US-1)
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China

China, *Appellant*
United States, *Appellee*

European Union, *Third Participant*
Japan, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Turkey, *Third Participant*
Viet Nam, *Third Participant*

AB-2011-4

Present:

Hillman, Presiding Member
Oshima, Member
Van den Bossche, Member

I. Introduction

1. China appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* (the "Panel Report").[1] The Panel was established on 19 January 2010 to consider a complaint by China with respect to a safeguard measure imposed by the United States on imports of certain passenger vehicle and light truck tyres from China.[2]

2. The measure was imposed as a product-specific safeguard under Section 16 of the Protocol on the Accession of the People's Republic of China to the World Trade Organization[3] (the "WTO") ("China's Accession Protocol" or the "Protocol") following an investigation conducted by the United States International Trade Commission (the "USITC").

[1]WT/DS399/R, 13 December 2010.

[2]WT/DS399/3. In this Report, we use the term "subject tyres" to describe the tyres at issue in this dispute, and which were the subject of the United States International Trade Commission (the "USITC") investigation. More specifically, such tyres consist of "new pneumatic tires, of rubber, from China, of a kind used on motor cars … and on-the-highway light trucks, vans, and sport utility vehicles, provided for in subheadings 4011.10.10, 4011.10.50, 4011.20.10, and 4011.20.50 of the Harmonized Tariff Schedule of the United States." (USITC, *Certain Passenger Vehicle and Light Truck Tires from China*, Investigation No. TA-421-7, Publication 4085 (July 2009) (Panel Exhibit US-1) (the "USITC Report"), pp. 3-4)

[3]WT/L/432. The product-specific safeguard mechanism is implemented in US law through Sections 421-423 of the United States Trade Act of 1974 (Public Law No. 93-618, 3 January 1975, 88 Stat. 1978, as amended (codified in *United States Code*, Title 19, section 2451, chapter 12), as amended), commonly referred to as "Section 421" (added as Public Law No. 106-286, 10 October 2000, 114 Stat. 882 (codified in *United States Code*, Title 19, section 2451)).

3. The safeguard investigation in this case was initiated following receipt of a petition filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union on 20 April 2009. The petition alleged that certain passenger vehicle and light truck tyres from China were being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to domestic producers of like or directly competitive products. The USITC initiated the investigation on 24 April 2009. The USITC determined that there was market disruption as a result of rapidly increasing imports of subject tyres from China that were a significant cause of material injury to the domestic industry.[4] Following a decision by the President of the United States, dated 11 September 2009, the United States imposed a safeguard measure on imports of subject tyres in the form of additional import duties for a three-year period: 35% *ad valorem* in the first year; 30% *ad valorem* in the second year; and 25% *ad valorem* in the third year (the "tyres measure").[5] The measure took effect on 26 September 2009.[6]

4. Before the Panel, China claimed that, in imposing the tyres measure, the United States acted inconsistently with Paragraphs 16.1, 16.3, 16.4, and 16.6 of China's Accession Protocol and Articles I:1 and II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[7]

5. The Panel Report was circulated to Members of the WTO on 13 December 2010. The Panel concluded that, in imposing the tyres measure, the United States did not act inconsistently with its obligations under Section 16 of the Protocol and Articles I:1 and II:1(b) of the GATT 1994.[8] More specifically, the Panel found that:

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[4]See Panel Report, para. 2.2. More specifically, the USITC determined, on the basis of the information obtained in the investigation, "that certain passenger vehicle and light truck tires from China are being imported into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers of certain passenger vehicle and light truck tires." (USITC Report, p. 3) All six of the USITC commissioners found that subject imports from China were "increasing rapidly" and that the US tyres industry was "materially injured". (*Ibid*., pp. 12, 18, and 45) However, two of the six USITC commissioners found that market disruption did not exist, because subject imports from China were not a significant cause of material injury to the domestic industry. (*Ibid*., p. 45) These two commissioners submitted views dissenting from the decision of the majority of USITC commissioners. The determination made by the USITC and the views of the commissioners (the views of the majority as well as the dissenting views) are contained in *Certain Passenger Vehicle and Light Truck Tires from China*, Investigation No. TA-421-7, USITC Publication 4085 (July 2009) (Panel Exhibit US-1), which we refer to in our discussion as the "USITC Report". The USITC Report also includes a report containing the information and data gathered by the USITC staff in the investigation (the "USITC staff report"). In our discussion, we use the term "USITC determination" to refer to the collective of the determination of the USITC and the views of the majority of the USITC commissioners.

[5]Panel Report, para. 2.2.

[6]Panel Report, para. 2.2.

[7]Panel Report, paras. 3.1 and 3.2.

[8]Panel Report, para. 8.1.

– the USITC did not fail to evaluate properly whether imports from China met the specific threshold under Paragraph 16.4 of China's Accession Protocol of "increasing rapidly"[9];

– the US statute implementing the causation standard of Section 16 into US law (Section 421 of the United States Trade Act of 1974[10]) does not require the United States to establish causation in a manner inconsistent with Section 16 of China's Accession Protocol[11];

– the USITC did not fail to establish properly that rapidly increasing imports from China were "a significant cause" of material injury to the domestic industry[12];

– China failed to establish that the tyres measure exceeds "the extent necessary to prevent or remedy" the market disruption caused by rapidly increasing subject imports, contrary to Paragraph 16.3 of China's Accession Protocol[13]; and

– China failed to establish that the tyres measure exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of China's Accession Protocol.[14]

6. The Panel also rejected consequential claims by China that the United States acted inconsistently with Articles I:1 and II:1(b) of the GATT 1994.[15]

7. In a communication dated 27 January 2011, China and the United States jointly requested the Dispute Settlement Body (the "DSB") to agree to an extension of the 60-day period provided for in Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") for the adoption or appeal of the Panel Report until 24 May 2011.[16] At a meeting held on 7 February 2011, the DSB agreed that, upon request by China or the United States, it would adopt the Panel Report no later than 24 May 2011, unless the DSB decided by consensus not to do so, or either party to the dispute notified the DSB of its decision to appeal.[17]

8. On 24 May 2011, China notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to

[9]Panel Report, para. 7.110.
[10]*Supra*, footnote 3 of this Report.
[11]Panel Report, para. 7.160.
[12]Panel Report, para. 7.379.
[13]Panel Report, para. 7.399.
[14]Panel Report, para. 7.415.
[15]Panel Report, para. 7.418.
[16]WT/DS399/5.
[17]WT/DSB/M/292.

Articles 16.4 and 17 of the DSU, and filed a Notice of Appeal[18] and an appellant's submission pursuant to Rules 20 and 21, respectively, of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[19] On 14 June 2011, the United States filed an appellee's submission.[20] On the same day, the European Union and Japan each filed a third participant's submission[21], and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Turkey, and Viet Nam each notified its intention to appear at the oral hearing as a third participant.[22]

9. The oral hearing in this appeal was held on 7 and 8 July 2011. The participants and one of the third participants (the European Union) made oral statements.[23] The participants and third participants responded to questions posed by the Members of the Division hearing the appeal.[24]

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by China – Appellant*

10. China appeals the Panel's finding that the USITC did not fail to evaluate properly whether imports from China were "increasing rapidly" so as to be "a significant cause" of material injury to the domestic industry within the meaning of Paragraphs 16.1 and 16.4 of China's Accession Protocol. In particular, China claims that the Panel erred in its interpretation and application of Paragraph 16.4 of the Protocol in finding that the USITC properly established that imports from China met the "increasing rapidly" threshold set forth in that provision. China claims further that the Panel erred in its interpretation and application of Paragraph 16.4 in affirming the USITC's determination that rapidly increasing imports from China were "a significant cause" of material injury to the domestic industry within the meaning of that provision. Finally, China claims that the Panel, in reaching its findings regarding the application of the term "a significant cause", acted inconsistently with its duty to conduct an objective assessment of the matter as required under Article 11 of the DSU.

[18]WT/DS399/6 (attached as Annex I to this Report).
[19]WT/AB/WP/6, 16 August 2010.
[20]Pursuant to Rule 22 of the *Working Procedures*.
[21]Pursuant to Rule 24(1) of the *Working Procedures*.
[22]Pursuant to Rule 24(2) of the *Working Procedures*.
[23]Japan made concluding remarks at the oral hearing.
[24]On 22 July 2011, the Chair of the Appellate Body informed the DSB that the Appellate Body Report in this appeal would be circulated to WTO Members no later than Monday, 5 September 2011 (WT/DS399/7). On 30 July 2011, we received a letter from the United States indicating that the United States wished to better understand the reasons why the Appellate Body Report in this dispute would not be submitted within the 90-day period referred to in Article 17.5 of the DSU. In the interest of transparency, the Chair of the Appellate Body will, at the time of transmittal of the Report, inform the DSB of the reasons for the delay.

1. Increase in Imports

11. China claims that the Panel erred in finding that the USITC did not fail to evaluate properly whether imports from China met the "increasing rapidly" threshold set forth in Paragraph 16.4 of China's Accession Protocol. China requests the Appellate Body to reverse this finding, to complete the legal analysis, and to find, instead, that the USITC did not provide a reasoned and adequate explanation for its finding that imports from China were "increasing rapidly" within the meaning of Paragraph 16.4 of the Protocol for the following reasons.

12. First, China claims that the Panel erred in finding that Paragraph 16.4 of China's Accession Protocol did not require the USITC to focus its analysis on import trends during the most recent past. China argues that the use of the present continuous tense "increasing" in Paragraph 16.4 suggests a focus on the most recent period of time.[25] According to China, the Panel failed to attribute significance to the textual distinction between "increasing" imports in Paragraph 16.4 and "increased" imports in Paragraph 16.1.[26] In China's view, Paragraph 16.1 sets forth the "general conditions" for the application of measures under Section 16 of the Protocol, and reflects the standard for import increases contained in provisions of other WTO agreements, in particular, Article 2.1 of the *Agreement on Safeguards*, which requires an assessment of past import increases.[27] However, when providing specific meaning to the general conditions of Paragraph 16.1, Paragraph 16.4 uses the present continuous tense "increasing", thereby suggesting that the Protocol provides for a distinct standard that requires an assessment of present import increases.[28] China emphasizes that the Panel should have given "more interpretative weight" to the more specific language of Paragraph 16.4 than to the more general language of Paragraph 16.1, and that only an interpretation that focuses on the most recent period of time can be reconciled with both provisions.[29]

13. China maintains further that, when applying the "increasing rapidly" standard of Paragraph 16.4, the Panel improperly upheld the USITC's assessment of import increases over the entire 2004-2008 period of investigation.[30] According to China, neither the USITC nor the Panel adequately explained why import increases over the full five-year period were relevant to a determination that imports were "increasing rapidly", or should be accorded equal weight to more recent import trends.[31] In China's view, such missing explanation is "particularly troubling" given the

[25]China's appellant's submission, paras. 58 and 88.
[26]China's appellant's submission, paras. 66, 94, 96, 98, and 105.
[27]China's appellant's submission, paras. 63, 64, and 100.
[28]China's appellant's submission, paras. 65, 77, and 100.
[29]China's appellant's submission, paras. 102 and 104.
[30]China's appellant's submission, para. 129.
[31]Referring to the Appellate Body in *US – Lamb*, China argues that the USITC had to explain why such 2004-2008 temporal assessment was adequate. (China's appellant's submission, para. 130 (quoting Appellate Body Report, *US – Lamb*, para. 156))

"sharp difference" between the average 34% import increase over the entire five-year period of investigation and the 10.8% import increase in 2008.[32] China adds that the USITC did not provide an adequate explanation for its conclusion that import increases were "large, rapid, and continuing" in 2008.[33]

14. Second, China claims that the Panel erred in finding that Paragraph 16.4 of China's Accession Protocol did not require the USITC to focus on the rates of increase in imports from China. China posits that the Panel failed to attribute proper significance to the term "rapidly" in Paragraph 16.4, which connotes imports that are "increasing at a swift rate".[34] China emphasizes that Article 4.2(a) of the *Agreement on Safeguards*, Article 3.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), and Article 15.2 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") do not require that imports be increasing "rapidly", and that this textual distinction must be given meaning. According to China, the Panel's reference to the ordinary meaning of "rapidly" ("with great speed" or "swiftly") was insufficient to dismiss the relevance of the rates of increase in imports, because "[t]here is no way to determine whether an increase is occurring at a 'great speed' without assessing its rate."[35] China maintains further that "rapidly" is a relative concept that conveys the idea of something increasing more quickly than something else, and therefore it is "useful" to focus on the rates of increase in imports.

15. In addition, China claims that the Panel erred in its application of Paragraph 16.4 of the Protocol when it upheld the USITC determination despite the fact that the USITC did not adequately assess the rates of increase in subject imports. In particular, China contends that the USITC did not provide an adequate explanation for its conclusion that imports were "increasing rapidly" despite the decline in the rate of increase in subject imports in 2008.[36] According to China, the Panel's reasoning that the 2008 import increase was in addition to earlier import increases was not sufficient, because import increases in every year and market share gains over the full period of investigation do not establish that imports were increasing "rapidly".

16. Third, China claims that the Panel erred in failing to require the USITC to assess the most recent rate of increase in subject imports relative to the rates of increase in earlier periods. China argues that the Panel ignored the meaning that the terms "increasing" and "rapidly" in Paragraph 16.4 of the Protocol impart to one another. China emphasizes that the term "rapidly" is a relative concept

[32]China's appellant's submission, para. 133.
[33]China's appellant's submission, para. 136 (quoting USITC Report, p. 12).
[34]China's appellant's submission, paras. 59 and 89.
[35]China's appellant's submission, para. 111.
[36]China's appellant's submission, paras. 142 and 144.

and, when used to qualify the term "increasing", it indicates that imports must be increasing more rapidly than some other benchmark, typically the rate that imports have increased in the past. For this reason, the rates of increase in imports must be put in the "factual context" of prior rates of increase in imports.[37] According to China, the earlier part of the period of investigation provides a "contextual baseline" for determining whether the rates of increase in the latter period can be considered "rapid", in that they were greater than the earlier rates of increase.[38]

17. China also claims that, in its application of Paragraph 16.4 of the Protocol, the Panel erred in finding that the USITC properly determined that imports were "increasing rapidly". China argues that the USITC failed to provide a reasoned and adequate explanation for finding that imports from China were "increasing rapidly" despite the drop in the rate of increase in imports in 2008 compared to the rates of increase in previous years. According to China, the Panel filled the gap in the USITC's reasoning by providing its own analysis of 2008 import increases. China adds that both the Panel and the USITC focused on "[import] increases in every year, the magnitude of the overall increase, and the fact that the level of imports was highest at the end of the period", when the legally relevant issue was whether the changes in the rates of increase at the end of the period of investigation were recent enough, and of such magnitude, as to be deemed "rapid".[39] China stresses further that both the USITC and the Panel erroneously focused on the overall change in the market share of subject imports over the entire period of investigation, and did not provide an adequate explanation as to why import increases could still be considered "rapid" when the rates of increase in their market share declined in 2008.

18. Finally, China argues that the object and purpose of the Protocol and the balance of rights and obligations reflected therein must be considered when interpreting the "increasing rapidly" standard contained in Paragraph 16.4. China emphasizes the Appellate Body's recognition that measures under the *Agreement on Safeguards* are "extraordinary", in that they restrict "fair" trade.[40] China underscores that the Protocol similarly allows for the restriction of "fair" trade; however, unlike the *Agreement on Safeguards*, it provides for the application of trade-restrictive measures exclusively against China. This "'extra'-extraordinary nature" of the Protocol must be taken into account in the interpretation of the distinct "increasing rapidly" standard set forth in Paragraph 16.4.[41]

[37]China's appellant's submission, para. 117.
[38]China's appellant's submission, para. 118.
[39]China's appellant's submission, para. 155.
[40]China's appellant's submission, para. 81 (quoting Appellate Body Report, *Argentina – Footwear (EC)*, paras. 94 and 95).
[41]China's appellant's submission, para. 84.

2. Causation

19. China claims that the Panel erred in finding that rapidly increasing imports from China were "a significant cause" of material injury to the US domestic industry within the meaning of Paragraph 16.4 of China's Accession Protocol. In particular, China argues that the Panel erred in its interpretation of the causation standard in Paragraph 16.4; erred in finding that the USITC properly assessed the conditions of competition in the US market; erred in finding that the USITC was entitled to rely, in its causation analysis, on the overall correlation between import increases and declines in injury factors; and erred in finding that the USITC did not fail to ensure that injury caused by other factors was not attributed to imports from China. China requests the Appellate Body to reverse these findings, to complete the legal analysis, and to find, instead, that the USITC did not properly establish that imports from China were "a significant cause" of material injury to the US industry, as required by Paragraph 16.4 of the Protocol.

(a) Interpretation

20. China claims that the Panel erred in its interpretation of the term "a significant cause" in Paragraph 16.4 of the Protocol. According to China, in failing to distinguish a "significant cause" from a "cause", the Panel read the word "significant" out of the text of Paragraph 16.4. In China's view, the inclusion of the word "significant" to qualify the word "cause" suggests that Paragraph 16.4 requires "a particularly strong, substantial, and important causal connection" between rapidly increasing imports and any material injury to the domestic industry.[42] In expanding on the general conditions set forth in Paragraph 16.1 of the Protocol and paragraph 246(c) of the Report of the Working Party on the Accession of China[43] (China's "Accession Working Party Report"), Paragraph 16.4 of the Protocol specifies that imports must be a "significant cause" and not merely a "cause" of material injury. This, in China's view, indicates that Paragraph 16.4 of the Protocol requires a higher degree of causality than other WTO agreements, in particular, Article 4.2(a) of the *Agreement on Safeguards*, which merely requires that imports "cause" serious injury. According to China, the fact that Paragraph 16.4 provides for a lower injury threshold than the *Agreement on Safeguards* ("material" rather than "serious" injury) does not affect this interpretation, because it reflects "an overall balance" struck by the Protocol between the degree of causation and amount of injury required.[44] China maintains that, insofar as the Protocol permits WTO Members to restrict "fair" trade and to apply safeguard measures in a discriminatory manner, its object and purpose suggests that "a significant cause" should be interpreted as setting a distinct standard that requires

[42]China's appellant's submission, para. 193.
[43]WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1.
[44]China's appellant's submission, paras. 206-208.

more of a Member imposing measures under the Protocol than would be required of a Member imposing measures under the *Agreement on Safeguards*.

21. In China's view, the Panel erred in failing to establish whether rapidly increasing imports from China amounted to "a significant cause" rather than simply a "cause" of material injury to the domestic industry. China argues that the Panel's reference to the ordinary meaning of the word "significant" was not sufficient to address its implications on the causation analysis required under Paragraph 16.4.[45] Following the analytical approach of the Appellate Body in *US – Upland Cotton*, China posits that the Panel should have assessed first whether the USITC properly established that subject imports were a cause of material injury, and second whether the USITC provided a reasoned and adequate explanation as to why such cause was "significant".[46] Referring to the Appellate Body reports in *US – Lamb* and *US – Cotton Yarn*, China maintains further that the Panel erred in failing to address how the qualifier "significant" modified the "core obligation" reflected in the term "cause".[47] For China, the Panel's conclusion that reference to "a" significant cause suggests that Paragraph 16.4 admits of multiple causes does not sufficiently address whether a certain cause is "significant", because this assessment is informed by the relative significance of the other causes at play.[48]

22. Furthermore, China argues that the Panel erred in failing to "refine" its causation analysis to meet the distinct "significant cause" standard set forth in Paragraph 16.4.[49] China refers to the analyses of the conditions of competition, correlation, and non-attribution as "intermediate step[s]" in the Panel's overall causation analysis, and suggests that a "particularly compelling explanation" is required from the investigating authority when one of such analyses suggests that subject imports are not "a significant cause" of material injury.[50] According to China, the Panel erred in failing to explain how these analytical steps should be "adjusted or applied" so as to support a finding of "significant cause".[51]

23. More specifically, with respect to the analysis of the conditions of competition, China submits that the "significant cause" standard of Paragraph 16.4 requires investigating authorities to establish the existence of "a greater degree of competitive overlap" between subject imports and the domestic industry than is required under the *Agreement on Safeguards*.[52] According to China, this involves a

[45]China's appellant's submission, paras. 261 and 266 (referring to Panel Report, para. 7.158).
[46]China's appellant's submission, paras. 265 and 266 (referring to Appellate Body Report, *US – Upland Cotton*, para. 429).
[47]China's appellant's submission, paras. 267-271 (referring to Appellate Body Report, *US – Lamb*, para. 124; and Appellate Body Report, *US – Cotton Yarn*, para. 98).
[48]China's appellant's submission, paras. 273-275 (referring to Panel Report, para. 7.140).
[49]China's appellant's submission, para. 217.
[50]China's appellant's submission, para. 218.
[51]China's appellant's submission, paras. 278, 279, and 281.
[52]China's appellant's submission, para. 224.

two-step analysis whereby investigating authorities must determine, first, how the existence of different market segments may "attenuate" the degree of competition between subject imports and other market participants[53]; and, second, whether the resulting degree of competition indicates that subject imports are capable of being a "significant cause" of material injury to the domestic industry.[54]

24. In relation to the analysis of correlation, China argues that the "significant cause" standard requires investigating authorities to go beyond mere "'overall' correlation" and assess the "degree of correlation" between rapidly increasing imports and injury factors of the domestic industry.[55] According to China, Paragraph 16.4 requires a specific correlation both in year-by-year changes and in the degree of magnitude between increases in imports and decreases in the performance indicators of the domestic industry.

25. In relation to the analysis of other causes, China argues that "there is an inherent requirement to consider other causes [of injury] when finding a causal link between imports and the condition of the domestic industry."[56] In China's view, the term "significant" in Paragraph 16.4 of the Protocol "requires more than just considering other causal factors in some generalized way".[57] In particular, China contends that an assessment of both the magnitude of "effects" attributable to subject imports and an assessment of the magnitude of "effects" attributable to other factors is required.[58] China asserts that this involves "separating not just the causes, but also the effects of those causes".[59] Moreover, the investigating authority is required to determine whether the separate effects properly associated with imports from China rise to the level of "significant".

26. China recognizes that the Protocol does not set forth any specific method for determining when the effects properly associated with subject imports rise to the level of being "a significant cause".[60] For China, this situation is therefore like those under other WTO agreements, where the absence of any specific guidance has meant that WTO Members have discretion as to the "methods and approaches" they employ.[61] In China's view, one approach would be to "weigh the different causes".[62] China recognizes that Paragraph 16.4 "does not specifically require the effects of imports from China to be larger than the effects of other causes".[63] Yet, in cases where "the effects of imports

[53]China's appellant's submission, para. 225.
[54]China's appellant's submission, para. 226.
[55]China's appellant's submission, para. 229. (emphasis omitted)
[56]China's appellant's submission, para. 240.
[57]China's appellant's submission, para. 247.
[58]China's appellant's submission, para. 251.
[59]China's appellant's submission, para. 252.
[60]China's appellant's submission, para. 254.
[61]China's appellant's submission, para. 254 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 224; and Appellate Body Report, *US – Lamb*, para. 181).
[62]China's appellant's submission, para. 255.
[63]China's appellant's submission, para. 256. (original underlining)

from China are less than [the effects of] other causes, the investigating authority must pause and consider the situation very carefully" and "must take particular care in fulfilling its duty to provide a reasoned and adequate explanation" if it concludes that imports from China are "a significant cause".[64] According to China, a finding of "significant cause" when the effects of imports from China are less than the effects of other causes would also require a "very compelling analysis".[65]

(b) Conditions of Competition in the US Tyres Market

27. China argues that the Panel erred in finding that the USITC properly assessed the conditions of competition in the US market. According to China, both the Panel and the USITC failed to explain adequately how imports from China could be "a significant cause" of material injury under Paragraph 16.4 of the Protocol, when approximately 60% of US production in 2008 went into two market segments where Chinese imports had only a 2-3% combined market share.[66]

28. More specifically, China maintains that both the Panel and the USITC failed to assess adequately the existence of "attenuated competition" between subject imports and domestic tyres in the US replacement market.[67] In China's view, the Panel's conclusion that there were no "bright-line distinctions" between tiers 1, 2, and 3 of the US replacement market does not sufficiently address the attenuated degree of competition between imported and domestic tyres in that market.[68] In addition, both the Panel and the USITC failed to assess adequately data indicating that, in 2008, Chinese imports represented less than 1% of total shipments into tier 1 of the replacement market where US producers concentrated 51% of their shipments.[69] Such "limited presence" of Chinese imports in tier 1 suggests that a "majority" of US production "faced virtually no competition from subject imports".[70] Moreover, the Panel's finding that competition in tiers 2 and 3 was more than "vestigial" did not, in China's view, provide a sufficient basis for concluding that subject imports were "a significant cause" of material injury, insofar as those segments represented "less than half" of the US replacement market.[71] China posits further that the Panel "went beyond the proper bounds of

[64]China's appellant's submission, para. 256.
[65]China's appellant's submission, para. 256 (referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.238).
[66]China's appellant's submission, para. 309.
[67]China's appellant's submission, para. 311.
[68]China's appellant's submission, para. 313 (referring to Panel Report, para. 7.197).
[69]China's appellant's submission, para. 316. China adds that "the competitive tension in this key tier 1 segment was overwhelming between the U.S. producers with 69.3 percent of the shipments and the non-subject imports with 29.9 percent of the shipments to this segment." (*Ibid.*, para. 317)
[70]China's appellant's submission, paras. 318 and 325.
[71]China's appellant's submission, para. 320 (referring to Panel Report, para. 7.197).

review" by providing its own analysis as to why competition between domestic tyres and subject imports was "significant" in tiers 2 and 3.[72]

29. Furthermore, China contends that the Panel erred in upholding the USITC's conclusion that subject imports had a "significant" competitive impact on domestic tyre production in the original equipment manufacturers ("OEM") market. According to China, the Panel erroneously focused on increasing trends in Chinese imports to the OEM market, when it should have instead assessed whether competition between Chinese and US tyres in that segment was significant. China underscores that its market share in the OEM market remained below 5% during the entire period of investigation. According to China, the Panel's end-point-to-end-point analysis obscures the fact that most of China's market share gains occurred by 2006. In addition, China stresses that non-subject imports had a larger and increasing share of the OEM market than subject imports, and that market share gains by non-subject imports in the OEM market occurred during a period in which they lost market share in the overall US market.

30. China maintains further that the Panel erred in separately assessing the conditions of competition in the replacement market and the OEM market, but failing to address their combined implication for the degree of competition in the overall US market. For China, the "extremely limited"[73] presence of Chinese imports in tier 1 of the replacement market and in the OEM market, where US producers concentrated approximately 60% of their total shipments, suggested that competition in the overall US market was "highly attenuated".[74] Moreover, the Panel ignored the fact that subject imports in the OEM market had no competitive effect on domestic tyres in the replacement market, and that tier 1 of the replacement market was more clearly delineated than tiers 2 and 3. In China's view, both the Panel and the USITC failed to provide a reasoned and adequate explanation as to how these data could support a finding that subject imports were "a significant cause" of material injury to the US industry.

(c) Correlation between Rapidly Increasing Imports and Material Injury

31. China argues that the Panel erred in finding that the USITC was entitled to rely on an "overall coincidence" between rapidly increasing imports and declines in injury factors in support of its conclusion that subject imports were a significant cause of material injury to the domestic industry.[75] According to China, the "significant cause" standard of Paragraph 16.4 of the Protocol requires a more specific degree of correlation between import increases and declines in injury factors. In

[72]China's appellant's submission, paras. 322 and 323 (referring to Panel Report, para. 7.195).
[73]China's appellant's submission, para. 343.
[74]China's appellant's submission, para. 336.
[75]China's appellant's submission, para. 350 (quoting Panel Report, para. 7.234).

particular, the Panel erroneously affirmed the USITC's end-point-to-end-point comparison, when it should have assessed instead "year-to-year relative changes" between imports and injury factors.[76] In addition, the Panel failed to assess adequately a "disconnect" between trends in 2007 and 2008, when the rate of increase in volume of imports declined, but injury factors such as production, shipments, and net sales nonetheless further deteriorated.[77] China adds that a similar "disconnect" existed between declines in the rate of increase in imports and declines in other injury factors such as operating profits, productivity, capacity utilization, and research and development.[78] According to China, the Panel failed to explain adequately whether these inconsistencies in trends suggested that injury was caused by other factors, such as the 2008 recession and the domestic industry's strategic decision to cede the low-end segment of the replacement market to imports from China and other countries.

32. Furthermore, China argues that the Panel incorrectly upheld the USITC's finding that subject imports had adverse effects on domestic prices and profitability. China stresses that the cost of goods sold ("COGS")/sales ratio improved by 5.3% in 2007, when the rate of increase in subject imports was at its highest, but declined by 5.8% in 2008, when the rate of increase in subject imports also declined.[79] In China's view, the Panel uncritically accepted the USITC's conclusion that there was a "sharp increase in this ratio in 2008", and ignored the sharp decrease in the COGS/sales ratio in 2007.[80] Similarly, the Panel failed to address year-by-year changes in finding that "underselling by subject imports *generally* had a highly detrimental impact on the domestic industry".[81] China emphasizes that, when the margin of underselling was greatest in 2007, the profitability of the domestic industry improved. In contrast, when the margin of underselling decreased in 2008, the profitability of the domestic industry also declined. China adds that the margin of underselling remained relatively high in 2008 because domestic higher-value branded tyres have higher prices than unbranded Chinese tyres. Thus, the Panel did not take into account the effects of "attenuated

[76]China's appellant's submission, para. 350.

[77]China's appellant's submission, paras. 354-358. China emphasizes that, when imports increased by 53.7% in 2007, US production decreased by 2.4%; US shipments decreased by 5%; and net sales decreased by 5.5%. However, in 2008 when imports increased by 10.8%, US production decreased by 11.1%; US shipments decreased by 12.1%; and net sales decreased by 11.7%. (*Ibid.*, para. 355)

[78]China's appellant's submission, para. 359. China underscores that, when imports increased by 53.7% in 2007, the domestic industry's operating profits increased by 5.6%; productivity increased by 0.1 tyres per hour; capacity utilization increased by 6.0%; and research and development increased by 6.4%. In contrast, when imports grew by 10.8% in 2008, operating profits declined by 6.9%; productivity declined by 0.2 tyres per hour; capacity utilization declined by 5.9%; and research and development declined by 0.1%. (*Ibid.*, para. 359)

[79]China's appellant's submission, para. 368.

[80]China's appellant's submission, para. 369 (quoting USITC Report, p. 24).

[81]China's appellant's submission, para. 371 (quoting Panel Report, para. 7.258). (emphasis added by China)

competition on underselling"[82], and failed to address adequately the fact that non-subject imports also undersold domestic tyres.

(d) Other Causes of Injury

33. China attributes the injury suffered by the US domestic industry, at least in part, to three factors other than subject imports from China, namely: (i) the domestic industry's business strategy of shifting to higher-value products; (ii) demand declines in the market; and (iii) non-subject imports. China contends that the Panel erred in finding that the USITC properly considered and addressed the effects of these other factors that were allegedly causing injury to the industry. China asserts that the Panel's focus was more on identifying some "residual effect" from imports, rather than understanding how each other factor might be affecting the condition of the domestic industry, and whether any remaining effects could properly be deemed "a significant cause" of material injury.[83] In China's view, under the Panel's standard, any injurious effects—including "residual effects"—could constitute "a significant cause". In other words, if the other causal factors "do not explain everything", and instead leave some residual injurious effects to subject imports, then those residual effects somehow constitute "a significant cause" of material injury. China refers to this as an "all or nothing" approach to other causes.[84]

34. China also alleges that certain preliminary observations made by the Panel regarding China's arguments on other causes "suffer from the Panel's repeated tendency to look at one fact in isolation, and not put that fact into the broader context of other competitive dynamics".[85] According to China, nothing in these preliminary observations "calls into doubt the importance of the changed business strategy for understanding the competitive dynamics in the industry, and the extent to which imports from China could properly be considered a 'significant cause' of injury".[86]

(i) *The US domestic industry's business strategy – Plant closures*

35. China emphasizes that there is no dispute in this case that the US industry changed its business strategy by withdrawing from low-value segments of the replacement market and shifting production in the United States towards the higher-value segments of the market. According to China, the issue is instead "why the strategy changed and what significance the new strategy and the

[82]China's appellant's submission, para. 377.
[83]China's appellant's submission, para. 285 (referring to Panel Report, para. 7.177).
[84]See China's appellant's submission, paras. 284, 289, 433, and 436.
[85]China's appellant's submission, para. 391 (referring to Panel Report, paras. 7.292-7.296).
[86]China's appellant's submission, para. 402.

resulting plant closures had for analyzing causation".[87] For China, the USITC improperly attributed the plant closures in the United States to imports from China, ignoring the effect of the change in business strategy.

36. At a general level, China submits that the Panel committed error when it rejected the USITC's finding that Chinese imports played a role in the closure of Continental's plant in Charlotte, North Carolina, but then failed to assess whether this conclusion undermined the USITC's overall conclusion concerning the reasons for plant closures, including the reasons for the closure of Bridgestone's plant in Oklahoma City, Oklahoma, and Goodyear's plant in Tyler, Texas. China further alleges that both the Panel and the USITC failed to ensure that the injurious effects resulting from the closure of Continental's plant in Charlotte were not improperly attributed to imports from China.

37. With respect to the reasons for the closure of Bridgestone's plant in Oklahoma City, China argues, on several grounds, that the Panel erred in finding that the USITC properly could have understood reference in Bridgestone's official press release to "fierce competition from low-cost producing countries" to include competition from subject imports from China.[88] First, China observes that the press release by Bridgestone refers only to "low-cost producing countries", and does not refer explicitly to imports from China as a reason for shutting down the plant.[89] Second, China asserts that the Panel erred in suggesting that a contemporaneous news report relied upon by the USITC in its report "quoted" a Bridgestone employee as identifying "low-cost Korean- and Chinese-made tires flooding the US market as one of the reasons for the plant's economic troubles".[90] Third, China claims that the Panel erred by relying on a statement made in the USITC staff report (which the USITC did not cite to in its determination) in assessing whether the USITC could properly attribute the closure of Bridgestone's plant to imports from China.[91] Fourth, China observes that "non-subject imports held between 78.8 and 87.1 percent of the import market during the period relevant for the plant closure decisions."[92] In China's view, the Panel "downplayed" the significant and increasing presence of such non-subject imports.[93] Yet, given the relative magnitude of non-subject imports, it

[87]China's appellant's submission, para. 387. (original underlining)
[88]China's appellant's submission, footnote 326 to para. 409 (quoting "Bridgestone Firestone to Close Oklahoma City Tire Plant", press release of 13 July 2006 (Panel Exhibit China-45)).
[89]China's appellant's submission, para. 409.
[90]China's appellant's submission, para. 410 and footnote 327 thereto (referring to Panel Report, para. 7.303, in turn quoting United States' response to Panel Question 52, para. 55).
[91]China's appellant's submission, para. 411 (referring to USITC Report, footnote 62 at p. III-16).
[92]China's appellant's submission, para. 414.
[93]China's appellant's submission, para. 415.

was improper to conclude that subject imports were "a significant cause" of the closures in 2006 and to "ignore" the effect of non-subject imports.[94]

38. China makes similar arguments regarding the Panel's analysis of the reasons for closure of Goodyear's plant in Tyler. First, China alleges that there was no factual basis for the Panel's assertion that "competition from subject imports was clearly greater than the competition from non-subject imports".[95] For China, given that non-subject imports represented more than 80% of the total import volume, priced on average approximately 17% below US price levels, and largely imported by US domestic producers themselves, it made "no sense" for the USITC and the Panel to read a generic reference to "low-cost imports" as a reference to imports from China.[96] China also criticizes the Panel for its "selective" approach in dealing with certain evidence, not only by equating "low-cost imports" to "subject imports" from China, but also by ignoring certain other factors behind Goodyear's plant closure that were identified by the USITC.[97] According to China, such an approach calls into question the Panel's "neutrality" in this dispute.[98]

39. China further contends that the Panel used the split between the majority and dissenting determinations of the USITC to "take a pass" on the plant closure issue.[99] In China's view, "the Panel never fully assessed whether the majority or the dissent was correct."[100] Instead, it merely found that plant closures "may well have been" linked to competition from imports and the decision to locate production in China "might well have been" the result of an independent business strategy, but the decision to close plants "might well have been" a response to imports.[101] China asserts that this conclusion was "wholly inadequate" and contends that the Panel should have considered critically whether the USITC majority sufficiently explained its conclusion to "ignore" the effect of the change in business strategy.[102] According to China, the Panel failed to do so and, instead, "simply deferred" to the USITC majority.[103]

40. China argues that, "even if one assumes the USITC could properly find that imports from China played some role in the decision to close the plants, that does not justify attributing the entire consequences of the plant closures to the imports from China."[104] In China's view, under the Panel's

[94]China's appellant's submission, para. 415.
[95]China's appellant's submission, para. 419 (quoting Panel Report, para. 7.305).
[96]China's appellant's submission, para. 426.
[97]China's appellant's submission, paras. 420 and 421 (referring to USITC Report, footnote 62 at p. III-16).
[98]China's appellant's submission, para. 421.
[99]China's appellant's submission, para. 429.
[100]China's appellant's submission, para. 429.
[101]China's appellant's submission, para. 429 (quoting Panel Report, para. 7.321).
[102]China's appellant's submission, para. 430.
[103]China's appellant's submission, para. 430.
[104]China's appellant's submission, para. 433. (original underlining)

logic, "insignificant residual effects become significant effects without any proper factual basis —much less a reasoned or adequate explanation".[105]

41. Referring to the multiple reasons behind the US industry's changed business strategy, the fact that the domestic producers did not support the petition in this case, and "given the importance of the finding on plant closures for the overall conclusion about 'significant cause'", China argues that the USITC had an obligation to provide a "particularly compelling justification" for its conclusion to attribute the plant closures to imports from China.[106] China asserts that it failed to do so and the Panel therefore should not have affirmed the USITC's "defective" explanation.[107]

(ii) *Declines in demand*

42. China takes issue with the Panel's analysis of declines in demand, arguing that both the Panel and the USITC failed to "evaluate seriously" demand declines as a possible alternative cause of injury to the domestic industry.[108] China claims that a contraction in demand over the full period of investigation, combined with a sharp decline in demand in 2008 due to the recession, accounted for "a sizeable portion"—albeit not all—of the injury suffered by the industry over the period of investigation.[109] According to China, however, the Panel conducted a rigid "all or nothing" analysis of other causes, "believing that if an alternative cause did not explain everything then it explained nothing".[110] For China, because "the contraction in demand did not explain the entire injury suffered by the domestic industry, the Panel impermissibly gave it short shrift."[111]

43. China alleges multiple errors in the Panel's review of the USITC's determination. First, China claims that, save for its consideration of the effects of the recession in 2008, the USITC did not address "the longer term trend in demand".[112] China asserts that the Panel, in its analysis, referred to statements by the USITC that addressed the trends in the market share of subject imports but did not say anything about trends in demand or trends in apparent consumption. Second, China argues that the USITC improperly assumed that an increasing market share held by imports from China meant that imports were having an adverse effect distinct from the effect of changing levels of demand. According to China, there were, however, many other factors at play affecting market shares that called into question this "simplistic assumption".[113] Third, China submits that the Panel "substituted

[105]China's appellant's submission, para. 434.
[106]China's appellant's submission, para. 435.
[107]China's appellant's submission, para. 435.
[108]China's appellant's submission, para. 437.
[109]China's appellant's submission, para. 436.
[110]China's appellant's submission, para. 436.
[111]China's appellant's submission, para. 436.
[112]China's appellant's submission, para. 438.
[113]China's appellant's submission, para. 439.

its own analysis" instead of analyzing the USITC's determination.[114] For example, the Panel compared the changing levels of apparent consumption with the changing levels of subject import penetration, although the USITC did not conduct such an analysis in its determination. China further submits that the data before the USITC suggested that market demand was shifting to all imports in general and not just imports from China. In such circumstances, it was "more misleading than useful" to compare a 42.7% increase in imports from China with a 0.8% decrease in overall consumption, as the Panel did.[115] Fourth, China argues that the Panel "confused the distinction between average trends over time and the fluctuations that inevitably occur year-by-year".[116] China recalls that the Panel acknowledged that consumption dropped by 10.3%, reflecting a decline of almost 32 million tyres, and that there was a decline in three out of four years of the period of investigation. According to China, these data indicate that total consumption fell significantly over the period of investigation, despite year-by-year variations. In China's view, this decline represents a significant competitive factor that the Panel and the USITC should have considered "more carefully".[117]

44. With respect to declines in demand resulting from the 2008 recession, China argues that the USITC did not explain how it "connected" certain facts to its specific conclusions, nor did it explain how its "consideration" of this issue represented a reasoned and adequate explanation of how it distinguished the contribution of imports from China from those of the 2008 recession on the overall condition of the industry.[118] Instead, in China's view, "the USITC simply stated its conclusion without any discussion or explanation."[119]

45. China asserts that the Panel addressed the 2008 recession in a similar fashion. In particular, China contends that, in its analysis of this issue, the Panel suggested that, if the sharp decline in demand "could not explain all of the injury to the domestic industry, then it could explain none of the injury".[120] According to China, rather than expect the USITC to consider and explain the relative contribution of each causal factor, the Panel "gave the USITC the far easier task of simply proving that declining demand did not explain everything".[121] China faults the Panel for stating that "significantly increased" imports "forced" the US domestic industry to absorb the fall in demand that was due to the 2008 recession.[122] In China's view, the data before the USITC in fact suggested that US producers "switched" their source of imports, "as imports from China increased by

[114]China's appellant's submission, para. 440.
[115]China's appellant's submission, para. 441.
[116]China's appellant's submission, para. 443.
[117]China's appellant's submission, para. 443.
[118]China's appellant's submission, para. 449.
[119]China's appellant's submission, para. 449.
[120]China's appellant's submission, para. 451. (original underlining)
[121]China's appellant's submission, para. 451.
[122]China's appellant's submission, para. 452 (referring to Panel Report, para. 7.354).

2.0 million tires while imports from other countries by the U.S. producers dropped by 5.1 million tires".[123] China suggests that additional tyres from China in 2008 simply "replaced" other imports brought in by US producers, and did not displace US production or shipments.[124]

(iii) *Non-subject imports*

46. China further argues that the USITC failed to address the competitive effect of non-subject imports in the US market, despite the fact that the non-subject imports held a larger share of the market than Chinese imports and were lower priced than the tyres produced in the United States. China also argues that the Panel erred by upholding the USITC's determination, despite the USITC's failure to provide any reasoned and adequate explanation for finding that non-subject imports were not an alternative cause of injury.[125]

47. In particular, China takes issue with the Panel's statement that "the dominant feature of the U.S. market was the rise of subject imports from China at the expense of both non-subject imports and the U.S. industry."[126] According to China, the USITC never made such a statement and thus the Panel "impermissibly substituted its judgment for that of the USITC".[127]

48. In addition, China alleges that the Panel's analysis of price effects "ignored" the relative volumes of subject and non-subject imports.[128] In relation to the US replacement market, China recalls that "imports from China in 2008 were less than 1 percent of the tier 1 market while imports from other countries made up 39 percent of the market."[129] In China's view, the Panel's analysis therefore "essentially assumed that one tire from China at $40 had more of an adverse impact than thirty nine tires from other countries at $55" per tyre.[130] China adds that "there were approximately nine times as many non-subject imports in the OEM market in 2008" as there were imports from China, and non-subject imports grew from 30.2% to 43.5% of the OEM market between 2004 and 2008.[131] Noting that together the OEM market and the tier 1 segment of the replacement market

[123]China's appellant's submission, para. 465.
[124]China's appellant's submission, para. 465. (emphasis omitted)
[125]At the oral hearing, China disagreed with the United States' assertion that it failed to identify before the Panel the issue of non-subject imports as a possible "other" factor causing injury that the USITC should have addressed in its analysis. China added that, in any event, it does not matter whether non-subject imports are examined as part of a "conditions of competition" analysis or as a possible "other" cause of injury. China explained that, in either case, the analysis is directed at understanding what is going on in the market and the effect, if any, that this has on the adequacy of the investigating authority's reasoning.
[126]China's appellant's submission, para. 473 (quoting Panel Report, para. 7.367).
[127]China's appellant's submission, para. 473.
[128]China's appellant's submission, para. 477.
[129]China's appellant's submission, para. 477.
[130]China's appellant's submission, para. 477. (original underlining)
[131]China's appellant's submission, para. 478 (referring to USITC Report, Table V-3 at p. V-4). (original underlining)

represent approximately 60% of US shipments, China asserts that the Panel ignored the fact that non-subject imports remained the "overwhelming competitive factor facing U.S. producers".[132]

(iv) *Comparative analysis and cumulative assessment*

49. China acknowledges that Section 16 of China's Accession Protocol does not require that an investigating authority compare or "weigh" the causal effects of various injury factors against one another.[133] However, China maintains that such analysis would provide an alternative way for an investigating authority appropriately to determine that imports from China are "a significant cause" in the light of other factors.[134] Moreover, even if this approach is not required, China contends that a consideration of the relative importance of other causes would "reinforce[ ]" the conclusion that imports from China were not in fact "a significant cause" of injury.[135] In China's view, this is because other factors reduced any residual contribution by imports from China to a level that no longer meets the standard of "significant cause".[136]

50. According to China, the USITC relied exclusively on its holistic explanation—based on conditions of competition, overall correlation, and other causes—without any assessment of the relative importance of each of the various causes at work. China makes reference to the US industry's alleged business strategy, declines in demand, and the role of non-subject imports, maintaining that the evidence before the USITC "strongly suggested" that these other possible causes of injury were more important than imports from China.[137] In particular, China asserts that US producers closed certain plants for a "broader set of economic and business reasons", and that subject imports were just one of many factors being considered by these firms.[138] China considers, therefore, that it does not make sense to attribute the entire effect of the US plant closures to imports from China. For China, approximately 61% of the reduction in US shipments must be attributed solely to the decline in consumption. Furthermore, there was no reason to conclude that "the smaller volume of imports from China were having a more significant price effect than the much higher volume of imports from other countries."[139] In China's view, "[i]t was error for the USITC to give so little attention to these other causes, and it was error for the Panel to affirm the inadequate USITC conclusions on this key issue."[140]

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[132]China's appellant's submission, para. 478.
[133]China's appellant's submission, paras. 480-482.
[134]China's appellant's submission, para. 481.
[135]China's appellant's submission, para. 481.
[136]China's appellant's submission, para. 481.
[137]China's appellant's submission, para. 492.
[138]China's appellant's submission, para. 485.
[139]China's appellant's submission, para. 491.
[140]China's appellant's submission, para. 492.

51. China also argues that the Panel improperly dismissed China's argument concerning the need to conduct a cumulative assessment of the effects of the other causes of injury. Referring to the Appellate Body's finding in *EC – Tube or Pipe Fittings* that "there may be cases where because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authorities improperly attributing the effect of these other causal facts to dumped imports", China alleges that it provided the Panel with the "unique factual 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.[141]

52. In China's view, the "interplay" between various factors—namely, business strategy, demand trends, and non-subject imports—reduced the possibility for subject imports to be a "significant cause" of domestic injury.[142] China argues, for instance, that import levels in 2007 and 2008 reflected, "at least in part", the consequences of earlier decisions by US producers to globalize and create more demand for imports.[143] According to China, the "void" left by US producers "became particularly important during the recession in 2008 as demand shifted to lower-priced value tires and thus shipments of those imported tires at a lower price-point held up significantly better than domestic shipments of the more expensive U.S.-manufactured tires."[144] China asserts that it was therefore "improper to assume imports from China displaced U.S. production at the end of the period when many of the U.S. production lines of the most directly competitive products had already been shut down for broader reasons that only partially related to imports from China."[145] With regard to non-subject imports, China asserts that it was "improper to attribute significant effects to the smaller volume of imports from China while ignoring the effects of the larger volume of imports from other countries that also undersold U.S. tire prices by a wide margin."[146] China adds that "the domestic industry itself was responsible for imports of both subject and non-subject imports, and therefore U.S. producers themselves had some control over the relative magnitude of those imports."[147] China argues that, given the importance of non-subject imports in the overall US market and their ability to undersell the US-based production of lower-end tyres, US producers themselves "had to find lower cost places to produce".[148] According to China, this "reinforced the need for a new business strategy to globalize production".[149] In China's view, "[i]t makes little sense to blame this need on the smaller

[141]China's appellant's submission, para. 494 (original underlining) and footnote 424 thereto (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192).
[142]China's appellant's submission, para. 494.
[143]China's appellant's submission, para. 495.
[144]China's appellant's submission, para. 495.
[145]China's appellant's submission, para. 495.
[146]China's appellant's submission, para. 496.
[147]China's appellant's submission, para. 496.
[148]China's appellant's submission, para. 499.
[149]China's appellant's submission, para. 499.

volume of imports from China", when "[a]ll imports—not just those from China—offered more price-competitive options and drove the new business strategy."[150] China further argues that the longer-term decline in overall US demand created the need for US producers to shift production to where the markets were strongest and "reinforc[ed] the need for a new business strategy to globalize production".[151] China adds that the "decline in U.S.-based automobile production drove down production for the OEM market" and further "reinforced the need to produce in other markets".[152]

(e) Integrated Analysis

53. China further argues that the Panel erred by considering each causation argument raised by China in isolation, and never addressing them together in an "integrated analysis".[153] According to China, this approach led the Panel to "internal inconsistencies" that could have been avoided by assessing the competitive dynamics and alleged causal connection more "holistically".[154] In China's view, the lack of correlation and the existence of attenuated competition in this case "reinforced each other" and "undermined" any conclusion that subject imports might be a significant cause of material injury.[155] China further argues that the US domestic industry's business strategy "helped explain why attenuated competition was an accelerating phenomenon in the market over the period of investigation".[156] China also refers to the "continuing large presence" of non-subject imports and improvements in the performance of the domestic industry in 2007, arguing that the Panel focused too little on how these factors interrelated.[157]

54. Finally, China argues that Paragraph 16.4 of the Protocol requires linking the condition of the domestic industry to imports that are found to be "increasing rapidly".[158] In China's view, both the USITC and the Panel failed to do so. In particular, the Panel largely focused its causation analysis on the overall period of investigation instead of focusing on the end of the period so as to establish the causal linkage between imports that are "increasing rapidly" and the condition of the industry at the end of the period. In doing so, the Panel drew many of its inferences from changes earlier, rather than later, in the period. According to China, this constitutes error. China notes, for example, that, in discussing attenuated competition in the replacement market, the Panel analyzed only data from 2008, but did not link this discussion to the trend in imports during that year. In addition, when discussing non-attribution, the Panel provided no analysis of how plant closures earlier in the period of

[150]China's appellant's submission, para. 499.
[151]China's appellant's submission, para. 497.
[152]China's appellant's submission, para. 497.
[153]China's appellant's submission, para. 502.
[154]China's appellant's submission, para. 502.
[155]China's appellant's submission, para. 506.
[156]China's appellant's submission, para. 507.
[157]China's appellant's submission, paras. 508-510.
[158]China's appellant's submission, para. 512.

investigation affected trends in both subject and non-subject imports later in the period, particularly in 2007 when apparent consumption increased.

3. Article 11 of the DSU

55. China submits that the Panel acted inconsistently with its duty to conduct an objective assessment under Article 11 of the DSU in its review of the USITC's determination that subject imports from China were "a significant cause" of material injury to the US domestic industry. China submits several arguments in support of its allegation.

56. First, China alleges that the Panel failed to consider the "totality of the evidence" on the question of causation.[159] China faults the Panel for failing to see how the various causation elements are interrelated, and argues that the Panel also failed to consider the way in which other causes interacted with each other.[160] Noting that the USITC itself "embraced a holistic approach to the causation issue", China submits that it was therefore error for the Panel to address each causation issue in isolation.[161]

57. Second, China contends that the Panel failed to conduct a balanced assessment of the evidence on the question of causation, and disregarded evidence that was not consistent with the conclusions reached by the USITC. In particular, China takes issue with the Panel's use of footnote 62 of the USITC staff report. According to China, the Panel "went out of its way to find and cite evidence the USITC majority did not cite or rely upon" and "extracted only those pieces of evidence that supported the USITC conclusion and ignored those other pieces of evidence that were not consistent with the USITC conclusion".[162] Referring to the Appellate Body Report in *US – Upland Cotton (Article 21.5 – Brazil)*, China submits that panels must be "even-handed" in their review and consider all of the arguments and evidence in a balanced and consistent way.[163]

58. Third, China submits that the Panel went beyond the rationale contained in the USITC determination on the question of causation, and relied on *post hoc* clarifications provided by the United States or the analysis developed by the Panel to "bolster the USITC determination".[164] In

[159]China's appellant's submission, heading III.E.2(a), p. 148.
[160]China's appellant's submission, para. 567.
[161]China argues that the situation in this case is thus analogous to the Appellate Body's guidance in *US – Countervailing Duty Investigation on DRAMS*, where the Appellate Body explained that, "when the authorities considered evidence as a whole, a panel must use the same approach when evaluating the WTO consistency of the decision reached by the authority." (China's appellant's submission, para. 568 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 188-190))
[162]China's appellant's submission, para. 569.
[163]China's appellant's submission, paras. 49 and 562 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293).
[164]China's appellant's submission, para. 572.

support of its claim, China refers to certain arguments it made earlier in its submission dealing with conditions of competition, declining consumption over the period of investigation, the 2008 recession, and the role of non-subject imports.[165]

59. Fourth, China asserts that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to consider China's arguments on how "other causes interacted with each other".[166] China also submits that the Panel disregarded China's argument concerning the existence of "attenuated competition" between subject imports and domestic tyres in the US replacement market, including evidence provided by the United States to the Panel indicating a limited presence of Chinese imports in tier 1 of that market segment.[167] Finally, China maintains that the Panel failed to consider China's argument that it was necessary to distinguish the Protocol's standard of "a significant cause" from the mere "cause" standard of other WTO agreements.

B. *Arguments of the United States – Appellee*

60. The United States submits on appeal that the Panel did not err in upholding the USITC's finding that imports from China were "increasing rapidly" so as to be "a significant cause" of material injury to the domestic industry within the meaning of Paragraphs 16.1 and 16.4 of the Protocol. The United States argues further that, in reaching these findings, the Panel did not act inconsistently with its duty to conduct an objective assessment of the matter as required under Article 11 of the DSU.

61. The United States requests the Appellate Body to uphold the Panel's findings and to reject China's claims on appeal. In the event that the Appellate Body were to reverse certain findings or conclusions of the Panel, the United States submits that the Appellate Body should decline to complete the analysis, given that this would require the Appellate Body to review a number of contested facts or the weight to be ascribed to those facts.

1. Increase in Imports

62. The United States argues that the Panel did not err in finding that the USITC properly established that imports from China met the "increasing rapidly" threshold set forth in Paragraph 16.4 of China's Accession Protocol.

63. First, the United States argues that the Panel properly concluded that the USITC was not required to focus its analysis on the most recent import increases. The United States emphasizes that the text of Paragraph 16.4 does not provide, explicitly or implicitly, that an authority must focus

[165]China's appellant's submission, paras. 574-577.
[166]China's appellant's submission, para. 579.
[167]China's appellant's submission, para. 580.

solely on import data for the "most recent" period.[168] The absence of any explicitly prescribed timeframe in Paragraph 16.4 suggests that investigating authorities have the discretion to select any period of investigation, provided that it allows for an assessment of import increases during a "recent period".[169] For the United States, the Panel's conclusion that the use of the present continuous tense in Paragraph 16.4 does not require an exclusive focus on the most recent past finds support in *Argentina – Footwear (EC)*, where the Appellate Body interpreted the use of the present continuous tense in Article 2.1 of the *Agreement on Safeguards* to require "sudden and recent" import increases.[170] The United States further rejects China's argument that Paragraph 16.4 should be given "controlling effect", and argues instead that the Panel's interpretation gave effect to both Paragraphs 16.1 and 16.4 of the Protocol.[171]

64. The United States adds that, contrary to China's assertion, the USITC and the Panel examined 2008 import data in arriving at the conclusion that import increases were "large, continuing and rapid" at the end of the period of investigation.[172] The USITC specifically indicated that the highest quantity and value of subject imports were in 2008.[173] The USITC also expressly reasoned that the two largest "year-to-year increases" in the ratio of the "subject imports to U.S. production" and in the "market share of the Chinese imports" occurred "at the end of the period in 2007 and 2008".[174] The Panel, for its part, explained that a 10.8% import increase in 2008 was neither "modest" nor "preclude[d] a finding that imports [were] 'increasing rapidly'", particularly because such increase was in addition to import increases in each previous year of the period of investigation.[175] The United States contends that, contrary to China's argument, the USITC and the Panel "focus[ed] appropriately" on the "significant, continuing increases in Chinese imports that occurred in 2008" and found the increases to be "rapid".[176]

65. Second, the United States argues that the Panel did not err in finding that the USITC was not required to focus its analysis on the rates of increase in subject imports. The Panel correctly held that the ordinary meaning of the term "rapidly" ("with great speed" or "swiftly") neither refers to the "rate" of increase in subject imports, nor requires that imports be increasing at an "accelerating rate".[177] According to the United States, the term "rapidly" does not embody a "relative concept", as suggested

[168]United States' appellee's submission, paras. 36 and 45.
[169]United States' appellee's submission, paras. 46 and 47.
[170]United States' appellee's submission, para. 49 (quoting Panel Report, para. 7.88, in turn quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 130).
[171]United States' appellee's submission, para. 51.
[172]United States' appellee's submission, para. 55 (referring to USITC Report, pp. 10-11, and 22).
[173]United States' appellee's submission, para. 55 (referring to USITC Report, p. 12).
[174]United States' appellee's submission, para. 55 (referring to USITC Report, p. 12).
[175]United States' appellee's submission, para. 57 (quoting Panel Report, para. 7.93).
[176]United States' appellee's submission, paras. 55-57.
[177]United States' appellee's submission, paras. 60 and 61 (referring to Panel Report, para. 7.92).

by China, because it does not mean "'more swiftly', 'more quickly', or 'with greater speed'".[178] The United States considers China's argument that the addition of the term "rapidly" indicates that Paragraph 16.4 reflects a more rigorous standard for import increases than other WTO agreements to be "misplaced".[179] This is because there are "significant distinctions" between the text of the Protocol and other WTO agreements that render the comparison with other WTO agreements "difficult, if not pointless".[180] The United States adds that the absence of a specific non-attribution requirement and the inclusion of a lower injury threshold undermine China's argument that the Protocol reflects a more rigorous standard for import increases than the *Agreement on Safeguards*.

66. Moreover, despite China's assertions to the contrary, the United States underscores that the USITC did examine the rates of increase in subject imports over the period of investigation. The United States stresses that the USITC explicitly referred in its analysis to "rates of increase" both in volume and value of subject imports, with particular emphasis on the rates of increase in the last two years of the period of investigation.[181] The United States adds that the USITC also reviewed the rates of increase in the market share of subject imports, and in their ratio to domestic production.[182]

67. Third, the United States contends that the Panel did not err in failing to require the USITC to assess the rates of increase in imports in 2008 relative to the rates of increase in earlier periods. The Panel correctly held that Paragraph 16.4 did not require a "swift progression in the rate of increase" in Chinese imports, and that a "decline in the rate of increase [did not] necessarily preclude[ ] a finding that imports are 'increasing rapidly'".[183] In any event, the United States stresses that the USITC, in its analysis, specifically referred to the percentage rates of increase in subject imports in the last two years of the period of investigation, and placed such rates of increase within the context of previous years in noting that the "two largest increases" in market share and ratio to domestic production occurred in 2007 and 2008.[184]

68. Furthermore, the United States maintains that the USITC provided a reasoned and adequate explanation for its finding that imports were "increasing rapidly", both absolutely and relatively, within the meaning of Paragraph 16.4. The United States stresses that the USITC assessed both absolute and relative import increases on a year-on-year basis, the rates of increase in each year, and

[178]United States' appellee's submission, para. 62 (referring to China's appellant's submission, paras. 113, 117, and 118).
[179]United States' appellee's submission, para. 69.
[180]United States' appellee's submission, para. 65.
[181]United States' appellee's submission, para. 72 (referring to USITC Report, p. 12).
[182]United States' appellee's submission, para. 72 (referring to USITC Report, p. 12).
[183]United States' appellee's submission, para. 71 (quoting Panel Report, para. 7.92).
[184]United States' appellee's submission, para. 73 (quoting USITC Report, p. 12).

emphasized the rapid increases that occurred in the last two years of the period of investigation.[185] The USITC further addressed—and rejected—China's contention that import increases had "abated" in 2008, on the basis of the "large, rapid, and continuing" import increases in 2007 and 2008.[186] Contrary to China's assertion, the import data did not contain any "complexities" that warranted a more detailed analysis by the USITC or the Panel, because "all of the possible metrics" indicated a "clear and uninterrupted upward trend in import volumes" during the period of investigation.[187]

69. Finally, the United States rejects China's argument that the object and purpose of the Protocol supports a more rigorous interpretation of the "increasing rapidly" threshold set forth in Paragraph 16.4. For the United States, unlike the *Agreement on Safeguards* and Article XIX of the GATT 1994, the Protocol does not contain language suggesting that the transitional safeguard mechanism was intended as an "emergency action", or that import increases must be the result of "unforeseen developments".[188] These distinctions, in the United States' view, do not suggest that the Protocol provides for an "extraordinary remedy" such as the one provided for under the *Agreement on Safeguards*.[189] In addition, the fact that the Protocol provides for a lower "material injury" standard than the "serious injury" standard of the *Agreement on Safeguards* undermines China's argument that the Protocol embodies a more rigorous threshold for import increases than the *Agreement on Safeguards*.

2. Causation

70. The United States argues that the Panel did not err in finding that the USITC properly established that rapidly increasing imports from China were "a significant cause" of material injury to the domestic industry within the meaning of Paragraph 16.4 of the Protocol. More specifically, the United States argues that the Panel did not err in its interpretation of the term "a significant cause" in Paragraph 16.4; did not err in finding that the USITC properly assessed the conditions of competition in the US market; did not err in finding that the USITC was entitled to rely on the overall correlation between import increases and injury factors in concluding that imports from China were "a significant cause" of material injury; and did not err in finding that the USITC properly ensured that injury caused by other factors was not attributed to the injury caused by imports from China. The United States further submits that the Panel acted consistently with Article 11 of the DSU in reaching these findings. The United States requests the Appellate Body to reject the entirety of China's appeal

[185]United States' appellee's submission, para. 75.
[186]United States' appellee's submission, para. 76 (quoting USITC Report, p. 12).
[187]United States' appellee's submission, para. 77 (quoting Panel Report, para. 7.103).
[188]United States' appellee's submission, para. 53.
[189]United States' appellee's submission, para. 53 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 93-95; and Appellate Body Report, *US – Line Pipe*, para. 81).

and to uphold the Panel's finding that the USITC did not fail to establish that imports from China were "a significant cause" of material injury to the domestic industry under Paragraph 16.4 of the Protocol.

(a) Interpretation

71. The United States argues that the Panel did not err in its interpretation of the term "a significant cause" in Paragraph 16.4 of the Protocol. The United States contends that nothing in the text of the Protocol indicates that its causation standard was intended to be more rigorous or demanding than the causation standards contained in other WTO agreements, as suggested by China. The United States notes that neither Paragraph 16.1 nor Paragraph 16.4 of the Protocol contains 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.[190] This, in the United States' view, supports the Panel's conclusion that the transitional mechanism provided under Section 16 of the Protocol is available when imports from China are "one, but not the only, significant cause of material injury".[191]

72. The United States rejects China's argument that Paragraph 16.4 sets forth a more rigorous causation standard than other WTO agreements because, in Paragraph 16.4, the word "cause" is modified by the word "significant". According to the United States, China's argument is predicated on other WTO agreements, such as the *Agreement on Safeguards*, which requires no more than imports being "a cause" of injury. However, the Appellate Body has made clear that the *Agreement on Safeguards* requires investigating authorities to establish a "genuine and substantial relationship of cause and effect" between subject imports and the requisite level of injury. This, in the United States' view, suggests that the *Agreement on Safeguards* requires, at a minimum, a "significant" causal link between imports and the requisite level of injury.[192] The United States adds that the ordinary meaning of the word "significant" ("important, notable, [ ] consequential") does not support China's view that a "particularly strong" causal link is required under the Protocol.[193] The United States emphasizes further that previous WTO panels have interpreted the word "significant" to mean simply more than "nominal or marginal" or "unimportant".[194] Moreover, the United States disagrees with China that the object and purpose of the Protocol implies a more demanding causation standard than other WTO agreements, because the Protocol does not refer to measures as "emergency actions", does not

[190]United States' appellee's submission, para. 90.
[191]United States' appellee's submission, para. 90 (referring to Panel Report, paras. 7.139-7.147).
[192]United States' appellee's submission, para. 104.
[193]United States' appellee's submission, para. 105.
[194]United States' appellee's submission, paras. 106 and 107 (referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307; and Panel Report, *Korea – Commercial Vessels*, paras. 7.567-7.571).

contain an "unforeseen developments" requirement, and provides for a lower threshold of injury than the *Agreement on Safeguards*.[195]

73. The United States underscores further that the Protocol does not require an investigating authority to apply any particular methodology in assessing whether subject imports have been a significant cause of material injury or threat of material injury to the domestic industry. Moreover, unlike the *Agreement on Safeguards*, the *Anti-Dumping Agreement*, and the *SCM Agreement*, Section 16 of the Protocol does not direct an investigating authority to consider the effects of other factors that also may be causing injury to the domestic industry, or direct the authority to ensure that it does not attribute the effects of these other factors to subject imports. Therefore, an investigating authority has the discretion to develop and use "an appropriate methodology that allows it to address these factors in a reasoned manner"[196], as long as it provides the "reasons" and "an explanation for the basis" for its determination that subject imports are a significant cause of material injury to the domestic industry.[197]

74. Accordingly, in the United States' view, the Panel correctly rejected China's argument that the Protocol required a more rigorous analysis of the conditions of competition and correlation than other WTO agreements. The United States stresses that the Protocol neither requires an investigating authority to apply "a greater degree of care" when performing its analysis of the conditions of competition and correlation, nor requires a WTO panel to apply "a higher degree of scrutiny" in its review of that analysis.[198] More specifically, the Panel correctly rejected China's argument that it was required to establish a correspondence between the magnitude of changes in imports and the magnitude of changes in injury factors. According to the United States, the Panel correctly held that a "coincidence of trends" analysis was "appropriately founded on a temporal relationship between movements in imports and movements in the injury factors", and that no Appellate Body or panel finding suggests that "the orders of magnitude [in the changes] are key" to a correlation analysis.[199] In addition, the United States agrees with the Panel that it would be "unrealistic" to expect a "precise correlation between the degree of change in imports and the degree of change in the injury factors", particularly where "there may be other causes of injury at work".[200]

75. With respect to the need to consider other causes and ensure that their injurious effects are not attributed to rapidly increasing imports, the United States argues that China "relies heavily" on the

[195]United States' appellee's submission, paras. 109-111.
[196]United States' appellee's submission, para. 89 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189; and Appellate Body Report, *US – Hot-Rolled Steel*, para. 224).
[197]United States' appellee's submission, para. 92 (referring to Panel Report, para. 7.18).
[198]United States' appellee's submission, para. 120.
[199]United States' appellee's submission, para. 122 (referring to Panel Report, paras. 7.230-7.232).
[200]United States' appellee's submission, para. 123 (quoting Panel Report, para. 7.229).

Appellate Body's findings in previous disputes arising under the *Agreement on Safeguards* and the *Anti-Dumping Agreement*, such as *US – Lamb* and *US – Hot-Rolled Steel*.[201] The United States points out, however, that the Appellate Body grounded those findings on "express language" in Article 4.2(b) of the *Agreement on Safeguards* and Article 3.5 of the *Anti-Dumping Agreement* "that specifically requires an authority not to attribute to imports the injury caused by other factors".[202] According to the United States, given the lack of a similar requirement in the Protocol, "there is no basis for China's assertion … that the USITC was required to perform the same 'separate and distinguish' analysis required by the Appellate Body" under the *Agreement on Safeguards* and the *Anti-Dumping Agreement*.[203]

76. However, the United States agrees with the Panel that "the USITC was required to perform some analysis of the effects of other factors that have caused injury to the industry."[204] Referring to the report of the Appellate Body in *US – Upland Cotton*, the United States notes, however, that, "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."[205] The United States submits that a competent authority's need to address the effects of other possibly injurious factors will depend on the facts and circumstances of the particular case. 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."[206] In other cases, "the factor may be contributing to injury in a considerably less significant fashion."[207] For the United States, 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."[208]

(b) Conditions of Competition in the US Tyres Market

77. The United States argues that the Panel did not err in finding that the USITC properly assessed the conditions of competition in the US market. According to the United States, the Panel correctly rejected China's contention that competition in the overall US market was "highly

[201]United States' appellee's submission, para. 128.
[202]United States' appellee's submission, para. 128 (referring to Appellate Body Report, *US – Lamb*, paras. 162-181; and Appellate Body Report, *US – Hot-Rolled Steel*, paras. 216-236).
[203]United States' appellee's submission, para. 128.
[204]United States' appellee's submission, para. 132 (referring to Panel Report, paras. 7.176 and 7.177).
[205]United States' appellee's submission, para. 132 (referring to Appellate Body Report, *US – Upland Cotton*, para. 436).
[206]United States' appellee's submission, para. 133.
[207]United States' appellee's submission, para. 133.
[208]United States' appellee's submission, para. 133.

attenuated" because of the "extremely limited competition" between Chinese and domestic tyres in tier 1 of the US replacement market and in the OEM market.[209]

78. More specifically, the United States posits that the Panel correctly concluded that there was "significant competition" in the replacement market, given the "significant quantities" of both US and Chinese tyres that were shipped into tiers 2 and 3 of that market in 2008.[210] Although market participants generally agreed that the US replacement market could be divided into three broad segments or tiers, the record evidence suggested there were no "clear dividing lines" among the tiers because there was no consensus among producers, importers, and purchasers on which tyre brands belonged in the different tiers.[211] Therefore, there was no reason for the USITC, or for the Panel upon reviewing this 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".[212] The United States adds that the Panel did not rely on the "mere presence" of Chinese imports in the US replacement market, as suggested by China, because both the USITC and the Panel determined that the "significant presence" of Chinese tyres in tiers 2 and 3 suggested that there was "significant competition" in the replacement market.[213]

79. The United States maintains further that it was reasonable for the USITC to rely on China's growing presence in the US OEM market in support of its finding that competition in the overall US market was significant. The United States emphasizes that Chinese imports increased their share of the OEM market consistently over the period of investigation, growing from a "minimal 0.8 percent of the market in 2004 to a no longer minimal level of 5.0 percent in 2008", while the domestic industry consistently lost market share over that period.[214] Because these trends were consistent with the trends in the overall US market, the USITC was entitled to rely on import trends in the OEM market as support for its analysis of the conditions of competition in the US market.[215] In addition, the Panel correctly rejected China's argument that competition in the OEM market was "negligible" on the basis of evidence suggesting that Chinese imports grew from 121,000 tyres in 2004 to 2.3 million tyres in 2008 in that market.[216]

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[209]United States' appellee's submission, para. 149.
[210]United States' appellee's submission, para. 150 (quoting Panel Report, para. 7.195).
[211]United States' appellee's submission, para. 151 (referring to USITC Report, pp. 15 and 27).
[212]United States' appellee's submission, para. 151.
[213]United States' appellee's submission, para. 153 (quoting Panel Report, para. 7.195; and USITC Report, p. 27).
[214]United States' appellee's submission, para. 154 (referring to USITC Report, Table V-2 at p. V-3).
[215]United States' appellee's submission, para. 154 (referring to USITC Report, p. 27).
[216]United States' appellee's submission, para. 155 (referring to Panel Report, para. 7.203).

80. Finally, the United States rejects China's argument that the Panel was only able to uphold the USITC's analysis by creating its "own, new analysis" of the data.[217] Instead, the United States maintains that the Panel performed a "detailed and thorough" review of the USITC's findings, and correctly concluded that the USITC reasonably determined that there was "significant competition" between Chinese and domestic tyres in tiers 2 and 3 of the US replacement market; that there was no "clear dividing line" between the tiers of the replacement market, with the result that Chinese imports in one tier could impact volumes and prices of domestic tyres in another tier; and that Chinese tyres were taking a "growing, though smaller" share of the OEM market.[218]

(c) Correlation between Rapidly Increasing Imports and Material Injury

81. The United States argues that the Panel did not err in finding that the USITC properly established a coincidence between increases in Chinese imports and declines in the performance indicators of the US domestic industry. For the United States, the Panel properly concluded that the USITC's analysis of correlation was both reasoned and adequate, and fully consistent with the record data. The United States rejects China's arguments that Paragraph 16.4 of the Protocol required the Panel to apply "a heightened standard of review" in its examination of the USITC's correlation analysis, and to determine whether there was a strong correlation in the "degrees of relative magnitude" of the changes in imports and industry trends.[219] The United States recalls that both the Appellate Body and panels have made clear that an analysis of "coincidence of trends" requires only an assessment of the temporal relationship between upward movements in imports and downward movements in the injury factors.[220]

82. The United States maintains that both the Panel and the USITC properly found that there was a clear overall "coincidence" in trends between rapidly increasing imports and their effects on the domestic industry.[221] The United States emphasizes that injury indicators such as market share, production, capacity, shipments, net sales, number of production-related workers, hours worked, and wages declined in every year of the period of investigation.[222] According to the United States, improvements in the profitability, productivity, and capacity utilization of the domestic industry

[217]United States' appellee's submission, para. 156 (quoting China's appellant's submission, para. 321).
[218]United States' appellee's submission, para. 156 (referring to Panel Report, paras. 7.185-7.195 and 7.201-7.205; and USITC Report, pp. 21 and 27).
[219]United States' appellee's submission, para. 159 (referring to China's appellant's submission, paras. 30 and 297).
[220]United States' appellee's submission, para. 160 (referring to Panel Report, paras. 7.230-7.233, in turn quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.229; Appellate Body Report, *Argentina – Footwear (EC)*, para. 145; and Panel Reports, *US – Steel Safeguards*, paras. 10.299 and 10.302).
[221]United States' appellee's submission, para. 161 (referring to USITC Report, p. 29).
[222]United States' appellee's submission, para. 161 (referring to USITC Report, pp. 15-18, 23-26, and Table C-1).

in 2007 do not undermine the Panel's overall coincidence finding because other injury factors such as market share, capacity and production level, shipments, sales quantities, production-related workers, hours worked, and wages continued to fall in that same year.[223] With respect to China's arguments regarding an absence of correlation in 2008, the United States observes that, despite an almost 7% decline in apparent consumption, subject imports increased by more than 10% over 2007 levels, while "virtually every injury factor" examined by the USITC fell to its lowest level for the period.[224] The United States dismisses China's argument that the Panel erroneously affirmed the USITC's "simplistic end-point-to-end-point analysis", because the Panel and the USITC reviewed year-to-year trends in imports and industry indicators during the period.[225] The United States adds that the Panel and the USITC did not rely exclusively on volume-based indicators, which, according to China, declined as a result of the domestic industry's business strategy. Rather, the Panel and the USITC also considered other factors such as the impact of imports on the domestic industry's pricing, productivity, and profitability levels during the period of investigation.[226]

83. The United States further submits that the Panel did not err in upholding the USITC's finding that subject imports adversely impacted the domestic industry's prices and profitability. In the United States' view, the Panel sufficiently addressed and rejected China's argument that an improvement in the COGS/sales ratio in 2007 suggested an absence of correlation, and correctly held that improvements in the profitability of the US domestic industry in 2007 did not suggest an absence of correlation, because the domestic industry's operating margins declined in three out of four years of the period of investigation.[227] In addition, the Panel correctly found that the USITC's finding of overall coincidence was not invalidated merely because "annual movements in every single injury factor did not precisely track annual movements in subject imports."[228] Moreover, the United States explains that the USITC reasonably found that "levels of pervasive underselling" by subject imports suppressed prices in the US market, thereby indicating that there was "significant pricing competition" in the replacement market.[229] The United States also stresses that subject imports consistently undersold non-subject imports over the period of investigation.

[223]United States' appellee's submission, para. 162 (referring to USITC Report, Table C-1) and para. 163.
[224]United States' appellee's submission, para. 164 (referring to USITC Report, Table C-1).
[225]United States' appellee's submission, para. 166 (quoting China's appellant's submission, para. 363; and referring to Panel Report, para. 7.234).
[226]United States' appellee's submission, para. 167 (referring to Panel Report, paras. 7.235 and 7.239-7.261; and USITC Report, pp. 23-24).
[227]United States' appellee's submission, para. 173 (referring to Panel Report, para. 258).
[228]United States' appellee's submission, para. 170 (quoting Panel Report, para. 7.244).
[229]United States' appellee's submission, para. 175.

(d) Other Causes of Injury

84. The United States considers that, in its determination, the USITC properly addressed all of the factors that could reasonably be considered significant enough to break the causal link between subject imports and material injury. Moreover, in the United States' view, the Panel properly 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 US tyres industry.

85. With respect to the Panel's "general observations", the United States notes that they were not a necessary component of the Panel's conclusion that the USITC reasonably found that Chinese imports played an important role in the US plant closures that occurred in 2006. Yet, they do "highlight the inherent weaknesses" of China's arguments regarding the US industry's voluntary withdrawal from low-value production.[230] The United States considers, for example, that the Panel reasonably questioned why Chinese imports would continue to be sold at prices significantly below those of domestically produced tyres if they were "simply filling a void left by the industry", as China had suggested.[231] The United States further argues that the record before the USITC showed that the domestic industry was not turning to Chinese imports because it had made a "voluntary decision to shift some production to China".[232] Instead, it was turning to these imports because it concluded that it could no longer compete with low-cost imports from China. The United States concludes, therefore, that the fact that the domestic industry was required to turn increasingly to Chinese imports reflects the injurious effects of the rapidly growing Chinese imports.

(i) *The US domestic industry's business strategy – Plant closures*

86. The United States argues that the USITC had an "ample factual foundation" for its conclusion that Chinese imports played an "important part" in the decisions taken by several US producers to close their domestic production facilities.[233] For example, 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."[234] Moreover, the record indicated that "fierce competition" from "low-cost … Chinese-made tyres" caused Bridgestone to close down its facility in 2006[235], while

[230]United States' appellee's submission, para. 194.
[231]United States' appellee's submission, para. 195.
[232]United States' appellee's submission, para. 199.
[233]United States' appellee's submission, para. 183 (quoting USITC Report, p. 26).
[234]United States' appellee's submission, para. 183 (referring to USITC Report, p. 26 and Table C-1).
[235]United States' appellee's submission, para. 186.

Goodyear closed down its facility in 2006 due to "significant competition from Chinese imports".[236] In support of its argument, the United States contends that, by 2006, Chinese imports were the largest of two "low-price" sources for tyre imports in the US market.[237] Furthermore, between 2004 and 2006, Chinese imports gained approximately 4.6 percentage points of market share, whereas non-subject imports gained 2.6 percentage points.[238] This, according to the United States, "suggests that Chinese imports were having a more significant impact" on the US industry's market share than non-subject imports.[239] In addition, these facts supported the USITC's conclusion that "low-cost imports" included Chinese imports. The United States further submits that the issue for the Panel was not whether Chinese imports were the "'sole' or 'primary' reason" for the material injury but, rather, whether they were "a significant cause" of such injury.[240]

87. The United States further argues that, even if factors other than subject imports had some impact on the plant closure decisions in 2006, this does not undermine in any significant way a conclusion that Chinese imports played an "important part" in these decisions.[241] Although the United States disagrees with the Panel's finding that the closure of Continental's plant in Charlotte, North Carolina, was not a result of competition from Chinese imports, the United States recalls the Panel's finding that the record showed that Chinese imports "played a significant role in the facility closures announced by Bridgestone and Goodyear in 2006".[242] These two closures represented a reduction in the industry's capacity of approximately 30.1 million tyres in 2006, which, according to the United States, provided sufficient justification for the USITC's finding that the US industry's overall capacity were "significantly affected" by Chinese imports.[243]

(ii) *Declines in demand*

88. The United States disagrees with China's assertion that the USITC and the Panel both "failed to evaluate seriously" demand declines in the US market as a possible alternative cause of injury to the domestic industry.[244] The United States considers that the USITC properly found that subject imports had injurious effects independent of any injury caused by changes in demand. In its analysis, the USITC addressed the factors that affected demand in the market and how demand, as measured by

[236]United States' appellee's submission, para. 187.
[237]United States' appellee's submission, para. 189.
[238]United States' appellee's submission, para. 190.
[239]United States' appellee's submission, para. 190.
[240]United States' appellee's submission, para. 191.
[241]United States' appellee's submission, para. 192 (referring to USITC Report, p. 26).
[242]United States' appellee's submission, para. 193 (referring to Panel Report, paras. 7.298-7.310).
[243]United States' appellee's submission, para. 193.
[244]United States' appellee's submission, para. 200 (referring to China's appellant's submission, paras. 436-469).

apparent US consumption, changed over the period of investigation.[245] The USITC also found that demand "fluctuated" from 2004 to 2007, but then fell considerably in 2008 in response to the recession. Moreover, after examining the impact of the 2008 recession on the increasing volumes of subject imports, and on the volume trends for US production and for non-subject imports, the USITC determined that the 2008 recession "did not indicate that the subject imports were not a significant cause of material injury to the industry".[246]

89. The United States rejects China's notion of a "consistent demand decline" in the US tyres market over the period of investigation, noting that the record rather indicated "fluctuat[ions]" in demand, with the "bulk" of the overall decline in consumption occurring during the recession in 2008.[247] The United States contends that the demand changes during the period of investigation did not explain "to any significant degree" the declines in the industry's condition, as the industry's performance worsened consistently while Chinese imports increased consistently, irrespective of the trends in demand.[248] The United States further submits that 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 caused by the recession in that year.[249]

90. The United States disagrees with China that the Panel substituted its analysis for that of the USITC, arguing that the Panel simply cited to the USITC's findings and the underlying record evidence in its discussion. The United States also rejects China's argument that demand was "shifting to all imports in general, not just imports from China".[250] Rather, the United States contends, demand was "shifting clearly and indisputably to China".[251]

(iii) *Non-subject imports*

91. The United States views China's arguments regarding the competitive significance of non-subject imports as "unfounded", and contends that China did not identify before the Panel non-subject imports as a possible "other" factor causing injury to the domestic industry that the

[245]United States' appellee's submission, para. 201 (referring to USITC Report, p. 15).
[246]United States' appellee's submission, para. 202 (referring to USITC Report, p. 29).
[247]United States' appellee's submission, para. 203 (quoting Panel Report, para. 7.339; and USITC Report, p. 15).
[248]United States' appellee's submission, para. 204.
[249]United States' appellee's submission, para. 207 (referring to USITC Report, p. 26).
[250]United States' appellee's submission, para. 210 (quoting China's appellant's submission, para. 441).
[251]United States' appellee's submission, para. 210.

USITC should have addressed in its analysis.[252] The United States thus considers it "inappropriate" for China to raise this issue on appeal.[253]

92. The United States further argues that 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. Thus, for example, in its discussion of conditions of competition in the US 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."[254] 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".[255] In these circumstances, the United States submits, it was 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 domestic industry that could "sever the link" between Chinese imports and material injury.[256]

93. The United States disagrees with China's assertion that, in its analysis, the Panel impermissibly substituted its own reasoning for that of the USITC. According to the United States, the Panel instead specifically relied on the USITC's findings and report, emphasizing the USITC's findings on the market shares and pricing levels of the Chinese, US, and non-subject tyres on this issue and "actively engaged with the evidence before it in light of the arguments of the parties".[257]

94. The United States rejects China's argument that non-subject imports had a more significant impact on the domestic industry's prices than subject imports in tier 1 of the US replacement market. The United States submits that, because of the strong degree of substitutability between the Chinese, US and non-subject tyres, the sale of significantly lower-priced tyres by one source in that part of the tyres market can have a significant adverse effect on prices of other competitors in that market segment, "since purchasers can use the lower price of the Chinese tire[s] to negotiate down prices of other tires in the market".[258] The United States further points out that China focuses exclusively on one segment of the overall market. Yet, under the Protocol, the issue for the USITC was not whether Chinese imports in tier 1 of the US replacement market had significant effects on domestic prices in that tier alone. Instead, the issue before the USITC was whether all of the Chinese tyre imports in the

[252]United States' appellee's submission, para. 216.
[253]United States' appellee's submission, para. 216.
[254]United States' appellee's submission, para. 219 (quoting USITC Report, p. 22).
[255]United States' appellee's submission, para. 219 (quoting USITC Report, p. 22).
[256]United States' appellee's submission, para. 220 (referring to USITC Report, p. 29; and Panel Report, paras. 7.364-7.367).
[257]United States' appellee's submission, para. 222 (referring to Panel Report, paras. 7.364 and 7.365).
[258]United States' appellee's submission, para. 223.

US market, including the significant volumes sold in tiers 2 and 3 of the replacement market, were having significant effects on domestic prices for tyres in the entire US market.[259] Moreover, the United States points out that the USITC also concluded that the low prices of Chinese tyres in tier 2 and tier 3 of the market were likely having effects not only on tyres in those tiers, but also on tyres sold in tier 1 of the market.[260] The United States adds that, even within the OEM market, the record showed that Chinese imports increased their market share, just as they had in the overall US market, and took market share from the domestic industry, whose market share declined in that segment. The United States submits that, in these circumstances, the USITC was not obliged to perform a more specific analysis of non-subject import competition in the OEM market than it did.[261]

(iv) *Comparative analysis and cumulative assessment*

95. The United States submits that the Panel correctly rejected China's assertion that the USITC was required to perform a "cumulative" analysis of the effects of declines in demand, non-subject imports, and the domestic industry's alleged "business strategy" before it could find that Chinese imports were a significant cause of material injury.[262] Referring to the Appellate Body report in *EC – Tube or Pipe Fittings*, the United States asserts that a complainant is required to identify the "specific factual circumstances" that warrant the use of a cumulative analysis in any particular case.[263] In the present case, however, China failed to demonstrate that a collective consideration of other factors was required. Instead, China's arguments before the Panel consisted of "a brief statement setting forth its position on the issue, and two broad assertions about the need for such an analysis".[264] The United States adds that China did not attempt to provide the Panel with the more detailed factual discussions that are included in China's appellant's submission.[265] In these circumstances, the Panel reasonably rejected China's assertion that both 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.

96. The United States adds that, as the USITC and the Panel both concluded, the record of the USITC's investigation showed that the industry's alleged "business strategy" was not a cause of injury

[259]United States' appellee's submission, para. 224 (referring to USITC Report, pp. 23-24; and Panel Report, para. 7.195).
[260]United States' appellee's submission, para. 225 (referring to USITC Report, p. 27).
[261]United States' appellee's submission, para. 226 (referring to USITC Report, p. 26, Table II-2, and Figure II-1).
[262]United States' appellee's submission, paras. 227 and 228.
[263]United States' appellee's submission, paras. 228 and 229 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 191 and 192).
[264]United States' appellee's submission, para. 229 (referring to China's first written submission to the Panel, paras. 235-238; and China's second written submission to the Panel, paras. 345-347).
[265]United States' appellee's submission, para. 229 (referring to China's appellant's submission, paras. 495-500).

to the domestic industry because the industry's decision to shift supply from the United States to China was taken in response to price competition from Chinese imports.[266] Similarly, as the USITC and the Panel also concluded, the record did not indicate that non-subject imports were a significant cause of the decline in the industry's condition over the period of investigation. In the light of these facts, the United States submits that "there was simply nothing for the USITC and the Panel to collectively assess."[267]

97. Finally, the United States rejects China's contention that the USITC should have performed a "comparative analysis" of the effects of the Chinese imports and the injurious effects of the other factors allegedly causing injury to the industry.[268] The United States points out that China acknowledges that "the Protocol does not itself require that an authority compare or 'weigh' the causal effects of various injury factors against one another."[269] In addition, China appears to concede that 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.[270] The issue in this case, therefore, was not whether Chinese imports were a more important or more significant cause of injury than any other alleged causes. Rather, the issue was whether the Chinese imports were a significant, that is, an important, cause of material injury to the US domestic industry.[271]

(e) Integrated Analysis

98. With respect to China's argument that the USITC acted improperly by not performing an "integrated" analysis of the relationship between imports that are increasing rapidly and the condition of the domestic industry, the United States submits that the USITC's causation analysis explained exactly that the rapid increases in Chinese imports were a significant cause of material injury to the US domestic industry.[272] The United States further argues that, as the Panel clarified, "the USITC's entire analysis was designed to establish the clear link between these imports and injury."[273]

[266]United States' appellee's submission, para. 230 (referring to USITC Report, pp. 26-27).
[267]United States' appellee's submission, para. 230.
[268]United States' appellee's submission, para. 231 (referring to China's appellant's submission, paras. 480-482).
[269]United States' appellee's submission, para. 231 (referring to China's appellant's submission, para. 480).
[270]United States' appellee's submission, para. 231.
[271]United States' appellee's submission, para. 231.
[272]United States' appellee's submission, footnote 730 to para. 231 (referring to China's appellant's submission, paras. 502-531; and USITC Report, pp. 22-29).
[273]United States' appellee's submission, footnote 730 to para. 231.

3. Article 11 of the DSU

99. The United States disagrees with China's assertion that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its review of the USITC's determination that imports from China were "a significant cause" of material injury to the US domestic industry. According to the United States, China's arguments regarding its claim under Article 11 "are merely a repetition of its arguments in respect of the Panel's interpretation of the substantive requirements of the Protocol regarding causation".[274]

100. First, the United States disagrees with China's argument that the Panel failed to consider the totality of the evidence on the question of causation. The United States contends that the Panel did address the entirety of the evidence and arguments before it and, in doing so, conducted a proper assessment as required by Article 11 of the DSU.[275]

101. Second, the United States submits that the Panel did not, as China alleges, deliberately disregard evidence that did not support the conclusion reached by the USITC. The United States considers 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.[276]

102. Third, the United States rejects China's argument that the Panel relied on *post hoc* clarifications provided by the United States or the analysis developed by the Panel instead of by the USITC. The United States maintains that 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 changes, and non-subject imports.[277] The United States emphasizes, however, that the Panel conducted an objective assessment of the facts before it. Specifically, with respect to the alleged use of *post hoc* rationalization regarding non-subject imports, the United States reiterates that non-subject imports were dealt with by the USITC and formed part of the record upon which the Panel based its analysis.

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[274]United States' appellee's submission, para. 232.

[275]The United States further submits that China's reference to the Appellate Body Report in *US – Countervailing Duty Investigation on DRAMS* is inapposite. The United States explains that, in that case, the Appellate Body found that "the panel had examined whether certain pieces of circumstantial 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." The United States submits, however, that this "is not [the] case here". (United States' appellee's submission, footnote 742 to para. 237 (referring to China's appellant's submission, para. 567, in turn referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 188-190))

[276]United States' appellee's submission, para. 239 (referring to Appellate Body Report, *EC – Hormones*, para. 138).

[277]United States' appellee's submission, para. 240 (referring to China's appellant's submission, paras. 573-577).

103. Fourth, with respect to China's allegation that the Panel acted inconsistently with Article 11 of the DSU by failing to consider certain arguments that China made before the Panel, the United States submits that the Appellate Body need not address this allegation, as it is "merely subsidiary" to China's argument that the Panel failed to apply the correct substantive standard.[278]

C. *Arguments of the Third Participants*

1. European Union

104. The European Union does not "take a position on the facts of this case", but rather focuses its comments on the interpretation of the terms "increasing rapidly" and "significant cause" in Paragraph 16.4 of China's Accession Protocol.[279] The European Union also makes additional observations in relation to China's claims under Article 11 of the DSU.

105. On a preliminary basis, the European Union expresses the view that China's appeal is "entirely dependent" on whether the Panel erred in its interpretation of the terms "increasing rapidly" and "a significant cause", because China does not take issue with the manner in which the Panel applied its own interpretation of the law to the facts of this case.[280] Thus, according to the European Union, the Appellate Body would not be required to examine whether the Panel erred in its application of the law to the facts of the case were it to uphold the Panel's interpretation of both terms. However, if the Appellate Body were to decide otherwise, it should only complete the analysis if factual findings by the Panel or undisputed facts in the record provide a sufficient basis to do so.[281]

106. In addition, the European Union considers that China's "distinct and stricter" interpretation of Paragraph 16.4 fails to take into account the most important differences between that provision and the *Agreement on Safeguards* and Article XIX of the GATT 1994.[282] The European Union notes that, unlike Article XIX of the GATT 1994, China's Accession Protocol does not characterize measures as "emergency actions" that are the result of "unforeseen developments".[283] This, in the European Union's view, indicates that Section 16 of the Protocol is not "an 'extraordinary' remedy", as suggested by China.[284] According to the European Union, this is confirmed by the fact that Paragraph 16.4

[278]United States' appellee's submission, para. 241.
[279]European Union's third participant's submission, para. 7.
[280]European Union's third participant's submission, paras. 5 and 6.
[281]European Union's third participant's submission, paras. 5 and 6 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 235; Appellate Body Report, *EC – Hormones*, paras. 222ff; Appellate Body Report, *EC – Poultry*, paras. 156ff; Appellate Body Report, *Australia – Salmon*, paras. 117 and 193ff; Appellate Body Report, *US – Shrimp*, paras. 123ff; Appellate Body Report, *Japan – Agricultural Products II*, paras. 112ff; and Appellate Body Report, *EC – Asbestos*, paras. 133ff).
[282]European Union's third participant's submission, para. 8.
[283]European Union's third participant's submission, para. 9.
[284]European Union's third participant's submission, para. 9.

provides for a lower "material injury" standard than the "serious injury" standard that applies under the *Agreement on Safeguards*.[285] Thus, viewed in the proper context, the increase in imports required under the Protocol is "less recent, less sudden, less sharp and less significant"[286] than that required under the *Agreement on Safeguards* and Article XIX of the GATT 1994. The European Union adds that the object and purpose of the Protocol does not support China's restrictive interpretation of it, because the Protocol constitutes a single "package" of rights and obligations that imposes obligations on China that are not imposed on other Members under the WTO agreements.[287]

107. Turning to the interpretation of the term "increasing rapidly", the European Union disagrees with China that the use of the present continuous tense in Paragraphs 16.1 and 16.4 implies a focus on the most recent period of investigation. According to the European Union, the present continuous tense simply indicates that the period of investigation must be "recent" and that investigating authorities must consider "trends" in imports.[288] The European Union adds that Paragraphs 16.1 and 16.4 must be interpreted harmoniously, and that the Appellate Body has found that language similar to that contained in Paragraph 16.1 "does *not* require that imports need to be increasing at the time of the determination".[289] Moreover, the European Union does not consider that the term "rapidly" implies an assessment of the "speed or rate" of import increases, because Paragraphs 16.1 and 16.4 clearly admit of rapid import increases in volume terms. For this reason, a decline in the rate of increase in imports at the end of the period of investigation does not necessarily preclude a finding that imports are "increasing rapidly".[290]

108. In addition, the European Union notes that Section 16 of the Protocol does not impose any specific methodology on how to determine whether rapidly increasing imports are "a significant cause" of material injury. However, in the European Union's view, Paragraph 16.4 incorporates the requirement to conduct a non-attribution analysis, insofar as the impact of other known factors has to be assessed in order to determine whether rapidly increasing imports can amount to a "significant" cause. According to the European Union, the use of the word "significant" before "cause" in paragraph 16.4 does not imply a stricter causation standard than the one reflected in Articles 2.1 and 4.2(a) and (b) of the *Agreement on Safeguards*, which the Appellate Body has interpreted to require a "genuine and substantial relationship of cause and effect" between import increases and

[285]European Union's third participant's submission, para. 10 (referring to Appellate Body Report, *US – Lamb*, para. 124; and Appellate Body Report, *US – Wheat Gluten*, para. 149).
[286]European Union third participant's submission, para. 12 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 131).
[287]European Union's third participant's submission, para. 14.
[288]European Union's third participant's submission, para. 25 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 129 and 131).
[289]European Union's third participant's submission, para. 26 (quoting Appellate Body Report, *US – Steel Safeguards*, para. 367 (original emphasis)).
[290]European Union's third participant's submission, para. 29.

serious injury.[291] Therefore, China's argument that the analysis of the conditions of competition and correlation should be stricter under the Protocol than under the *Agreement on Safeguards* is inapposite. The European Union adds that reference to "a" significant cause implies that rapidly increasing imports must be "*one* cause but not the only or main" cause of material injury.[292]

109. Finally, the European Union observes that, should the Appellate Body reverse the Panel's finding on the basis of a violation of Article 11 of the DSU, China has neither requested completion of the legal analysis, nor provided "a detailed description … as to how uncontested facts or factual findings made by the panel" would allow the Appellate Body to do so.[293]

2. Japan

110. Japan's arguments focus on the Panel's interpretation of the terms "increasing rapidly" and "a significant cause" in Paragraph 16.4 of China's Accession Protocol.

111. Referring to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, Japan submits that the use of the present continuous tense "increasing" in Paragraph 16.4 and the past tense "increased" in Paragraph 16.1 should be given meaning.[294] However, Japan considers that the use of the present continuous tense in Paragraph 16.4 does not necessarily mean that authorities have to rely on "the present data and may not rely on … data sometime in the past".[295] Japan does not take any specific position with respect to the appropriate time period to be used as the proxy for the present situation in this case, but nevertheless observes that the Panel did in fact examine 2008 import increases in reaching its conclusion that imports were "increasing rapidly".[296]

112. In addition, Japan does not agree with China that the term "rapidly" requires a focus on the rates of increase in imports.[297] Japan submits that the express language in Paragraph 16.4 that increases may be assessed "either absolutely or relatively" undermines China's arguments in this respect.[298] In Japan's view, the term "either absolutely or relatively" in Paragraph 16.4 indicates that

[291]European Union's third participant's submission, para. 44 (quoting Appellate Body Report, *US – Wheat Gluten*, paras. 67 and 69; and Appellate Body Report, *US – Lamb*, paras. 168 and 179).
[292]European Union's third participant's submission, para. 46. (original emphasis)
[293]European Union's third participant's submission, para. 49 (referring to Appellate Body Report, *US – Countervailing Measures on DRAMs*, para. 197; and Appellate Body Report, *Japan – DRAMs (Korea)*, para. 142).
[294]Japan's third participant's submission, paras. 3 and 4 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 558).
[295]Japan's third participant's submission, para. 5.
[296]Japan's third participant's submission, para. 6 (referring to Panel Report, para. 7.93).
[297]Japan's third participant's submission, para. 10.
[298]Japan's third participant's submission, para. 11.

the assessment could be based either on an absolute increase of import volumes over a certain period of time, or on an increase of the subject imports relative to other sources, such as domestic production or imports from other countries.[299]

113. Japan maintains further that China's interpretation extends beyond the ordinary meaning of the term "a significant cause" and therefore "exaggerate[s]" the causation requirement of Paragraph 16.4.[300] In Japan's view, the article "a" indicates that imports from China may be one of various factors that cause material injury to the domestic industry.[301] Japan notes further that the panel in *EC – Countervailing Measures on DRAM Chips* interpreted the word "significant" as "more than just a nominal or marginal movement".[302] Japan considers that a determination of whether imports make "more than just a nominal or marginal" contribution to material injury can only be made where the investigating authority reviews the effects of other factors.[303] However, because the Protocol does not set forth any particular methodology for conducting this assessment, it is sufficient for the investigating authority to provide a reasoned and adequate explanation for finding that the effects of Chinese imports on the domestic industry are "more than just nominal or marginal".[304]

114. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Turkey, and Viet Nam did not file third participants' submissions, but attended the oral hearing in this appeal.

III. Issues Raised in This Appeal

115. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that the USITC properly determined that subject imports were "increasing rapidly" within the meaning of Paragraph 16.4 of China's Accession Protocol; and

(b) whether the Panel erred in finding that the USITC properly established that rapidly increasing imports from China were "a significant cause" of material injury to the US domestic industry within the meaning of Paragraph 16.4 of the Protocol, and in particular:

[299]Japan's third participant's submission, para. 11.
[300]Japan's third participant's submission, para. 16.
[301]Japan's third participant's submission, para. 16.
[302]Japan's third participant's submission, para. 18 (quoting Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307).
[303]Japan's third participant's submission, para. 20.
[304]Japan's third participant's submission, para. 21.

(i) whether the Panel erred in finding no error in the USITC's assessment of the conditions of competition in the US market;

(ii) whether the Panel erred in finding that the USITC was entitled to rely on an overall correlation between rapidly increasing imports and declines in injury factors;

(iii) whether the Panel erred in finding that China had failed to establish that the USITC's analysis improperly attributed injury caused by other factors to subject imports; and

(iv) whether, in reaching these findings, the Panel acted inconsistently with its obligations under Article 11 of the DSU.

IV. Introduction

116. Before commencing our analysis of the issues of law and legal interpretations raised in this appeal, we briefly introduce the relevant provisions of the Protocol on the Accession of the People's Republic of China to the WTO (the "Protocol" or "China's Accession Protocol").[305]

A. *China's Accession Protocol and Other WTO Agreements*

117. China's appeal focuses on the disciplines that apply under Section 16 of China's Accession Protocol for the application of a transitional product-specific safeguard mechanism and the Panel's assessment of whether the United States International Trade Commission (the "USITC") properly determined that imports of certain passenger vehicle and light truck tyres from China ("subject imports") were "increasing rapidly" as to be "a significant cause" of material injury within the meaning of Paragraph 16.4 of the Protocol.

118. Paragraph 1.2 of China's Accession Protocol provides that the Protocol "shall be an integral part"[306] of the *WTO Agreement*. As such, the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna*

[305]WT/L/432.

[306]This language mirrors Article II:7 of the GATT 1994 and Article XX:3 of the *General Agreement on Trade in Services* (the "GATS"). Specifically, Article II:7 of the GATT 1994 states that "[t]he Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement." Similarly, Article XX:3 of the GATS provides that "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

Convention")[307], are, pursuant to Article 3.2 of the DSU, applicable in this dispute in clarifying the meaning of Paragraphs 16.1 and 16.4 of the Protocol.[308]

119. Paragraphs 16.1 and 16.4 of China's Accession Protocol provide as follows:

> 1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.
>
> 4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if 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.

120. Section 16 of China's Accession Protocol sets out the conditions for the imposition of a product-specific safeguard measure on imports from China and provides that application of this transitional safeguard mechanism shall be terminated 12 years after the date of China's accession, that is, in December 2013. The text of Section 16 of the Protocol resembles to some extent the language found in provisions of other WTO agreements, such as the *Agreement on Safeguards*. Yet, there are important textual and contextual differences between Section 16 of the Protocol and the relevant provisions of other WTO agreements that will inform our interpretative analysis. In the light of these differences, and as we explain further below, we view Paragraphs 16.1 and 16.4 of the Protocol as establishing a distinct standard for the imposition of safeguard measures as compared to the standards set out in other WTO agreements.[309]

121. An analysis of the particular obligations set out under Section 16 of China's Accession Protocol must begin with, and focus upon, the actual language used in the Protocol itself, including the phrases "increasing rapidly" and "a significant cause". The provisions of other WTO agreements

[307]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[308]See Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at 16; and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 31, DSR 1996:I, 97, at 122-123.

[309]See *infra*, paras. 131-140 and 176-185 of this Report.

provide context, within the meaning of Article 31(1) and (2) of the *Vienna Convention*, to the interpretation of Paragraphs 16.1 and 16.4 of the Protocol.[310] Such context is relevant to the extent that it sheds light on the interpretative issues to be resolved in this case.[311]

B. *Standard of Review*

122. Article 11 of the DSU states in relevant part that:

> ... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

123. Article 11 of the DSU sets out the standard of review applicable in WTO panel proceedings. It is well established that, in examining an investigating authority's determination, a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, a panel should examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations.[312] A panel's examination of an investigating authority's conclusions must be critical, and be based on the information contained in the record and the explanations given by the authority in its published report.[313] As the Appellate Body has explained, what is "adequate" will depend on the facts and circumstances of the particular case and the claims made.[314] In *US – Lamb*, the Appellate Body provided guidance on how panels should assess the conclusions of national investigating authorities under Article 4.2(a) of the *Agreement on Safeguards*:

> 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

[310]Appellate Body Reports, *China – Auto Parts*, para. 151.
[311]Appellate Body Reports, *China – Auto Parts*, para. 151.
[312]See Appellate Body Report, *Argentina – Footwear (EC)*, paras. 119-121; Appellate Body Report, *US – Cotton Yarn*, paras. 74-78; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 183 and 186-188; Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *US – Lamb*, paras. 101 and 105-108; Appellate Body Report, *US – Steel Safeguards*, para. 299; Appellate Body Report, *US – Wheat Gluten*, paras. 160 and 161; Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; and Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 516.
[313]See Appellate Body Report, *US – Lamb*, para. 106.
[314]Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

> competent authorities is not reasoned or adequate.[315] (original emphasis)

124. In articulating the standard of review that it applied in this dispute, the Panel referred to, and quoted from, the above guidance of the Appellate Body, and made certain additional statements. Importantly, the Panel recalled that the standard of review to be applied by a panel in a given case is also a function of the substantive provisions of the specific covered agreement that is at issue in the dispute, and thus "must be understood in the light of the obligations of the particular covered agreement at issue".[316] The Panel noted that, under Paragraph 16.4 of China's Accession Protocol, an investigating authority is required to "consider objective factors" in determining whether market disruption exists, and that, under Paragraph 16.5, the importing Member "shall provide written notice of the decision to apply a measure, including the reasons for such measure".[317] The Panel further observed that "a panel's standard of review is necessarily distinct from the substantive and procedural obligations of the investigating authority."[318] On this basis, the Panel considered that, in order to review whether the reasoning of the USITC was adequate, the Panel was required to "assess whether the reasoning provided by the USITC in its determination seem[ed] adequate in light of plausible alternative explanations of the record evidence or data advanced by China in this proceeding."[319] The USITC made an affirmative determination that certain passenger vehicle and light truck tyres from China are being imported into the United States in such increased quantities or under such conditions as to cause market disruption.[320] In the present case, the Panel was therefore required to assess whether the USITC provided a reasoned and adequate explanation to support this determination.[321]

125. The participants do not contest the Panel's *articulation* of the standard of review to be applied in assessing claims brought under Section 16 of the Protocol. In its appeal, China contends, rather,

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[315]Appellate Body Report, *US – Lamb*, para. 106.

[316]Panel Report, para. 7.15 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184).

[317]Panel Report, para. 7.18.

[318]Panel Report, para. 7.18.

[319]Panel Report, para. 7.18 (referring to, *inter alia*, Appellate Body Report, *US – Lamb*, para. 106).

[320]USITC Report, p. 29.

[321]USITC Report, p. 29. As noted above in footnote 4 of this Report, the determination of the USITC, the views of the USITC commissioners, and the "USITC staff report" containing the information and data gathered by the USITC staff in the investigation are set forth in *Certain Passenger Vehicle and Light Truck Tires from China*, Investigation No. TA-421-7, USITC Publication 4085 (July 2009) (Panel Exhibit US-1) (the "USITC Report"). All six of the USITC commissioners found that subject imports from China were "increasing rapidly" and that the US tyres industry was "materially injured". (USITC Report, pp. 12, 18 and 45) However, two of the six USITC commissioners found that market disruption did not exist, because subject imports from China were not a significant cause of material injury to the domestic industry. (*Ibid.*, p. 45) These two commissioners submitted views dissenting from the decision of the majority of USITC commissioners. The determination of the USITC, the views of the majority, and the separate views of the dissenting commissioners were accompanied by the USITC staff report. We address the relevance of the separate views of the dissenting USITC commissioners and the information and data contained in the USITC staff report in paragraphs 211 and 326 of this Report, respectively.

that the Panel erred in its *application* of the standard of review prescribed by Article 11 of the DSU, and as clarified by the Appellate Body in previous disputes.[322]

V. Increase in Imports

126. Against this background, we turn to the issues raised by China in this appeal. We begin our analysis with China's claim that the Panel erred in finding that the USITC properly determined that subject imports were "increasing rapidly" within the meaning of Paragraph 16.4 of China's Accession Protocol. Because China and the United States offer conflicting views on the proper interpretation of the term "increasing rapidly" in Paragraph 16.4, we find it useful to address the meaning of this legal standard before turning to the specific issues raised by China on appeal.

A. *The Meaning of "Increasing Rapidly"*

127. China claims that the use of the present continuous tense "increasing" requires investigating authorities to focus on the most recent past, whereas the ordinary meaning of the term "rapidly" implies a focus on the rates of increase in imports.[323] According to China, Paragraph 16.4 provides specific meaning for the more general language, "in such increased quantities", found in Paragraph 16.1 of the Protocol. China contends that imports must be "increasing rapidly" and not merely be in an "'increased' state".[324] China also contrasts the "increasing rapidly" standard of Paragraph 16.4 with the standards contained in other WTO agreements, all of which use the past tense to provide for an assessment of previous—rather than current—increases in imports.[325]

128. China emphasizes further that the object and purpose of the Protocol supports its contention that Paragraph 16.4 provides for a higher threshold for increases in imports than other WTO agreements. China notes the Appellate Body's recognition that measures under the *Agreement on Safeguards* are "extraordinary" because they restrict "fair" trade.[326] China stresses that the Protocol similarly allows for the restriction of "fair" trade; however, unlike the *Agreement on Safeguards*, it further allows for the derogation of the most-favoured nation ("MFN") principle, because it provides for the application of trade-restrictive measures exclusively against China. For

[322]China refers to, for example, the Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188; Appellate Body Report, *US – Lamb*, paras. 148 and 149; Appellate Body Report, *US – Wheat Gluten*, paras. 160-162; and Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 526. (China's appellant's submission, paras. 557-564)

[323]China's appellant's submission, paras. 58 and 59.

[324]China's appellant's submission, para. 63.

[325]China's appellant's submission, paras. 64-66.

[326]China's appellant's submission, para. 81 (quoting Appellate Body Report, *Argentina – Footwear (EC)*, paras. 94 and 95).

China, this "'extra'-extraordinary" nature of measures under the Protocol must be taken into account in the interpretation of the distinct "increasing rapidly" standard provided in Paragraph 16.4.[327]

129. The United States responds that the text of Paragraph 16.4 does not support the "increasing rapidly" standard articulated by China. For the United States, the absence of any explicitly prescribed period of investigation in Paragraph 16.4 suggests that investigating authorities have the discretion to select any period, provided that it allows for an assessment of import increases during a "recent period".[328] The United States argues further that the ordinary meaning of the term "rapidly" ("with great speed" or "swiftly") does not embody a "comparative or relative concept"[329], and that, for this reason, rates of increase in imports are not relevant. In the United States' view, the standards for import increases articulated by other covered agreements are significantly different from the specific standard provided for under the Protocol, and therefore are of limited contextual relevance.[330]

130. Moreover, the United States argues that the object and purpose of the Protocol does not support a "heightened standard" for import increases.[331] According to the United States, the Appellate Body's conclusion that a safeguard measure is an "extraordinary remedy" stems from the express reference to "emergency actions" and "unforeseen developments" in the text of Article XIX of the GATT 1994, and neither of these terms are present in the text of Section 16 of the Protocol.[332] The United States also emphasizes that the "material injury" threshold provided for in the Protocol is lower than the "serious injury" threshold under the *Agreement on Safeguards*, thus undermining China's argument that the Protocol provides for a higher threshold for import increases than the *Agreement on Safeguards*.[333]

131. Paragraph 16.1 sets forth the general conditions for the imposition of product-specific safeguard measures provided for under Section 16 of the Protocol. It establishes that such measures may be applied 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".

[327]China's appellant's submission, para. 84.
[328]United States' appellee's submission, para. 46.
[329]United States' appellee's submission, para. 62 (referring to China's appellant's submission, paras. 113, 117, and 118).
[330]United States' appellee's submission, paras. 64-68.
[331]United States' appellee's submission, para. 52.
[332]United States' appellee's submission, para. 53.
[333]United States' appellee's submission, para. 54.

132. Paragraph 16.4 specifies the conditions in which "market disruption" within the meaning of Paragraph 16.1 shall exist, in the following terms:

> 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 cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exits, 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. (emphasis added)

133. The first sentence of Paragraph 16.4 thus establishes that market disruption shall exist when the following three conditions are met. First, imports from China are "increasing rapidly, either absolutely or relatively". Second, the domestic industry producing like or directly competitive products is materially injured, or threatened with material injury. Third, rapidly increasing imports are "a significant cause" of material injury to the domestic industry, or threat thereof. This part of China's appeal concerns only the first condition, which constitutes a threshold requirement for the existence of "market disruption" within the meaning of Paragraphs 16.1 and 16.4 of the Protocol.

134. We begin our analysis with the ordinary meaning of the term "increasing rapidly". The ordinary meaning of the verb "increase" is to "make or become greater in size, amount, duration or degree".[334] As noted by China, when specifying the conditions under which products "are being imported in such increased quantities" under Paragraph 16.1, Paragraph 16.4 uses the present continuous tense "are increasing". In our view, the use of the present continuous tense "are increasing" connotes import increases that are still in progress at the present time.[335] The use of the present continuous tense "are increasing" also suggests that imports follow an upward trend, in that they have increased in the past and continue to increase at present.

135. The first sentence of Paragraph 16.4 employs the adverb "rapidly" to describe the nature of increases in imports that could give rise to "market disruption". The ordinary meaning of the term "rapid" is "with great speed, swift, developed or completed within a short time".[336] Therefore, the adverb "rapidly" refers both to the speed with which, and to the short period of time in which, such

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[334]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 1350.

[335]However, as noted in paragraph 146, *infra*, since investigating authorities do not have access to real-time import data, they must review imports over a sufficiently recent period, which is used as a proxy for present imports.

[336]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2465.

increase is occurring. Thus, the ordinary meaning of the term "increasing rapidly" seems to suggest that imports are presently becoming greater in amount or degree, at great speed or swiftly, and within a short period of time.

136. Paragraph 16.4 further provides that market disruption exists where imports are increasing rapidly "*either absolutely or relatively*". This suggests that either an absolute or a relative increase may be relevant in determining whether imports are increasing "rapidly" within the meaning of that provision. In our view, a rapid increase in *absolute* terms occurs when the volume of imports increases significantly over a short period of time. Paragraph 16.4 provides no express guidance as to which benchmarks may be used in assessing whether imports are "increasing rapidly" in *relative* terms. However, to the extent that Paragraph 16.4 defines "market disruption" with reference to imports that are increasing rapidly "so as to be a significant cause of material injury … to the domestic industry", any benchmark that compares increases in imports from China vis-à-vis relevant indicators of the domestic industry, such as consumption (that is, market share) or production, could be appropriate. Therefore, imports will be increasing "rapidly" in *relative* terms when the share of imports from China relative to consumption or other relevant benchmarks increases significantly over a short period of time.

137. Paragraph 16.4 must be read together with Paragraph 16.1, which establishes that market disruption may arise where products from China "are being imported … in such increased quantities" as to cause market disruption. In our view, Paragraph 16.1 imparts two distinct elements that are relevant for the interpretation of Paragraph 16.4. First, Paragraph 16.1 requires that Chinese products "*are being imported*". The fact that Paragraph 16.1, like Paragraph 16.4, employs the present continuous tense further buttresses our conclusion that the term "increasing rapidly" in Paragraph 16.4 connotes increases in imports that continue at the present time. Similar language contained in Article 2.1 of the *Agreement on Safeguards* ("is being imported") was interpreted by the Appellate Body in *Argentina – Footwear (EC)* as implying that the increase in imports "must have been sudden and recent".[337]

138. Second, Paragraph 16.1 establishes that Chinese imports are being imported "*in such increased quantities*" as to cause market disruption. Reference to "*increased* quantities" suggests a comparative assessment, in that imports must have become greater than they once were. The term "such", in turn, establishes a threshold requirement in relation to the magnitude or degree of import increases that could cause market disruption under Paragraph 16.1. Market disruption under Paragraph 16.1 arises not when Chinese products are being imported merely in "increased quantities",

[337]Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

but rather "in *such* increased quantities" as to cause market disruption. This, in our view, suggests that, in order to cause market disruption, imports must be at significantly higher levels than they once were.[338]

139. Finally, the "increasing rapidly" threshold of Paragraph 16.4 must be interpreted consistently with the object and purpose of the Protocol, as reflected in Section 16 thereof. This object and purpose is to afford temporary relief to domestic industries that may be exposed to market disruption as a result of a rapid increase in Chinese imports of like or directly competitive products, subject to the terms and conditions provided for in Section 16. Viewed in this light, Paragraph 16.4 strikes a particular and distinct balance between, on the one hand, imports that are increasing significantly in a short period of time and, on the other hand, the requisite level of injury to the domestic industry ("material injury") and the causal link between imports that are increasing rapidly and material injury to the domestic industry (rapidly increasing imports must be a "significant cause" of material injury).

140. In sum, imports from China will be "increasing rapidly" under Paragraph 16.4 of the Protocol when they are increasing at great speed or swiftly, either in relative or absolute terms. Such import increases must be occurring over a short and recent period of time, and must be of a sufficient absolute or relative magnitude so as to be a significant cause of material injury to the domestic industry.

B. *China's Claim of Error regarding "Increasing Rapidly"*

141. With this interpretative guidance in mind, we turn to the specific issues raised by China on appeal. China claims that the Panel erred in finding that the USITC properly determined that subject imports met the "increasing rapidly" threshold set forth in Paragraph 16.4 of China's Accession Protocol. China essentially argues that a decline in the *rate* of increase in subject imports in the last year of the 2004-2008 period of investigation indicated that subject imports were not "increasing rapidly" within the meaning of Paragraph 16.4. China develops three lines of argumentation in

[338]In the same vein, the Appellate Body found, in *Argentina – Footwear (EC)*, that the term "in *such* increased quantities" in Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 implied a minimum threshold requirement for the level of imports which would suffice to cause "serious injury" within the meaning of these provisions. In particular, the Appellate Body found that:

> … not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language … requires that the 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".

(Appellate Body Report, *Argentina – Footwear (EC)*, para. 131) (original emphasis))

support of this contention, styled as parallel claims of error in relation to the Panel's interpretation and its application of the term "increasing rapidly" in Paragraph 16.4 of the Protocol.

1. Most Recent Import Increases

142. First, China claims that the Panel erred in its interpretation of Paragraph 16.4 of the Protocol in finding that the USITC was not required to focus its analysis on import trends during the *most recent* period, in this case, the year 2008. China argues that the use of the present continuous tense "increasing" in Paragraph 16.4 requires a focus on the most recent past, and that the Panel erred in failing to distinguish between "increasing" imports in Paragraph 16.4, and "increased" imports in Paragraph 16.1.[339] China adds that the Panel's reliance on the contextual guidance provided in Article 2.1 of the *Agreement on Safeguards* was misplaced, insofar as that provision clearly focuses on past, rather than present, import increases.[340] China further maintains that the more specific language of Paragraph 16.4 should prevail over the more general language of Paragraph 16.1, and that interpreting "increasing" as requiring a focus on the most recent period is the only interpretation that can be reconciled with both provisions.[341]

143. In addition, China claims that the Panel erred in its application of the "increasing rapidly" standard of Paragraph 16.4 by improperly upholding the USITC's assessment of import increases over the entire 2004-2008 period of investigation. According to China, neither the USITC nor the Panel adequately explained why import increases over the full five-year period of investigation were relevant to a determination that imports were "increasing rapidly", or should be accorded equal weight to the most recent import trends.[342] China maintains further that the USITC did not provide an adequate explanation for its conclusion that import increases were "large, rapid, and continuing" in 2008, and that the Panel filled this gap by providing its own analysis of the 2008 increase viewed in isolation.[343]

144. The United States responds that the Panel properly concluded that the USITC was not required to focus its analysis on the most recent import increases. For the United States, the absence of any explicitly prescribed period of investigation in Paragraph 16.4 suggests that investigating authorities have the discretion to select any period, provided that it allows for an assessment of import increases during a "recent period".[344] The United States rejects China's argument that Paragraph 16.4

[339]China's appellant's submission, para. 94.
[340]China's appellant's submission, para. 100.
[341]China's appellant's submission, paras. 102 and 104.
[342]China's appellant's submission, paras. 132-134.
[343]China's appellant's submission, para. 136.
[344]United States' appellee's submission, paras. 46 and 47 (quoting Panel Report, para. 7.88).

should prevail over Paragraph 16.1, and argues instead that the Panel's interpretation gave effect to both Paragraphs 16.1 and 16.4 of the Protocol.[345]

145. The United States maintains further that, contrary to China's assertion, both the USITC and the Panel did in fact examine 2008 import data in arriving at the conclusion that import increases at the end of the period of investigation were "large, continuing and rapid".[346] In its analysis, the USITC indicated that the highest "quantity" and "aggregate value" of subject imports was in 2008.[347] The United States underscores further that the USITC also expressly reasoned that the two largest "year-to-year increases" with respect to the ratio of the "subject imports to U.S. production" and "market share of the Chinese imports" occurred "at the end of the period in 2007 and 2008".[348]

146. We are not persuaded that the use of the present continuous tense "are increasing" in Paragraph 16.4 of the Protocol requires investigating authorities to focus exclusively on import increases that occurred during the *most* recent past. As noted earlier, the use of the present continuous tense in both Paragraph 16.4 ("are increasing") and Paragraph 16.1 ("are being imported") connotes an upward trend in imports that continues at the present time. However, because investigating authorities normally do not have access to real-time import data, they have to examine the behaviour of imports during a sufficiently recent period in the past, which is used as a proxy for current imports. For this reason, the period of investigation selected by the investigating authority must be sufficiently *recent* to provide a reasonable indication of *current* trends in imports. As the Appellate Body noted in *Argentina – Footwear (EC)*:

> [T]he use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine *recent* imports, and not simply trends in imports during the past five years—or, for that matter, during any other period of several years.[349] (emphasis added)

147. Thus, the Appellate Body made clear that the use of the present continuous tense in the phrase "is being imported" requires investigating authorities to examine "recent" import trends. For this reason, investigating authorities must select a period of investigation that is sufficiently recent to

[345]United States' appellee's submission, para. 51.
[346]United States' appellee's submission, para. 55 (referring to USITC Report, p. 12).
[347]United States' appellee's submission, para. 55 (referring to USITC Report, p. 12).
[348]United States' appellee's submission, para. 55 (referring to USITC Report, p. 12).
[349]Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

provide a reasonable indication of current trends in imports.[350] Or, as the Appellate Body put it, "the investigation period should *be* the recent past".[351] However, once the period of investigation is selected, and is sufficiently recent to provide a reasonable indication of current trends in imports, nothing in the use of the present continuous tense "are increasing" in Paragraph 16.4 and "are being imported" in Paragraph 16.1 implies that the analysis must be limited to import data relating to the very end of the period of investigation.

148. Moreover, Paragraph 16.1 establishes that market disruption, as defined in Paragraph 16.4, may be caused when Chinese products "are being imported … in such increased quantities". As noted earlier, reference to "in *such* increased quantities" suggests a comparative assessment, indicating that imports must be at significantly higher levels than earlier in the period of investigation. Investigating authorities would not be able to determine whether imports have increased, and whether the level of such increase in imports meets the threshold requirement implied by the terms "in *such* increased quantities", if they were to focus exclusively on the most recent period.

149. In the light of these considerations, we see no error in the Panel's conclusion that "there is nothing in the use of the present continuous tense in Paragraphs 16.1 and 16.4 of the Protocol that would require an investigating authority to focus on the movements in imports during the *most* recent past, or during the period immediately preceding the authority's decision."[352]

150. Moreover, the Panel and the USITC did assess 2008 import data in determining that imports from China were "increasing rapidly" under Paragraph 16.4. The Panel reviewed absolute import data collected by the USITC for each year of the 2004-2008 period of investigation and the percentage increase in imports from China year-on-year between 2005 and 2008.[353] The Panel observed that there were absolute import increases in each year of the period of investigation, with the greatest increase occurring in the last two years of the period, when subject imports increased by 14.5 million units and 4.5 million units, respectively.[354] On the basis of this data, the Panel saw no error in the USITC's conclusion that imports from China were "increasing rapidly" in absolute terms, for the following reasons:

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[350]We note that China does not argue on appeal that the USITC selected a period of investigation that is not sufficiently recent to provide an indication of the current behaviour of imports. Rather, China argues that the USITC should have focused its analysis on import data for 2008, which is the most recent calendar year of the five-year 2004-2008 period of investigation. Before the Panel, China also argued that the USITC erred in not including interim data for the first quarter of 2009 in the period of investigation. The Panel found that the USITC was not "obliged to collect and incorporate absolute and relative data for the first quarter of 2009 into its period of investigation". (Panel Report, para. 7.109) China does not challenge this finding on appeal.

[351]Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130 to para. 130. (original emphasis)

[352]Panel Report, para. 7.90. (original emphasis)

[353]Panel Report, para. 7.83.

[354]Panel Report, para. 7.84 and footnote 175 thereto.

> In absolute terms, imports of subject tires from China increased throughout the period of investigation and *were the highest, in terms of both quantity and value, in 2008, at the end of the period*. The quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and *by 10.8 percent between 2007 and 2008*. The value of subject imports rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and *by 19.8 percent between 2007 and 2008*.[355] (emphasis added)

151. We agree with the Panel that the USITC's finding that imports were "increasing rapidly" in *absolute* terms would have, on its own, satisfied the requirements of Paragraph 16.4.[356] Nonetheless, the USITC took the additional step of reviewing data on import increases in *relative* terms, and the Panel accordingly reviewed that analysis. The Panel observed that the USITC reviewed both import data relative to total domestic consumption (that is, market share) and import data relative to domestic production. The Panel noted the USITC's finding that the relative import data also supported a finding that subject imports were "increasing rapidly", for the following reasons:

> Both the ratio of subject imports to U.S. production and the ratio of subject imports to U.S. apparent consumption rose throughout the period examined, and *both ratios were at their highest levels of the period in 2008*. The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with the *two largest year-to-year increases occurring at the end of the period in 2007 and 2008.* The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the *two largest year-to-year increases also occurring at the end of the period in 2007 and 2008.*[357] (emphasis added)

152. The Panel added that both the market share of subject imports and the ratio of subject imports relative to domestic production increased in every year of the period of investigation, including in 2008.[358] The Panel noted that, over the period of investigation, the market share of subject imports increased by 12%, whereas the market share of non-subject imports remained "more or less stable".[359] Similarly, the ratio of subject imports relative to domestic production increased by 22% over the entire period.[360] On this basis, the Panel concluded that "regardless of a focus on imports relative to market share or relative to domestic production there were increases from year to year and significant increases over the period of investigation".[361]

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[355]Panel Report, para. 7.85.
[356]Panel Report, para. 7.100.
[357]Panel Report, para. 7.94 (quoting USITC Report, p. 12).
[358]Panel Report, paras. 7.96 and 7.98.
[359]Panel Report, para. 7.96.
[360]Panel Report, para. 7.98.
[361]Panel Report, para. 7.98.

153. In the light of the above, we do not agree with China that the Panel erred in its application of the "increasing rapidly" standard of Paragraph 16.4 by upholding the USITC's assessment of import increases over the entire 2004-2008 period of investigation. In any event, as the Panel noted, the USITC separately examined absolute and relative import data for the last two calendar years of the period of investigation.

2. Rates of Increase in Imports

154. Second, China claims that the Panel erred in its interpretation of Paragraph 16.4 of the Protocol in finding that the USITC was not required to focus its analysis on the *rates* of increase in subject imports. China argues that the term "rapidly" in Paragraph 16.4 requires that investigating authorities focus on the *rates* of increase in subject imports. According to China, the Panel's reference to the ordinary meaning of "rapidly"—"with great speed" or "swiftly"—was insufficient to dismiss the relevance of rates of increase, because "[t]here is no way to determine whether an increase is occurring at a 'great speed' without assessing its rate."[362] China emphasizes that "rapidly" is a relative concept, which conveys the idea that something is increasing more quickly than something else, and therefore it is "useful" to assess the rates of increase in subject imports.[363]

155. Moreover, China claims that the Panel erred in its application of Paragraph 16.4 when it upheld the USITC's "inadequate" assessment of the *rates* of increase in subject imports.[364] China contends that the USITC did not provide an adequate explanation for its conclusion that imports were "increasing rapidly", despite a decline in the rate of increase in subject imports in 2008.[365] According to China, the Panel's reasoning that the 2008 rate of increase was in addition to increases in prior years was not sufficient, because increases in every year of the period of investigation and market share gains over the full period of investigation do not establish that increases were "rapid".[366]

156. The United States responds that the Panel correctly held that the ordinary meaning of the term "rapidly" does not refer to the "rate" of increase in subject imports.[367] For the United States, the Panel correctly rejected China's attempt to read into the term "rapidly" a requirement that imports be increasing not only "swiftly" or "quickly" but also "at an accelerating rate of increase".[368] The

[362]China's appellant's submission, para. 111.
[363]China's appellant's submission, para. 113.
[364]China's appellant's submission, paras. 130, 133, and 134.
[365]China's appellant's submission, paras. 140 and 144.
[366]China's appellant's submission, paras. 145 and 146 (referring to Panel Report, para. 7.93).
[367]United States' appellee's submission, para. 60.
[368]United States' appellee's submission, para. 61.

United States further rejects China's contention that the term "rapidly" necessarily involves a "relative concept", because the word "rapidly" does not mean "'more swiftly', 'more quickly' or 'with greater speed'".[369]

157. In addition, the United States notes that the USITC did examine the rates of increase in subject imports in the final years of the period of investigation. The United States emphasizes that the USITC "explicitly" referred in its analysis to "rates of increase" both in volume and value, and specifically addressed the rates of increase in the last two years of the period.[370] The United States adds that the USITC also reviewed the rates of increase in the market share of subject imports, and in their ratio to domestic production, and emphasized that the "two largest year-to-year increases" in these metrics occurred in 2007 and 2008.[371]

158. Like the Panel, we do not find that the ordinary meaning of the term "rapidly" ("with great speed" or "swiftly") suggests an exclusive focus on the rates of increase in subject imports.[372] In our view, the text of Paragraph 16.4 requires that *imports*—and not the *rates* of increase in imports—be increasing "rapidly". While it might be useful for investigating authorities to review rates of increase in imports in assessing whether imports are "increasing rapidly", we cannot agree with China that imports will only be increasing "rapidly" when they are increasing at progressively accelerating rates. To the contrary, we agree with the Panel that a decline in the yearly rate of increase does not "necessarily preclude a finding that imports are 'increasing rapidly'".[373] This is particularly so because, under Paragraph 16.4, rapid *absolute* import increases suffice to establish that imports are "increasing rapidly". Moreover, one might expect that the rate of increase in imports will normally decline as imports grow from an increasingly larger base. Yet this alone would not, in our view, preclude a finding that imports are "increasing rapidly" in absolute terms.

159. As noted earlier, the term "rapidly" in Paragraph 16.4 connotes both the speed with which, and the short time period in which, imports are increasing. Accordingly, imports will be "increasing rapidly" in *absolute* terms when the volume of imports increases significantly over a short period of time. Conversely, imports will be increasing "rapidly" in *relative* terms when the share of subject imports relative to production, consumption, or other appropriate benchmarks increases significantly over a short period of time. Viewed in this light, the term "rapidly" does not require that the *rates* of increase in either the volume or market share of subject imports progressively increase over the period

[369]United States' appellee's submission, para. 62.
[370]United States' appellee's submission, paras. 72 and 73.
[371]United States' appellee's submission, para. 72 (quoting USITC Report, p. 12).
[372]Panel Report, para. 7.92 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2465).
[373]Panel Report, para. 7.92.

of investigation. This is because the volume or market share of subject imports may still be increasing significantly over a short period of time in situations where the *rate* of increase in a given year decelerates in comparison to previous years. In this sense, we agree with the Panel that the relative *change* in either the volume or the market share of subject imports is "a step further away" from the text of Paragraph 16.4, which requires rapid increases in either the volume or market share of subject imports.[374]

160. In any event, the Panel's analysis indicates that the USITC took sufficient account of the rates of increase in imports at the end of the period of investigation, both in absolute and relative terms. As the Panel noted, the USITC expressly found that "[t]he quantity of subject imports rose … by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008".[375] The USITC also expressly noted that "[t]he value of subject imports rose even more rapidly, increasing … by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008".[376] Turning to the USITC's analysis of relative import data, the Panel expressly referred to the USITC's finding that "[t]he 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."[377] Similarly, the Panel also noted the USITC's finding that "[t]he ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008."[378]

161. Moreover, the Panel expressed the view that a decline in the *rate* of increase in subject imports in 2008 did not undermine the USITC's finding that subject imports were "increasing rapidly" within the meaning of Paragraph 16.4. The Panel explained that:

> … the fact that the 10.8 per cent increase in 2008 was lower than the increase in the preceding year does not mean that imports were not "increasing rapidly" in 2008. An increase of 10.8 per cent in 2008 by no means precludes a finding that imports are "increasing rapidly", especially when that increase is assessed in context. 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

[374]Panel Report, para. 7.99.
[375]Panel Report, para. 7.85 (quoting USITC Report, pp. 11-12).
[376]Panel Report, para. 7.85 (quoting USITC Report, pp. 11-12).
[377]Panel Report, para. 7.94 (quoting USITC Report, p. 12).
[378]Panel Report, para. 7.94 (quoting USITC Report, p. 12).

> imports were "increasing rapidly" during the period, and continued to be "increasing rapidly" at the end of the period.[379] (original emphasis)

162. We see no error in the Panel's reasoning. We agree, in particular, with the Panel's reasoning that a decline in the *rates* of increase in imports towards the end of the period of investigation does not detract from the USITC's conclusion that imports from China were "increasing rapidly", particularly when import increases at the end of the period of investigation remained significant both in relative and in absolute terms.

3. Rates of Import Increases in Context

163. Third, and finally, China claims that the Panel erred in its interpretation of Paragraph 16.4 of the Protocol in finding that the USITC was not required to assess the most recent rate of increase in subject imports *relative* to the rates of increase in earlier periods. China argues that the Panel ignored the meaning that the words "increasing" and "rapidly" impart to one another. China emphasizes that "rapidly" is a relative concept and, when qualifying the term "increasing", it indicates that imports must be increasing more rapidly than some other benchmark, typically the rate of import increases in the past.[380] For this reason, the earlier part of the period of investigation provides a "contextual baseline" for determining whether later rates of increase can be considered "rapid", in that they are greater than prior rates of increase.[381]

164. China argues further that the Panel erred in affirming the USITC's determination, despite the fact that the USITC failed to provide a reasoned and adequate explanation for finding that imports were "increasing rapidly" when the rate of increase in subject imports in 2008 was lower than the rates of increase in previous years. China charges the Panel with filling the gap in the USITC's reasoning by providing its own analysis of the 2008 increases.[382] According to China, neither the USITC nor the Panel provided an adequate explanation as to why import increases could be considered "rapid" when the *rates* of increase in market share and in subject imports relative to domestic production fell in 2008.[383]

165. The United States responds that the Panel correctly rejected China's argument that an increase can only be rapid under Paragraph 16.4 where 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

[379]Panel Report, para. 7.93.
[380]China's appellant's submission, paras. 60 and 117.
[381]China's appellant's submission, para. 118.
[382]China's appellant's submission, para. 153.
[383]China's appellant's submission, paras. 159-163.

increase in the prior year".[384] For the United States, the term "increasing rapidly" does not require an "accelerating rate of increase" over the period of investigation.[385]

166. The United States adds that the USITC provided a reasoned and adequate explanation for its finding that imports were increasing rapidly, both in absolute and relative terms. The United States stresses that the USITC assessed import increases on a year-on-year basis and the rate of increase in each year, and emphasized the rapid increases that occurred in the last two years of the period of investigation.[386] For the United States, the import data did not contain any "complexities" that warranted a more detailed analysis by the USITC or the Panel, because "all of the possible metrics" indicated a "clear and uninterrupted upward trend in import volumes" during the period of investigation.[387]

167. We have earlier disagreed with China that the term "increasing rapidly" requires investigating authorities to focus on import increases during the most recent past, and to focus their analysis on the *rates* of increase in imports from China. Instead, we concluded that Paragraph 16.4 requires investigating authorities to assess import trends over a sufficiently recent period, and to determine whether imports are increasing significantly, either in absolute or relative terms, within a short period of time. We have also expressed the view that the decline in the rate of increase in subject imports in 2008 did not preclude a finding that imports were "increasing rapidly", particularly in the light of the fact that Paragraph 16.4 refers to rapid import increases either in absolute or relative terms. Accordingly, we cannot agree with China that the Panel erred in not requiring the USITC to focus on the rate of increase in subject imports in 2008, and to compare it with the rates of increase earlier in the period of investigation.

168. In any event, contrary to China's allegation, the Panel's analysis demonstrates that the USITC provided a reasoned and adequate explanation for its conclusion that subject imports continued to increase rapidly at the end of the period of investigation. As the Panel noted, the USITC properly assessed import increases over the last two years of the period of investigation in finding that "[t]he quantity of subject imports rose … by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008".[388] Similarly, turning to the USITC's assessment of relative import data, the Panel expressly referred to the USITC's finding that both the market share of subject imports and the

[384]United States' appellee's submission, para. 60 (quoting Panel Report, para. 7.92).
[385]United States' appellee's submission, para. 61.
[386]United States' appellee's submission, para. 75.
[387]United States' appellee's submission, para. 77 (quoting Panel Report, para. 7.103). (underlining omitted)
[388]Panel Report, para. 7.85 (quoting USITC Report, pp. 11-12). The USITC also expressly noted that "[t]he value of subject imports rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008." (*Ibid*.)

ratio of subject imports relative to domestic production increased in every year of the period of investigation, "*with the two largest year-to-year increases occurring at the end of the period in 2007 and 2008*".[389] Moreover, we cannot agree with China that the Panel impermissibly filled the gap in the USITC's analysis simply by noting that the 10.8% increase in imports in 2008 came in addition to earlier increases in each year of the period of investigation.[390] In our view, the Panel was simply reciting data contained in the USITC record, and determining whether the USITC's assessment of that data supported the USITC's ultimate conclusion that imports from China met the "increasing rapidly" threshold of Paragraph 16.4.

4. Conclusion

169. On this basis, we find no error in the Panel's finding that the USITC did not fail to provide a reasoned and adequate explanation for determining that subject imports were "increasing rapidly" under Paragraph 16.4 of the Protocol. The analysis above reasonably supports the Panel's endorsement of the USITC's ultimate conclusion that:

> ... subject imports increased, both absolutely and relatively throughout the period by significant amounts in each year and, as stated above, were at their highest levels at the end of the period in 2008. Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period—and from an increasingly large base.[391]

170. Based on all of the above, we *uphold* the Panel's finding, in paragraph 7.110 of the Panel Report, that the USITC did not fail to evaluate properly whether imports from China met the specific threshold under Paragraph 16.4 of China's Accession Protocol of "increasing rapidly".

VI. Causation

171. We turn next to China's appeal of the Panel's finding that the USITC did not fail to establish properly that rapidly increasing imports from China were "a significant cause" of material injury to the domestic industry under Paragraph 16.4 of China's Accession Protocol. China argues that this finding is in error for several reasons. First, China claims that the Panel erred in finding that the USITC properly assessed the conditions of competition in the US tyres market, which, according to China, demonstrate the existence of "attenuated" competition between subject imports and domestic tyres. Second, China claims that the Panel erred in finding that the USITC was entitled to rely on an

[389]Panel Report, para. 7.94 (quoting USITC Report, p. 12). (emphasis added)
[390]Panel Report, para. 7.93.
[391]Panel Report, para. 7.85 (quoting USITC Report, pp. 11-12).

"overall coincidence" between import increases and declines in injury factors in finding that subject imports were a significant cause of material injury to the domestic industry. Third, China claims that the Panel erred in finding that the USITC did not fail to address adequately the individual and cumulative effects of other causal factors in finding that subject imports were a significant cause of material injury to the domestic industry. Furthermore, China claims that the Panel acted inconsistently with its obligation to conduct an objective assessment of the matter under Article 11 of the DSU in upholding the USITC's finding that subject imports were a significant cause of material injury to the domestic industry under Paragraph 16.4 of the Protocol.

172. Before turning to the specific issues raised by China on appeal, we find it useful to address the meaning of the term "a significant cause" in Paragraph 16.4 of the Protocol, in the light of the conflicting arguments raised by the participants in this respect.

A. *The Meaning of "A Significant Cause"*

1. Interpretation

173. China claims that the Panel erred in its interpretation of Paragraph 16.4 of the Protocol in failing to give meaning to the term "significant".[392] China contends that the inclusion of the term "significant" to qualify the term "cause" indicates that Paragraph 16.4 of the Protocol imposes a more rigorous causation standard than other WTO agreements, which simply refer to "cause".[393] According to China, Paragraph 16.4 requires a "particularly strong, substantial, and important causal connection" between rapidly increasing imports and material injury to the domestic industry.[394] China adds that the object and purpose of the Protocol weighs in favour of a more rigorous causation standard under Paragraph 16.4. This is because of the "'extra'-extraordinary" nature of the measures provided under the Protocol, which restrict "fair" trade in a discriminatory manner.[395]

174. The United States responds that the Panel properly interpreted the meaning of "a significant cause" in Paragraph 16.4 of the Protocol. The United States maintains that the ordinary meaning of the term "significant" does not imply a causation standard that is more rigorous than the "genuine and substantial" causation standard contained in other WTO agreements.[396] In the United States' view, the object and purpose of the Protocol does not support a more rigorous causation standard, because measures under the Protocol are not "emergency actions" resulting from "unforeseen developments",

[392]China's appellant's submission, para. 184.
[393]China's appellant's submission, paras. 188-210.
[394]China's appellant's submission, para. 193.
[395]China's appellant's submission, paras. 211-214.
[396]United States' appellee's submission, paras. 104 and 105.

and because the Protocol provides for a lower injury threshold than the *Agreement on Safeguards* ("material" rather than "serious" injury).[397]

175. As we noted above, Paragraph 16.4 specifies the conditions in which products from China "are being imported … in such increased quantities" as to cause "market disruption" under Paragraph 16.1 of the Protocol. Pursuant to Paragraph 16.4, "market disruption" shall exist where the following three conditions are met: (i) imports of products from China are increasing rapidly, either absolutely or relatively; (ii) the domestic industry is materially injured, or threatened with material injury; and (iii) such rapidly increasing imports are *a significant cause* of material injury or threat thereof.[398] This part of China's appeal concerns only the last condition.

176. The ordinary meaning of "significant" is "important, notable, [ ] consequential".[399] The term "significant" qualifies the term "a cause" in Paragraph 16.4, thus suggesting that rapidly increasing imports must be a cause that is "important" or "notable".[400] The term "cause", in turn, has been interpreted by the Appellate Body in other contexts as "denot[ing] a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element".[401] Thus, Paragraph 16.4 seems to suggest that rapidly increasing imports must be an "important" or "notable" factor in "bringing about, producing or inducing" material injury to the domestic industry.

177. In this respect, we note that Paragraph 16.4 stipulates that rapidly increasing imports from China must be "a" significant cause of material injury to the domestic industry. This, in our view, suggests that rapidly increasing imports may be one of several causes that contribute to producing or bringing about material injury to the domestic industry. To that extent, we agree with the Panel that Paragraph 16.4 must be interpreted "in a way that allows for the possibility that [rapidly increasing imports] is one of several causal factors that together produce or bring market disruption".[402] However, we consider that the inclusion of the term "significant" to qualify "a cause" indicates that rapidly increasing imports must be more than a mere contributing cause to the material injury of the domestic industry. Rather, the contribution made by rapidly increasing imports to the material injury of the domestic industry must be important or notable.

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[397]United States' appellee's submission, paras. 109-111.

[398]See *supra*, para. 133 of this Report.

[399]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2835.

[400]We do not consider that a "significant" cause can properly be described as a "consequential" cause.

[401]Appellate Body Report, *US – Wheat Gluten*, para. 67 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1958).

[402]Panel Report, para. 7.140.

178. Paragraph 16.4 further establishes that market disruption exists when imports are "increasing rapidly … *so as to be* a significant cause of material injury". As implied by the meaning of the term "so as to be", that is, "in a manner that"[403], imports can only be "a significant cause" of material injury when they are "increasing rapidly". In other words, the phrase "so as to be" links the ability of subject imports to be "a significant cause" of material injury to the threshold of imports that are "increasing rapidly, absolutely or relatively". Reference to "are being imported … in such increased quantities as to *cause* … market disruption" in Paragraph 16.1 also links subject imports' ability to cause "market disruption" to subject imports being imported "in such increased quantities".[404]

179. The second sentence of Paragraph 16.4 further requires investigating authorities to consider "objective factors" in determining whether market disruption exists, including the "volume of imports", the "effect of imports on [domestic] prices", and the "effect of such imports on the domestic industry". The volume of imports from China and their effects on prices and on the domestic industry are therefore the factors that an investigating authority is required to consider in assessing whether rapidly increasing imports are "a significant cause" of material injury to the domestic industry. The word "including" in the second sentence of Paragraph 16.4 suggests that other elements may also be relevant in determining whether rapidly increasing imports are a significant cause of market disruption.

180. In our view, these textual and contextual elements suggest that the term "significant" describes the causal relationship or nexus that must be found to exist between rapidly increasing imports and material injury to the domestic industry, which must be such that rapidly increasing imports make an "important" or "notable" contribution in bringing about material injury to the domestic industry. Such assessment must be carried out on the basis of the objective factors listed in the second sentence of Paragraph 16.4, such as the volume of imports, the effect of imports on prices, and the effect of imports on the domestic industry.

181. In the light of the above, we do not agree with China that the inclusion of the term "significant" to qualify the term "a cause" indicates that Paragraph 16.4 of the Protocol imposes a more rigorous causation standard than other WTO agreements, which require that imports "cause" injury.[405] We do not find China's comparison particularly useful, given the distinct causation standard set forth in the Protocol. In any event, we note that China's argument is premised on other WTO

[403]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 125.

[404]In *US – Steel Safeguards*, the Appellate Body noted that similar language contained in Article 2.1 of the *Agreement on Safeguards* "clearly links the relevant increased imports to their ability to cause serious injury". (Appellate Body Report, *US – Steel Safeguards*, para. 346)

[405]See, for example, Articles 2.1 and 4.2(a) and (b) of the *Agreement on Safeguards*; Article 3.5 of the *Anti-Dumping Agreement*; and Articles 5 and 15.5 of the *SCM Agreement*.

agreements requiring that subject imports be no more than "a cause" of injury to the domestic industry. However, the Appellate Body has interpreted the causation standard reflected in the use of the term "cause" in other WTO agreements as requiring a "genuine and substantial relationship of cause and effect"[406] between import increases and the requisite level of injury. Such a "genuine and substantial" causal link, in our view, implies a higher degree of causality than subject imports being merely "a cause" of the requisite level of injury to the domestic industry.

182. Furthermore, the context of Paragraph 16.4 does not seem to support China's interpretation of the requisite causation standard. We note that Paragraph 16.1 of the Protocol refers to products from China being imported in such increased quantities as to "cause or threaten to cause" market disruption. In our view, the fact that the causal link reflected in Paragraph 16.1 is not similarly qualified by the term "significant" provides contextual support for the interpretation that Paragraph 16.4 does not establish a more rigorous causation standard, because the terms "cause" in Paragraph 16.1 and a "significant cause" in Paragraph 16.4 must be interpreted harmoniously.

183. In this regard, we also note that the injury threshold provided for in Paragraph 16.4 of the Protocol is "material injury", rather than the "serious injury" threshold contained in Article 2.1 of the *Agreement on Safeguards*. In *US – Lamb*, the Appellate Body explained that "the word 'serious' connotes a much higher standard of injury than the word 'material'".[407] Such lower injury threshold thus seems to imply a lower degree of injurious effects caused by rapidly increasing imports to the domestic industry. This reading also appears to be consistent with the meaning of the term "disruption" in Paragraph 16.4, that is, "lack of order or regular arrangement; disarray, confused state"[408], which similarly suggests a lower injury threshold than "serious injury".

184. The above observations militate against China's argument that the object and purpose of the Protocol supports an interpretation of "a significant cause" that implies a "particularly strong, substantial, and important causal connection"[409] between rapidly increasing imports and material injury to the domestic industry. China is correct that the Protocol provides for restrictive measures on "fair" trade, and permits, for a transitional period, the application of such measures on Chinese imports alone. However, as noted above, we consider that the object and purpose of the Protocol, as reflected in Section 16 thereof, is to afford temporary relief to domestic industries that are exposed to

[406]Appellate Body Report, *US – Wheat Gluten*, para. 69. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 132; Appellate Body Report, *US – Upland Cotton*, para. 438; Appellate Body Report, *US – Steel Safeguards*, para. 488; and Appellate Body Report, *US – Lamb*, para. 179.

[407]Appellate Body Report, *US – Lamb*, para. 124.

[408]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 704.

[409]China's appellant's submission, para. 193.

market disruption as a result of a rapid increase in Chinese imports of like or directly competitive products, subject to the conditions and requirements provided therein. Therefore, the object and purpose of the Protocol, as reflected in Section 16 thereof, seems to weigh in favour of an interpretation pursuant to which temporary relief is available whenever rapidly increasing imports are making an "important", rather than a "particularly strong [and] substantial"[410], contribution to the material injury of the domestic industry.

185. In sum, Paragraph 16.4 of the Protocol sets forth a distinct causation standard whereby rapidly increasing imports must be "a significant cause" of material injury to the domestic industry. This causation standard requires that rapidly increasing imports from China make an important contribution in bringing about material injury to the domestic industry. Pursuant to the second sentence of Paragraph 16.4, such determination is to be made on the basis of objective criteria, including the volume of imports, the effects of rapidly increasing imports on prices, and the effects of rapidly increasing imports on the domestic industry.

2. Nature of the Analysis

(a) Conditions of Competition and Correlation

186. China claims that, because Paragraph 16.4 of the Protocol requires a "particularly strong, substantial, and important"[411] causal link between rapidly increasing imports and material injury to the domestic industry, investigating authorities are required to conduct a differentiated, more searching analysis of both the conditions of competition and of the correlation between increasing imports and declining injury indicators in determining whether such imports are "a significant cause" of material injury to the domestic industry. According to China, the analysis of the conditions of competition must examine the *degree of competitive overlap* between imported and domestic products, and the analysis of correlation must identify a coincidence both in the "year-by-year changes"[412] and in the "degree of magnitude" between subject imports and injury factors.[413]

187. For its part, the United States argues that Paragraph 16.4 of the Protocol does not require investigating authorities to "refine" their causation analysis by applying a higher degree of scrutiny in their analysis of conditions of competition or of correlation.[414] The United States underscores that the Protocol does not set forth any specific methodology for determining whether subject imports rise to the level of "a significant cause" of material injury to the domestic industry. More specifically, with

[410]China's appellant's submission, para. 193.
[411]China's appellant's submission, para. 193.
[412]China's appellant's submission, para. 232. (original underlining)
[413]China's appellant's submission, para. 236. (original underlining)
[414]United States' appellee's submission, para. 118.

respect to correlation, the United States stresses that Paragraph 16.4 requires no correspondence between the magnitude of changes in subject imports and the magnitude of changes in the performance indicators of the domestic industry.[415]

188. The Panel found that investigating authorities have the discretion to apply any methodology to establish causation under Paragraph 16.4, provided that it sufficiently addresses the objective factors listed in the second sentence of Paragraph 16.4, and sufficiently establishes that rapidly increasing imports are "a significant cause" of material injury. For the Panel, an analysis of the conditions of competition and of correlation "will often be relevant" and may indeed "prove essential" to a consideration of "significant cause".[416] To the extent that the USITC did rely on the conditions of competition and on correlation, the Panel said it would objectively assess those analyses in reviewing the USITC's determination of "significant cause".[417]

189. In relation to the analysis of correlation, the Panel disagreed with China that a finding of "significant cause" depended on a finding of correlation between *degrees* of increase in imports and *degrees* of decreases in injury indicators.[418] The Panel reasoned that such "more precise degree of correlation" was "unrealistic" to expect, especially where other causes of injury might be at work.[419] The Panel added:

> While a more precise degree of correlation between the upward movements in imports and the downward movements in injury factors might result in a more robust finding of causation, and might indeed suffice on its own to demonstrate causation, a finding of "significant cause" is not excluded simply because an investigating authority relies on an overall coincidence between the upward movement in imports and the downward movement in injury factors, especially if that finding of overall coincidence is combined—as it was in the present case—with other analyses indicative of causation.[420]

190. On this basis, the Panel concluded that the USITC "was entitled to support its determination of 'significant cause' with a finding of overall coincidence between an upward trend in subject imports from China and downward trends in the relevant injury factors".[421]

191. On our part, we note that Paragraph 16.4 of the Protocol does not provide specific guidance with respect to the methodology investigating authorities may apply in determining whether rapidly

[415]United States' appellee's submission, para. 125.
[416]Panel Report, para. 7.170.
[417]Panel Report, para. 7.170.
[418]Panel Report, para. 7.229.
[419]Panel Report, para. 7.229.
[420]Panel Report, para. 7.229.
[421]Panel Report, para. 7.234.

increasing imports are "a significant cause" of material injury. Thus, we agree with the Panel that Paragraph 16.4 gives investigating authorities a certain degree of discretion in selecting the methodology to assess the existence of a causal link, provided that such methodology establishes that rapidly increasing imports are "a significant cause" of material injury to the domestic industry, and considers the objective factors listed in the second sentence of Paragraph 16.4. The Appellate Body recently noted that "the appropriateness of a particular method [to establish causation] may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances".[422]

192. We also agree with the Panel that an analysis of the conditions of competition and of correlation may prove "essential" in order properly to establish causation under Paragraph 16.4.[423] Indeed, rapidly increasing imports from China will be capable of being "a significant cause" of material injury to the domestic industry only where they are engaged in actual or potential competition with the like or directly competitive products in the domestic industry. Similarly, a temporal coincidence between upward trends in imports and a decline in the performance indicators of the domestic industry may evidence the existence of a causal link between rapidly increasing imports and material injury to the domestic industry. However, as China itself acknowledges, the examination of the conditions of competition and the analysis of correlation between movements in imports and injury factors are merely "analytical tools" that may assist an investigating authority in determining whether rapidly increasing imports are "a significant cause" of material injury to the domestic industry.[424] As such, neither of these analytical tools is dispositive of the question of whether rapidly increasing imports are "a significant cause" of material injury to the domestic industry under Paragraph 16.4.

193. In respect of correlation in particular, the Appellate Body agreed with the panel in *Argentina – Footwear (EC)* that a correlation analysis focuses on "the *relationship* between *movements* in imports (volume and market share) and the *movements* in injury factors".[425] The Appellate Body further clarified that:

> … with respect to a "coincidence" between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should "normally" occur if causation is present. The Panel qualified this statement, however, with the following sentence:

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[422]Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1376 (referring to Panel Report, *US – Upland Cotton*, para. 7.1194; and Panel Report, *Korea – Commercial Vessels*, para. 7.560).

[423]Panel Report, para. 7.170.

[424]China's appellant's submission, para. 217.

[425]Appellate Body Report, *Argentina – Footwear (EC)*, para. 144 (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.237). (emphasis added by the Appellate Body)

> While such a coincidence by itself cannot *prove* causation … its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[426] (original emphasis; footnotes omitted)

194. Thus, the Appellate Body made clear that the existence of correlation, though indicative, is by no means dispositive of the existence of a causal link. Indeed, the Appellate Body considered that the lack of correlation does not preclude a finding that a causal link exists, provided that a very compelling analysis is provided.

195. In our view, China's argument that Paragraph 16.4 of the Protocol requires a more rigorous scrutiny of the conditions of competition and a stricter correlation between import increases and decreases in injury factors than other WTO agreements is predicated on Paragraph 16.4 requiring a "particularly strong, substantial, and important"[427] causal link between rapidly increasing imports and material injury to the domestic industry. For the reasons discussed earlier, we consider that the term "a significant cause" requires that rapidly increasing imports make an important contribution in bringing about material injury to the domestic industry. This legal standard must inform the investigating authority's analysis of causation under Paragraph 16.4 of the Protocol. As we see it, an investigating authority may choose to rely—as the USITC did in this case—on both an analysis of the conditions of competition and an analysis of correlation to show that rapidly increasing imports are "a significant cause" of material injury to the domestic industry. A careful analysis of degrees of competitive overlap and a greater coincidence in the magnitude of import increases vis-à-vis decreases in injury factors may provide a more robust basis for a finding of causation. However, investigating authorities may calibrate their analysis to the particular circumstances of the case at hand, as long as the analysis provides a sufficiently reasoned and adequate explanation for a finding that rapidly increasing imports are "a significant cause" of material injury. The causation standard set forth in Paragraph 16.4 will be satisfied where these analytical tools provide a reasoned and adequate explanation for the investigating authority's determination that rapidly increasing imports make an important contribution in bringing about material injury to the domestic industry.

[426]Appellate Body Report, *Argentina – Footwear (EC)*, para. 144 (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.238). See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 145. In *US – Upland Cotton*, the Appellate Body also stated that "mere correlation between payment of subsidies and significantly suppressed prices would be insufficient, without more, to prove that the effect of the subsidies [was] significant price suppression." (Appellate Body Report, *US – Upland Cotton*, para. 451)

[427]China's appellant's submission, para. 193.

(b) Analysis of Other Causes

196. China further argues that "there is an inherent requirement to consider other possible causes of injury when finding a causal link between imports and the condition of the domestic industry."[428] In China's view, the term "significant" in Paragraph 16.4 of the Protocol "requires more than just considering other causal factors in some generalized way".[429] In particular, China contends that an assessment of both the magnitude of "effects" attributable to subject imports and an assessment of the magnitude of "effects" attributable to "other factors" is required.[430] China asserts that this involves "separating not just the causes, but also the effects of those causes".[431] Moreover, the investigating authority is required to determine whether the separate effects properly associated with imports from China rise to the level of "significant" cause.[432]

197. China recognizes that the Protocol does not set forth any specific method for determining when the effects properly associated with subject imports rise to the level of being "a significant cause".[433] For China, this situation is therefore like those under other WTO agreements, where the absence of any specific guidance has meant that WTO Members have discretion as to the "methods and approaches" they employ.[434] In China's view, one approach would be to "weigh the different causes".[435] China recognizes that Paragraph 16.4 "does not specifically require the effects of imports from China to be larger than the effects of other causes".[436] Yet, in cases where "the effects of imports from China are less than the effects of other causes, an investigating authority must pause and consider the situation very carefully" and "must take particular care in fulfilling its duty to provide a reasoned and adequate explanation" if it concludes that imports from China are "a significant cause".[437]

198. In response, the United States argues that China "relies heavily" on the Appellate Body's findings in previous disputes, such as *US – Lamb* and *US – Hot-Rolled Steel*.[438] The United States points out, however, that the Appellate Body grounded those findings on "express language in Article 4.2(b) of the *Agreement on Safeguards* and Article 3.5 of the *Anti-Dumping Agreement* that

[428]China's appellant's submission, para. 240.
[429]China's appellant's submission, para. 247.
[430]China's appellant's submission, para. 251.
[431]China's appellant's submission, para. 252.
[432]China's appellant's submission, para. 253.
[433]China's appellant's submission, para. 254.
[434]China's appellant's submission, para. 254 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 224; and Appellate Body Report, *US – Lamb*, para. 181).
[435]China's appellant's submission, para. 255.
[436]China's appellant's submission, para. 256. (original underlining)
[437]China's appellant's submission, para. 256.
[438]United States' appellee's submission, para. 128.

specifically requires an authority not to attribute to imports the injury caused by other factors".[439] In the present case, the United States agrees with the Panel that the USITC was required "to perform some analysis of the effects of other factors that have caused injury to the industry".[440] Referring to the report of the Appellate Body in *US – Upland Cotton*, the United States notes, however, that "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."[441]

199. For its part, the Panel began by noting that the parties agreed that some form of non-attribution analysis may be required under Section 16 of the Protocol.[442] Based on its analysis, the Panel concluded that "the causal link between rapidly increasing imports and material injury must be assessed 'within the context of other possible causal factors'."[443]

200. As the Panel noted, an analogy can be drawn with the approach in *US – Upland Cotton*, where, notwithstanding the absence of explicit non-attribution language in Articles 5 and 6.3 of the *SCM Agreement*, both the panel and the Appellate Body found that, where other possible causes are present, some form of non-attribution analysis is inherent in establishing the causal link between the subsidy and price suppression and that, if a non-attribution analysis does not occur, one cannot establish with certainty that price suppression was the effect of the challenged subsidy (as opposed to some other injurious factor).[444] The Appellate Body further found that the absence of expressly prescribed causation requirements under Articles 5(c) and 6.3(c) suggests that "a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression".[445]

201. Although the reasoning of the Appellate Body in that case was based on language found in other WTO agreements, we consider it apt and instructive in this dispute. In particular, it supports the notion that some form of analysis of the injurious effects of other factors is required to demonstrate that subject imports are "a significant cause" of injury within the meaning of Paragraph 16.4 of the Protocol, despite the absence of language explicitly requiring a consideration of other possible causes

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[439]United States' appellee's submission, para. 128 (referring to Appellate Body Report, *US – Lamb*, paras. 162-181; and Appellate Body Report, *US – Hot-Rolled Steel*, paras. 216-236).

[440]United States' appellee's submission, para. 132 (referring to Panel Report, paras. 7.176 and 7.177).

[441]United States' appellee's submission, para. 132 (referring to Appellate Body Report, *US – Upland Cotton*, para. 436).

[442]Panel Report, para. 7.174.

[443]Panel Report, para. 7.177 (quoting Panel Report, *US – Upland Cotton*, para. 7.1344).

[444]Panel Report, para. 7.176; Appellate Body Report, *US – Upland Cotton*, paras. 437 and 438; Panel Report, *US – Upland Cotton*, para. 7.1344. See also Appellate Body Report, *US – Lamb*, para. 179.

[445]Appellate Body Report, *US – Upland Cotton*, para. 436.

of injury.[446] As we see it, an investigating authority can make a determination as to whether subject imports are a significant cause of material injury only if it properly ensures that effects of other known causes are not improperly attributed to subject imports and do not suggest that subject imports are in fact only a "remote" or "minimal" cause, rather than a "significant" cause, of material injury to the domestic industry. For this reason, the significance of the effects of rapidly increasing imports needs to be assessed in the context of other known causal factors.[447] The extent of the analysis that is required will depend on the impact of other causes that are alleged to be relevant and the facts and circumstances of the particular case.

B. *Conditions of Competition in the US Tyres Market*

202. Against this background, we turn to the specific issues raised by China on appeal. In this section, we examine China's claim that the Panel erred in finding that the USITC properly examined the conditions of competition in the US tyres market in determining that rapidly increasing subject imports were "a significant cause" of material injury to the domestic industry under Paragraph 16.4 of China's Accession Protocol.

203. China claims that this finding is in error for two principal reasons. First, because the Panel (and the USITC) failed to assess adequately evidence indicating that a majority of US production was sold in a particular segment (referred to as tier 1) of the replacement market[448], where they faced "virtually no competition" from subject imports, which were primarily sold in tiers 2 and 3 of that market.[449] Second, because the Panel (and the USITC) failed to assess adequately evidence suggesting that domestic producers focused on the original equipment manufacturer ("OEM") market[450], where competition from subject imports was not significant. According to China, taken

[446]For example, Article 4.2(a) of the *Agreement on Safeguards* provides that, "when factors other than increased imports are causing injury at the same time, such injury shall not be attributed to increased imports". Article 3.5 of the *Anti-Dumping Agreement* reads, in relevant part, as follows: "The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

[447]See *infra*, para. 252 of this Report.

[448]The replacement market (sometimes also referred to as "aftermarket") consists of customers buying tyres to use as replacement tyres for cars already on the road. It accounts for about 80% of the total US market. (China's appellant's submission, para. 310 (referring to USITC Report, p. V-3)) Both the Panel and the USITC accepted that the replacement market generally could be divided into three segments or "tiers", differentiated on the basis of brand and prices. (See Panel Report, para. 7.197; and USITC Report, p. 27) Tier 1 consists of major, flagship premium brands; tier 2 consists of secondary, associate, or foreign producer brands; and tier 3 includes private label, mass market, lesser-known brands, and non-branded tyres. (USITC Report, footnote 41 at p. 9, and p. V-4)

[449]China's appellant's submission, para. 318.

[450]The OEM market consists of tyres produced for sale to manufacturers of new passenger vehicle and light trucks. It represents about 20% of the total US market. (See China's appellant's submission, para. 310 (referring to USITC Report, p. V-3))

together, this evidence suggested a "highly attenuated"[451] degree of competition between Chinese imports and domestic tyres in the US market, and therefore neither the Panel nor the USITC "provided a reasoned and adequate explanation … [as] to how these data could be reconciled with the ultimate conclusion" that imports from China were "a significant cause" of material injury to the domestic industry within the meaning of Paragraph 16.4 of the Protocol.[452]

1. Conditions of Competition in the US Replacement Market

204. China claims that both the Panel and the USITC failed to assess adequately the existence of "attenuated competition" between subject imports and domestic tyres in the US replacement market.[453] According to China, the Panel's conclusion that there were no "bright-line distinctions" between tiers 1, 2, and 3 of the US replacement market did not sufficiently address the attenuated degree of competition that existed in the US replacement market.[454] China underscores that subject imports represented less than 1% of total shipments in tier 1 of the replacement market, where US producers concentrated 51% of their shipments.[455] Such "limited presence" of Chinese imports in tier 1 suggested that a "majority" of US production faced "virtually no competition" from subject imports in the replacement market.[456] Moreover, the Panel's finding that competition in tiers 2 and 3 was more than "vestigial" did not, in China's view, provide a sufficient basis for concluding that subject imports were "a significant cause" of material injury, because those segments represented "less than half" of the US replacement market.[457] China further argues that the Panel "went beyond the proper bounds of review" by providing its own analysis as to why competition between domestic tyres and subject imports was "significant" in tiers 2 and 3.[458]

205. The United States responds that the Panel properly upheld the USITC's conclusion that competition between subject imports and domestically produced tyres in the replacement market was significant. The United States emphasizes that "significant quantities" of both US and Chinese tyres were shipped into tiers 2 and 3 in 2008, thus supporting the USITC's conclusion that competition was significant within those tiers.[459] The United States adds that the Panel correctly upheld the USITC's conclusion that the unclear demarcations between the tiers of the US replacement market did not

[451]China's appellant's submission, para. 336.
[452]China's appellant's submission, para. 348.
[453]China's appellant's submission, para. 311.
[454]China's appellant's submission, para. 313 (referring to Panel Report, para. 7.197).
[455]China's appellant's submission, para. 316.
[456]China's appellant's submission, paras. 318 and 325.
[457]China's appellant's submission, para. 320 (referring to Panel Report, para. 7.195).
[458]China's appellant's submission, paras. 322 and 323.
[459]United States' appellee's submission, para. 150.

support China's argument that imports in one tier could not impact volumes and prices in another tier of the market.[460]

206. For its part, the Panel noted that the evidence before the USITC suggested that there was no consensus as to the dividing lines between the tiers of the replacement market, particularly in respect of the differentiation between tiers 2 and 3.[461] Moreover, the Panel emphasized that, even if tiers 2 and 3 could be "clinically isolated" from tier 1, there remained "significant competition" between domestic tyres and subject imports in tiers 2 and 3.[462] Therefore, the Panel found no fault with the USITC's conclusions that "there was no distinct dividing line between … tiers [1, 2, and 3]"[463] and that "subject imports and domestic products were not focused in different tiers".[464]

207. We begin our analysis with China's argument that the Panel erred in upholding the USITC's conclusion that there were no distinct dividing lines between tiers 1, 2, and 3 of the US replacement market.[465] China contends that this finding is in error because the Panel did not sufficiently address the "attenuated" degree of competition that existed in the replacement market. According to China, the Panel erroneously focused on the question of whether the distinct tiers of the replacement market were clearly demarcated, when it should have instead focused on how the existence of those segments affected the USITC's conclusion that competition between imports from China and domestic tyres in the US replacement market was not attenuated.[466]

208. At the outset, we note that the Panel (and the USITC) addressed the question of whether tiers 1, 2, and 3 of the US replacement market were clearly divided in response to China's argument that imports from China and domestically produced tyres were focused on different market segments of the US replacement market. According to China, US tyre production was primarily directed towards tier 1, whereas Chinese tyres were primarily sold into the low-end tiers 2 and 3.[467] Viewed in this light, we cannot agree with China to the extent that it suggests that the question of whether the distinct segments of the replacement market were clearly delineated was not relevant for the Panel's review of the USITC's assessment of the degree of competition between Chinese and domestic tyres in the US replacement market. In our view, the fact that the distinct tiers of the US replacement market were not clearly divided is significant, insofar as it suggests a greater degree of competitive overlap across these tiers than otherwise would have existed had such tiers been clearly delineated.

[460]United States' appellee's submission, paras. 151 and 152.
[461]Panel Report, para. 7.188 (referring to USITC Report, p. 51).
[462]Panel Report, para. 7.195.
[463]Panel Report, para. 7.197.
[464]Panel Report, para. 7.197.
[465]Panel Report, para. 7.157.
[466]China's appellant's submission, para. 313.
[467]Panel Report, para. 7.185.

209. However, a careful review of the Panel's analysis indicates that the reasoning articulated by the Panel in support of the USITC's conclusion that "there was less agreement [among firms submitting questionnaire responses] as to which tires were included in the two lower-priced categories"[468] refers to the views expressed by the *dissenting USITC commissioners*. Indeed, in rejecting China's argument concerning segmentation in the US replacement market, the Panel noted the dissenting USITC commissioners' observation that questionnaire responses were "mixed as to where to place associate brands, with some responses placing them in tier 2 and others placing them in tier 3"[469], and that there were "wide variations in the estimates for the share of the total U.S. market accounted for by each tier".[470] For the Panel, these findings suggested that "there was no established market perception of where the boundaries between tiers 1, 2 and 3 should lie."[471] In response to China's argument that domestic tyres were principally confined to tier 1, whereas subject imports were concentrated on tiers 2 and 3, the Panel referred to the following statement by the dissenting USITC commissioners:

> While not arguing that there is a clear dividing line among each of the tiers, *respondents*, in general, contend that competition is attenuated between *domestically produced tires which are primarily in tier 1 and 2* tires for the OEM and replacement markets, and *subject imports which are primarily in tier 3* tires for the replacement market.[472] (emphasis added by the Panel)

210. The Panel also referred to the testimony of a Chinese producer who stated that it was "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."[473]

211. As the above reasoning suggests, the Panel upheld the USITC's conclusion that there were no distinct dividing lines between tiers 1, 2, and 3 of the US replacement market on the basis of findings made by the *dissenting USITC commissioners*, and on the basis of a statement by one Chinese producer before the USITC. However, as noted earlier, the proper standard of review under Article 11 of the DSU required the Panel to establish whether the USITC provided a reasoned and adequate explanation for its *affirmative* finding of market disruption. The separate views of any dissenting commissioners are not part of the USITC's determination that market disruption exists. Accordingly, insofar as the Panel relied on the views of the dissenting USITC commissioners to

[468]Panel Report, para. 7.186 (quoting USITC Report, p. 27).
[469]Panel Report, para. 7.188 (quoting USITC Report, p. 51). (emphasis omitted)
[470]Panel Report, para. 7.189 (quoting USITC Report, p. 52).
[471]Panel Report, para. 7.190.
[472]Panel Report, para. 7.191 (quoting statement by the dissenting commissioners, USITC Report, p. 51).
[473]Panel Report, para. 7.192 (quoting GITI Post-Hearing Brief (Panel Exhibit China-40), p. 6). (emphasis added by the Panel)

support its finding that the USITC provided a reasoned and adequate explanation for its determination that subject imports were a significant cause of material injury under Paragraph 16.4, including the USITC's assessment of the conditions of competition in the US market, the Panel was in error.

212. Having said that, we note that the Panel's endorsement of the USITC's conclusion that there were no distinct dividing lines between tiers 1, 2, and 3 of the US replacement market was but one of the reasons articulated by the Panel in support of its finding that the USITC did not err in finding that competition between Chinese and domestic tyres in that market was not attenuated.[474] In addition to finding that the USITC correctly concluded that such tiers were not clearly divided, the Panel further reasoned that the market share data before the USITC did not suggest that competition between domestic and Chinese tyres in the replacement market was attenuated, for the following reasons:

> [E]ven if tiers 2 and 3 could be clinically isolated from tier 1, record evidence demonstrates that there remained significant competition between domestic tyres and subject imports in tiers 2 and 3. In 2008, U.S. producers and subject imports accounted for 16 and 27.3 per cent respectively of tier 2 shipments, and 18.6 and 42.4 per cent respectively of tier 3 shipments. In our view, such U.S. industry presence in tiers 2 and 3 suggests significantly more than the merely "vestigial" competition alleged by China. The fact that this data relates to 2008, after the U.S. industry closed plant producing lower-value (i.e., tier 2 and 3) tyres, suggests that the competition between the U.S. industry and subject imports would have been even greater earlier in the period of investigation.[475] (footnotes omitted)

213. On this basis, although the Panel acknowledged that imports from China had only a "limited presence" in tier 1, which accounted for 51.2% of US shipments in the replacement market, the Panel found that subject imports had "a far greater presence in the remainder of the replacement market", where domestic tyres were also "prevalent".[476]

214. In our view, the above reasoning reasonably supports the Panel's conclusion that the USITC did not err in finding that the presence of both domestic and Chinese tyres in tiers 2 and 3 suggested that, overall, there was significant competition in the US replacement market, despite the limited presence of Chinese imports in the larger tier 1 of that market. As the Panel noted, although there was some variation in the levels of competition in the distinct tiers of the replacement market, there was

[474]Panel Report, para. 7.197; USITC Report, p. 27.

[475]Panel Report, para. 7.195 (referring to United States' response to Panel Question 46, para. 24). The USITC similarly found 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, both are also present in the Tier 1 segment (category 1) and the OEM market, and there is significant competition between the subject imports and domestic tires in the U.S. market." (USITC Report, p. 27)

[476]Panel Report, para. 7.196.

significant competition between domestic and Chinese tyres in tiers 2 and 3[477], which in turn supported the USITC's ultimate finding that subject imports were a significant cause of material injury to the domestic industry.

215. Accordingly, we are not persuaded that the Panel erred in finding that the USITC correctly assessed the conditions of competition in the US replacement market. Although we consider the Panel to have fallen into error in referring to views expressed by the dissenting USITC commissioners on the question of whether the different tiers of the US replacement market were clearly divided, we do not consider that this error invalidates the Panel's ultimate conclusion that the USITC properly established that there was significant competition between imports from China and domestically produced tyres in the US replacement market. In our view, this conclusion is supported by the Panel's reasoning that market share data before the USITC suggested that both Chinese and domestic tyres had a significant presence in tiers 2 and 3 of the US replacement market. Accordingly, we do not consider that the Panel erred in finding that the USITC did not fail to assess adequately the existence of "attenuated competition"[478] between subject imports and domestic tyres in the US replacement market.

2. US Producers' Focus on the OEM Market

216. According to China, the Panel erroneously focused on increasing trends in Chinese imports to the OEM market when instead it should have assessed whether competition in that market was significant.[479] China underscores that its share of the OEM market remained below 5% during the entire period of investigation.[480] For China, the Panel's end-point-to-end-point analysis obscures the fact that most of China's gain in market share occurred by 2006.[481] China also stresses that non-subject imports had a larger and increasing share of the OEM market than subject imports, even during a period of time when they lost market share in the overall US market.[482]

217. The United States counters that it was reasonable for the USITC to rely on China's growing presence in the OEM market to support its finding that competition in the overall US market was

[477]Panel Report, para. 7.195. In this regard, we do not agree with China that the Panel "went beyond the proper bounds of review" in concluding that there remained significant competition in tiers 2 and 3 of the US replacement market. (China's appellant's submission, para. 322) The Panel was simply reciting market share data before the USITC for those tiers, and critically examining whether this data supported the USITC's conclusion that competition between domestic tyres and subject imports was significant in the US market.

[478]China's appellant's submission, para. 311.

[479]China's appellant's submission, para. 334.

[480]China's appellant's submission, para. 330.

[481]China's appellant's submission, para. 331.

[482]China's appellant's submission, paras. 332 and 333.

significant. The United States emphasizes that Chinese imports increased their share of the OEM market consistently over the period of investigation, while the domestic industry consistently lost market share.[483] Because these trends were in accordance with the changes in the overall market, the United States argues, the conditions of competition in the OEM market supported the USITC's overall finding.[484] In addition, the United States points out that a volume of 2.3 million tyres from China, representing a 5% market share in 2008, could not be considered "negligible".[485]

218. Although the Panel acknowledged that the OEM sector was more important to domestic producers than for subject imports, it noted that the proportion of domestic shipments in that segment was decreasing (from 23.3% in 2004 to 17.7% in 2008), whereas the proportion of subject imports was increasing (from 0.8% in 2004 to 5% in 2008).[486] In absolute terms, the volume of domestic tyre shipments to the OEM market over the period of investigation decreased by 46% (from 45,351,000 units in 2004 to 24,211,000 units in 2008), whereas the volume of subject imports increased by 1,785% (from 121,000 units in 2004 to 2,281,000 units in 2008).[487] On the basis of this data, the Panel stated:

> Thus, during the period of investigation both subject imports and domestically-produced tyres were present in the OEM sector. Over the period as a whole, the degree of the resultant competition between subject imports and domestically-produced tyres in the OEM sector was increasing, as the relative importance of domestically-produced tyres decreased, and that of subject imports increased. Consistent with the trend for OEM and replacement market shipments overall, the competitive importance of subject imports in the OEM market became particularly pronounced at the end of the period of investigation, when despite a fall in apparent consumption of 16.4 per cent, subject imports were able to increase by 12.6 per cent, while non-subject imports and U.S. producer shipments fell by 11.3 and 22 per cent respectively.[488] (footnote omitted)

Based on this analysis, the Panel rejected China's assertion that "the USITC was required to dismiss the level of competition from subject imports in the OEM sector as 'negligible'."[489]

219. We agree with China that the Panel could have provided a more thorough analysis of the data concerning the level of competition in the OEM market. After noting that both Chinese and domestic tyres were "present" in the OEM sector, the Panel appears to have relied primarily on an end-point-to-

[483]United States' appellee's submission, para. 154.
[484]United States' appellee's submission, para. 154.
[485]United States' appellee's submission, para. 155.
[486]Panel Report, para. 7.201.
[487]Panel Report, para. 7.202.
[488]Panel Report, para. 7.204.
[489]Panel Report, para. 7.205 (quoting China's first written submission to the Panel, para. 226).

end-point comparison of relative volumes and market share in coming to the conclusion that the degree of competition between domestically produced tyres and subject imports was "increasing" in the OEM market.[490] The Panel then sought to buttress this conclusion by juxtaposing the upward trend in subject imports' market share with downward trends in apparent consumption and market share of both domestic tyres and non-subject imports.[491]

220. We note that the Appellate Body has expressed reservations about end-point-to-end-point analyses of the type developed by the Panel in relation to the OEM market.[492] Leaving that aside, the Panel could have provided a more thorough analysis of the conditions of competition in the OEM market. In particular, the Panel did not discuss in detail why an "increasing degree of competition"[493] in the OEM market supported its ultimate conclusion that the USITC was not required to dismiss competition in that market as "negligible".[494] Having said that, the Panel in this case was called upon to assess whether the USITC properly concluded that there was significant competition between subject imports and domestic tyres in the *overall* US market, rather than in the OEM market alone. Thus, the relevant question before the Panel was whether the degree of competition in the OEM market supported the USITC's conclusion that competition between subject imports and domestically produced tyres in the overall US market was significant. This is the question to which we turn next.

3. Conditions of Competition in the Overall US Market

221. As a final matter, China claims that the Panel failed to grasp the significance of the combined effect of attenuated competition in the OEM and replacement markets for its review of the USITC's assessment of the conditions of competition in the overall US market. According to China, both the Panel and the USITC failed to explain adequately how subject imports could be a significant cause of material injury under Paragraph 16.4 of the Protocol when approximately 60% of US production went into tier 1 of the replacement market and the OEM market, where Chinese imports held only a 2-3% combined market share.[495]

222. The United States responds that the Panel correctly concluded that the USITC reasonably determined that there was "significant competition" between Chinese and domestic tyres in tiers 2

[490]Panel Report, para. 7.204.
[491]Panel Report, para. 7.204.
[492]See, for example, Appellate Body Report, *US – Steel Safeguards*, para. 354; Appellate Body Report, *Argentina – Footwear (EC)*, para. 129; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1188.
[493]Panel Report, para. 7.204.
[494]Panel Report, para. 7.205.
[495]China's appellant's submission, paras. 309 and 336.

and 3 of the US replacement market[496]; that Chinese imports in different segments could impact prices and volumes of domestic tyres in other segments because there were "no clear dividing lines" between the tiers of the replacement market[497]; and that subject imports were taking a "growing, though smaller" share of the OEM market.[498]

223. We recall our earlier conclusion that the Panel did not err in reviewing the USITC's assessment of the conditions of competition in the US replacement market.[499] We have agreed with the Panel that the USITC properly concluded that the significant presence of both Chinese imports and domestic tyres in tiers 2 and 3 indicated a sufficient degree of competition in the replacement market, despite the limited presence of subject imports in tier 1 of that market. However, we have also found that the Panel could have provided a more thorough analysis of the conditions of competition in the OEM market.

224. Nonetheless, we observe that the OEM market was generally less important for *both* US producers and subject imports than the replacement market. As China acknowledges, whereas the replacement market accounted for more than 80% of the overall US market, the OEM market represented less than 20% of that market.[500] During the period of investigation, the OEM market represented from 23.3% to 17.7% of total US producers shipments, and from 0.8% to 5% of subject imports.[501] Therefore, even assuming that China is correct in arguing that competition in the OEM market was not significant[502], the resulting degree of competition between subject imports and domestic tyres in the larger replacement market would have sufficed to establish that competition in the *overall* US market was significant. Moreover, the significant presence of Chinese imports in tiers 2 and 3 of the replacement market, combined with their limited—but growing—presence in tier 1 of the replacement market and in the OEM market, supports the Panel's endorsement of the USITC's conclusion that there was "significant competition between the subject imports and domestic tires in the U.S. market".[503]

225. In our view, China's arguments in respect of "attenuated" competition in the US market are predicated on its interpretation of the causation standard in Paragraph 16.4 of the Protocol. For China,

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[496]United States' appellee's submission, para. 156 (referring to Panel Report, para. 7.195; and USITC Report, pp. 21 and 27).
[497]United States' appellee's submission, para. 156 (referring to Panel Report, paras. 7.185-7.194; and USITC Report, pp. 21 and 27).
[498]United States' appellee's submission, para. 156 (referring to Panel Report, paras. 7.201-7.205; and USITC Report, pp. 21 and 27).
[499]See *supra*, para. 215 of this Report.
[500]China's appellant's submission, para. 310.
[501]Panel Report, para. 7.201 (referring to USITC Report, Table V-3).
[502]China's appellant's submission, para. 327.
[503]USITC Report, p. 27.

the degree of competition in the US market does not support a finding that subject imports are "a significant cause" of material injury to the domestic industry because China reads Paragraph 16.4 as requiring a "particularly strong, substantial, and important" causal link between subject imports and any material injury to the domestic industry.[504] However, as we explained above[505], the causation standard of Paragraph 16.4, properly read, requires that subject imports make an important contribution in bringing about material injury to the domestic industry. In our view, the degree of competition between subject imports and domestic tyres in the US market that was established by the USITC, and confirmed by the Panel, was sufficient to support a finding that imports from China were "a significant cause" of material injury to the domestic industry.

4. Conclusion

226. On the basis of the foregoing, we consider that the Panel did not err in finding that the USITC properly assessed the conditions of competition in the overall US market. Accordingly, we *uphold* the Panel's finding, in paragraph 7.216 of the Panel Report, that the USITC did not err in its assessment of the conditions of competition in the overall US market.

C. *Correlation between Rapidly Increasing Imports and Material Injury*

227. We turn next to China's claim that the Panel erred in finding that the USITC was entitled to rely on "overall coincidence" between upward movements in subject imports and downward movements in injury factors in reaching its finding that subject imports were a significant cause of material injury under Paragraph 16.4 of China's Accession Protocol.

228. First, China argues that the Panel erred in not requiring a more specific degree of correlation between increases in subject imports and declines in injury factors. According to China, the Panel was under an obligation under Paragraph 16.4 to analyze carefully "year-to-year relative changes"[506] between subject imports and injury factors. In particular, China contends that the Panel failed to assess adequately a "disconnect" in the trends between 2007 and 2008, when the rate of increase in subject imports declined, but injury factors such as production, shipments, and sales nonetheless deteriorated.[507] China adds that a similar "disconnect" existed between declines in the rate of increase in subject imports and a decline in other injury factors such as operating profits, productivity, capacity utilization, and research and development.[508] According to China, the Panel failed to address in its explanation whether these inconsistencies in trends suggested that injury was caused by other factors,

[504]China's appellant's submission, para. 193.
[505]*Supra*, paras. 176 and 177 of this Report.
[506]China's appellant's submission, para. 350.
[507]China's appellant's submission, paras. 354-358.
[508]China's appellant's submission, para. 359.

such as the 2008 recession and the domestic industry's strategic decision to cede the low-end segment of the US replacement market.[509]

229. Second, China argues that the Panel incorrectly upheld the USITC's finding that subject imports had adverse effects on domestic prices and profitability. In particular, China stresses that the cost of goods sold ("COGS")/sales ratio increased between 2007 and 2008, when the rate of increase in subject imports declined.[510] In China's view, the Panel uncritically accepted the USITC's conclusion that there was "a sharp increase in this ratio in 2008", and ignored the sharp decrease in the COGS/sales ratio in 2007.[511] Similarly, the Panel failed to address yearly changes in finding that "underselling by subject imports *generally* had a highly detrimental impact on the domestic industry".[512] China emphasizes that, when the margin of underselling was greatest, in 2007, the profitability of the domestic industry improved. In contrast, when the margin of underselling decreased in 2008, the profitability of the domestic industry also declined.[513] China adds that the margin of underselling remained relatively high in 2008 because domestic higher-value branded tyres have higher prices than unbranded Chinese tyres.[514] Thus, the Panel did not take into account the effects of "attenuated competition" on underselling[515], and failed to address adequately the fact that non-subject imports also undersold domestic tyres.[516]

230. The United States responds that the USITC's analysis of correlation was both reasoned and adequate, and sufficiently supported the USITC's conclusion that subject imports were "a significant cause" of material injury to the domestic industry. In the United States' view, the Panel correctly held that Paragraph 16.4 of the Protocol did not require a strict correlation in the degrees of changes in subject imports and injury factors.[517] The United States emphasizes that injury indicators such as market share, production, capacity, shipments, net sales, number of production-related workers, hours worked, and wages declined in every year of the period of investigation.[518] Other factors such as productivity, capacity utilization, operating margins, and operating income fell in three out of

[509]China's appellant's submission, paras. 364-366.
[510]China's appellant's submission, para. 368. The COGS/sales ratio expresses the portion of total sales value that is accounted for by costs directly associated with making a particular good. A higher COGS/sale ratio therefore indicates that such costs make up a higher portion of sales value, leaving a smaller margin for selling, general and administrative expenses, and profits. The COGS/sales ratio therefore provides an indication of whether the sales value is sufficient to cover the production costs to produce the goods that are sold.
[511]China's appellant's submission, para. 369 (quoting USITC Report, p. 24).
[512]China's appellant's submission, para. 371 (quoting Panel Report, para. 7.258). (emphasis added by China)
[513]China's appellant's submission, para. 372.
[514]China's appellant's submission, para. 375.
[515]China's appellant's submission, para. 377.
[516]China's appellant's submission, para. 379.
[517]United States' appellee's submission, para. 160.
[518]United States' appellee's submission, para. 161.

four years of the period of investigation.[519] The United States argues that improvements in the profitability, productivity, and capacity utilization of the domestic industry in 2007 do not undermine the Panel's overall correlation finding because other factors such as market share, capacity and production levels, shipments, sales quantities, number of production-related workers, hours worked, and wages continued to fall in that same year.[520]

231. The United States further submits that the Panel did not err in finding that subject imports adversely impacted the domestic industry's prices and profitability. In the United States' view, the Panel sufficiently addressed and rejected China's argument that an improvement in the COGS/sales ratio in 2007 suggested an absence of correlation.[521] In addition, the Panel correctly held that improvements in the profitability of the US industry in 2007 did not suggest an absence of correlation, because the industry's operating margins declined in three out of four years of the period of investigation.[522] Moreover, the United States explains that the USITC reasonably found that "levels of pervasive underselling" by subject imports suppressed prices in the US market, thereby indicating that there was "significant price competition" in the replacement market.[523] In addition, the United States stresses that subject imports also consistently undersold third-country imports over the period of investigation.[524]

232. The Panel, for its part, noted that Paragraph 16.4 did not expressly require a showing of correlation between material injury and rapidly increasing imports, and described it as a "tool" that the investigating authority might use to establish causation.[525] The Panel disagreed with China that a finding of "significant cause" depended on a finding of correlation between varying *degrees* of increase in imports and varying *degrees* of decline in injury indicators.[526] The Panel reasoned that "a more precise degree of correlation" was "unrealistic" to expect, especially where other causes of injury might be at work.[527] The Panel added that a finding of "significant cause" is not excluded simply because an investigating authority relies on "an overall coincidence" between import increases and declining injury factors, particularly where that analysis is combined with other analyses indicative of causation.[528]

[519]United States' appellee's submission, para. 162.
[520]United States' appellee's submission, para. 163.
[521]United States' appellee's submission, paras. 170 and 171.
[522]United States' appellee's submission, para. 173.
[523]United States' appellee's submission, para. 175.
[524]United States' appellee's submission, para. 176.
[525]Panel Report, para. 7.228.
[526]Panel Report, para. 7.229.
[527]Panel Report, para. 7.229.
[528]Panel Report, para. 7.229.

233. Turning to the correlation analysis conducted by the USITC, the Panel noted that, while subject imports were "increasing rapidly", the domestic industry's market share, production, capacity, shipments, sales quantities, and employment-related factors declined in every year of the period of investigation.[529] The Panel added that the domestic industry suffered declines in operating income, operating margins, capacity utilization, and productivity in three out of four years of the period of investigation, and that all, except for capacity utilization, were at their lowest levels in 2008, when imports from China were at their highest.[530] For the Panel, these data were sufficient for the USITC properly to find that there was an overall coincidence between the upward movement in subject imports and the downward movement in injury factors.[531]

234. The Panel further disagreed with China that a decline by 5.3 percentage points in the COGS/sales ratio in 2007 undermined the USITC's finding that the domestic industry experienced a "cost-price squeeze" over the period of investigation. The Panel recalled that the USITC had made a finding of *price suppression*, and that price increases over the period of investigation were not sufficient to offset increases in production costs.[532] For the Panel, the USITC's conclusion regarding a "cost-price squeeze" was further confirmed by the "pervasive underselling" by subject imports in the US market over the period of investigation.[533] The Panel reasoned that the fact that discrete injury factors—profitability and COGS/sales ratio—improved in 2007 did not undermine the USITC's conclusion concerning overall coincidence between increases in subject imports and declines in injury factors.[534]

1. Trend "Disconnect" between 2007 and 2008

235. We begin our analysis with China's claim that the Panel—and the USITC—failed to assess adequately year-by-year relative changes between subject imports and injury factors. According to China, the following indicators suggest that the performance of the domestic industry improved in 2007 when the *rate* of increases in subject imports was highest, at a 53.7% increase over 2006 levels, but deteriorated significantly in 2008 when the *rate* of increases in subject imports declined to 10.8% over 2007 levels.

[529]Panel Report, para. 7.234 (referring to USITC Report, pp. 15-18 and 23-26).
[530]Panel Report, para. 7.235 (referring to USITC Report, Table C-1 at pp. C-3-C-4).
[531]Panel Report, para. 7.236.
[532]Panel Report, para. 7.245.
[533]Panel Report, para. 7.246.
[534]Panel Report, paras. 7.244 and 7.258.

Volume Disconnects In Correlation (2006/2007 vs. 2007/2008 Period)

Injury Factor	Change from '06 to '07	Change from '07 to '08
Production Capacity	18.8 M tire drop-off (-8.8%)	9.9 M tire drop-off (-5%)
Production	4.5 M tire drop-off (-2.4%)	20 M tire drop-off (-11.1%)
U.S. Shipments	8.1 M tire drop-off (-5%)	18.9 M tire drop-off (-12.1%)
Net Sales	10.4 M tire drop-off (-5.5%)	21 M tire drop-off (-11.7%)

Source: China's appellant's submission, para. 355 (referring to USITC Report, Table C-1 at pp. C-3-C-4).

Value Disconnects In Correlation (2006/2007 vs. 2007/2008 Period)

Injury Factor	Change from '06 to '07	Change from '07 to '08
U.S. Shipments	$484 M increase (+5.1%)	$430 M decrease (-4.3%)
Net Sales	$523 M increase (+4.8%)	$451 M decrease (-4%)

Source: China's appellant's submission, para. 358 (referring to USITC Report, Table C-1 at pp. C-3-C-4).

Omitted Factor Disconnects In Correlation (2006/2007 – 2007/2008 Period)[535]

Injury Factor	Change from '06 to '07	Change from '07 to '08
Operating Profits	5.6% pt increase	6.9% pt decrease
Productivity	0.1 tire per hour increase	0.2 tire per hour decrease
Capacity Utilization	6.0% pt increase	5.9% pt decrease
Research and Development	6.4% increase	0.1 percent decrease
Capital Expenditures	3.6% increase	22.1% increase

Source: China's appellant's submission, para. 359 (referring to USITC Report, Table C-1 at pp. C-3-C-4).

236. At the outset, we note that China's argument seems premised on its interpretation that Paragraph 16.4 required the USITC to establish a strict year-by-year correlation between the *magnitude* of upward import trends and the *magnitude* of downward movements in the relevant performance indicators of the domestic industry. As noted above[536], we see nothing in the text of Paragraph 16.4 that would require investigating authorities to establish a stricter degree of correlation between movements in imports and movements in injury factors in assessing causation under the Protocol than under other WTO agreements.

237. As the Appellate Body has explained, the analysis of correlation focuses on "the *relationship* between *movements* in imports (volume and market share) and the *movements* in injury factors".[537]

[535]USITC Report, Table C-1 at pp. C-3-C-4.
[536]*Supra*, para. 195 of this Report.
[537]Appellate Body Report, *Argentina – Footwear (EC)*, para. 144. (original emphasis)

Furthermore, although the Appellate Body has acknowledged that correlation would "normally" suggest the existence of a causal link, it has made clear that it "cannot by itself prove causation", and that its absence does not preclude an affirmative causation finding provided a "compelling analysis is present".[538] Hence, a correlation analysis is merely indicative—but not dispositive—of the existence of a causal link, and may assist an investigating authority in establishing that subject imports are "a significant cause" of material injury to the domestic industry under Paragraph 16.4 of the Protocol.

238. Moreover, we agree with the Panel that correlation between increases in subject imports and decreases in injury factors "is not an exact science", and that it would be "unrealistic" to require a strict correlation in the degree of change in subject imports and the degree of change in injury indicators, particularly where other causes of injury are at work.[539] This is particularly so because, in economic terms, different injury indicators will respond differently to increases in subject imports, thereby making it difficult—if not impossible—to establish such a precise correlation in the degree of changes in subject imports and the degree of changes in injury indicators. We agree with the Panel that, while a more precise degree of correlation between the upward movements in subject imports and the downward movements in injury factors might result in a more robust finding of causation, a finding of "significant cause" is not excluded simply because an investigating authority relies on overall coincidence between the upward movement in subject imports and the downward movement in injury factors.[540]

239. In any event, we are not persuaded that the statistics put forward by China demonstrate that the Panel and the USITC failed to assess adequately the relationship between trends in subject imports and relevant injury indicators in their analyses. We note that China presents data on the relative *change* in discrete injury factors as compared to the immediately preceding year, and compares this with the relevant *change* in the *rate* of increases in subject imports. We do not consider that the USITC was required to conduct such an analysis. For the reasons articulated above, a correlation analysis is not one seeking to establish a precise coincidence between trends in the yearly *rates* of increase in subject imports and the yearly *rates* of change in injury factors. In other words, in its

[538]Appellate Body Report, *Argentina – Footwear (EC)*, para. 144 (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.238).

[539]Panel Report, para. 7.229. We understand the Panel's reference to a "decrease" in injury factors as referring to a deterioration in the performance of the domestic industry, irrespective of whether the particular injury factor expresses such deterioration in positive or negative terms.

[540]Panel Report, para. 7.229.

analysis of correlation, the USITC did not need to establish whether subject imports *accelerated* over the period of investigation at the same *pace* at which the injury factors deteriorated. Moreover, a proper correlation analysis seeks to establish a *temporal* coincidence between an upward trend in *subject imports* and a downward trend in the performance indicators of the domestic industry, and does not necessarily require strict simultaneity in the movements of these indicators. Viewed in this light, the data compiled by the USITC for the years 2007 and 2008, and reviewed by the Panel, do not detract from the USITC's overall finding of coincidence between the upward movement in subject imports and the downward movement in injury factors, because in that period subject imports continued to increase[541] and injury indicators continued to deteriorate.

240. Indeed, whereas subject imports increased in both absolute and relative terms in each year of the period of investigation, including 2008, performance indicators of the domestic industry consistently deteriorated over the same period. As the Panel correctly observed, factors such as market share[542], production[543], capacity[544], shipments[545], sales quantities[546], and employment-related factors[547] declined in every year of the period of investigation.[548] Other factors such as operating income[549], operating margins[550], capacity utilization[551], and productivity[552] declined in three out of four years of the period of investigation, and all, except for capacity utilization, were at their lowest levels in 2008, when the volume of subject imports was greatest.[553]

[541]We recall that the volume of subject imports increased by 53.7% in 2007, and by 10.8% in 2008.

[542]The domestic industry's market share fell in every year of the period of investigation, declining by 13.7% over the entire period. (Panel Report, para. 7.234 (referring to USITC Report, pp. 25-26))

[543]The domestic industry's production declined in every year of the period of investigation, resulting in an overall decline of 26.6%. (Panel Report, para. 7.234 (referring to USITC Report, pp. 15-18 and 24))

[544]The domestic industry's capacity declined in every year of the period of investigation, with an overall decline of 17.8%. (Panel Report, para. 7.234 (referring to USITC Report, pp. 15-18 and 24))

[545]The domestic industry's US shipments declined in every year of the period of investigation, with an overall decline of 29.7%. (Panel Report, para. 7.234 (referring to USITC Report, pp. 15-18 and 24))

[546]The domestic industry's net sales quantities declined in every year of the period of investigation, with an overall decline of 28.3%. (Panel Report, para. 7.234 (referring to USITC Report, pp. 23-24))

[547]The domestic industry's employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2%, the number of hours worked falling by 17.0%, and wages paid falling by 12.5% over the entire period. (Panel Report, para. 7.234 (referring to USITC Report, pp. 17 and 24))

[548]Panel Report, para. 7.234.

[549]Operating income fell from US$256.2 million in 2004 to a loss of US$262.8 million in 2008. (Panel Report, para. 7.235 (referring to USITC Report, Table C-1 at pp. C-3-C-4))

[550]Operating margins fell by 4.8% over the period of investigation, with declines in three out of four years of that period. (Panel Report, para. 7.235 (referring to USITC Report, Table C-1 at pp. C-3-C-4))

[551]Capacity utilization fell by 10.3% over the period of investigation. (Panel Report, para. 7.235 (referring to USITC Report, Table C-1 at pp. C-3-C-4))

[552]Productivity fell by 11.5% over the period of investigation. (Panel Report, para. 7.235 (referring to USITC Report, Table C-1 at pp. C-3-C-4))

[553]Panel Report, para. 7.235.

241. Accordingly, we do not consider that the Panel erred in finding that these data were "sufficient for the USITC to properly find that there was an overall coincidence between the upward movement in subject imports and the downward movement in domestic industry injury factors."[554]

2. Correlation between Import Increases, Domestic Prices, and Profitability

242. We turn to China's claim that the Panel erred in finding correlation between increases in subject imports and prices and profitability in the domestic industry. In particular, China argues that improvements in the COGS/sales ratio and in the domestic industry's profitability in 2007 (when the margin of underselling by subject imports was at its highest) undermined the USITC's conclusion that domestic producers had suffered a "cost-price squeeze" over the period of investigation. Both of these indicators, China emphasizes, further deteriorated in 2008, when the margin of underselling by subject imports declined in comparison to 2007.

243. At the outset, we note that the COGS/sales ratio expresses the portion of total sales value that is accounted for by costs directly associated with making a particular good. A higher COGS/sale ratio therefore indicates that such costs make up a higher portion of sales value, leaving a smaller margin for selling, general and administrative expenses, and profits. The COGS/sales ratio therefore provides an indication of whether the sales value is sufficient to cover the production costs of the goods that are sold. Over the period of investigation, the yearly COGS/sales ratios of US producers were: 84.7% in 2004; 87.0% in 2005; 89.6% in 2006; *84.3% in 2007*; and 90.1% in 2008.[555] China argues that a 5.3% improvement in the COGS/sales ratio in 2007, when subject imports rose by their highest margin, suggests a lack of correlation between subject imports and prices of the domestic industry.

244. Addressing the same arguments that China now raises on appeal, the Panel found that "[t]he fact that annual movements in every single injury factor did not precisely track annual movements in subject imports does not invalidate the USITC's finding of overall coincidence."[556] Highlighting that the USITC had found the existence of *price suppression* over the period of investigation, the Panel further noted that domestic price increases for that period should be assessed in the light of even larger increases in industry costs.[557]

245. We agree with the Panel that an improvement in the COGS/sales ratio in 2007 does not *per se* undermine the USITC's finding that subject imports negatively affected domestic prices. As noted earlier, we do not interpret Paragraph 16.4 of the Protocol as requiring a strict correlation between

[554]Panel Report, para. 7.236.
[555]USITC Report, Table III-5 at p. III-13.
[556]Panel Report, para. 7.244.
[557]Panel Report, para. 7.245.

yearly upward movements in subject imports and downward movements in *all* injury factors. Moreover, the fact that the COGS/sales ratio increased in all but one year of the period of investigation reasonably supports, in our view, the Panel's conclusion that the USITC provided a reasoned and adequate explanation with respect to the occurrence of a "cost-price squeeze" over the period of investigation.

246. Similarly, the fact that the profitability of the domestic industry improved when margins of underselling were at their highest in 2007 cannot be determinative as to whether overall there was a correlation between increases in subject imports and declines in injury factors. As the Panel correctly pointed out, even if the profitability of the domestic industry recovered in 2007, other injury factors such as domestic capacity, production, shipments, sales, and employment continuously deteriorated in each year of the period of investigation, including 2007.[558] For the reasons discussed above, we do not consider that a single injury factor should be determinative, provided that the investigating authorities' correlation analysis provides a reasoned and adequate explanation for a determination that subject imports are a significant cause of material injury to the domestic industry.

247. In this respect, an analogy can be drawn with the Appellate Body's finding in *Argentina – Footwear (EC)* that a decline in each injury factor is not necessary to support a finding that the domestic industry is seriously injured within the meaning of Article 4.1(a) of the *Agreement on Safeguards*. The Appellate Body explained:

> Obviously, any such evaluation will be different for different industries in different cases, depending on the facts of the particular case and the situation of the industry concerned. An evaluation of each listed factor will not necessarily have to show that each such factor is "declining". In one case, for example, there may be significant declines in sales, employment and productivity that will show "significant overall impairment" in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate "significant overall impairment" of the industry.[559]

248. Similarly, in this case, we consider that the improvement in discrete injury factors during the period of investigation does not *per se* undermine the overall coincidence found by the USITC—and upheld by the Panel—between increases in subject imports and general downward trends in prices. Moreover, we note that such injury factors deteriorated in all other years of the period of investigation.

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[558]Panel Report, paras. 7.258 and 7.234.
[559]Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

3. Conclusion

249. For these reasons, we *uphold* the Panel's finding, in paragraph 7.261 of the Panel Report, that the USITC's reliance on an overall coincidence between an upward movement in subject imports and a downward movement in injury factors reasonably supports the USITC's finding that rapidly increasing imports from China are a significant cause of material injury to the domestic industry within the meaning of Paragraph 16.4 of China's Accession Protocol.

D. *Other Causes of Injury*

1. The Panel's Approach to the USITC's Analysis of Other Causes of Injury

250. The Panel began by noting that, while at the outset of the proceeding, it appeared that the parties disagreed fundamentally on whether an investigating authority was required under Section 16 of China's Accession Protocol to perform a non-attribution analysis, by the end it was clear that the parties agreed that some form of non-attribution analysis may be required in certain circumstances.[560]

251. China's Accession Protocol does not contain express non-attribution language. The Panel observed, however, 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 factors."[561] As noted above, the Panel drew an analogy with the approach in *US – Upland Cotton*, where, notwithstanding the absence of explicit non-attribution language in Articles 5 and 6.3 of the *SCM Agreement*, both the panel and Appellate Body found that some form of non-attribution analysis is inherent in establishing a causal link between the subsidy and price suppression and that, "if non-attribution does not occur, one cannot establish with certainty that price suppression [is] the effect of the subsidy (as opposed to some other injurious factor)".[562] The Panel thus concluded that:

> … the causal link between rapidly increasing imports and material injury must be assessed "within the context of other possible causal factors". In particular, a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors. We shall evaluate the USITC's assessment of alternative causes in this light.[563] (footnote omitted)

[560]Panel Report, para. 7.174.
[561]Panel Report, para. 7.176.
[562]Panel Report, para. 7.176.
[563]Panel Report, para. 7.177 (quoting Panel Report, *US – Upland Cotton*, para. 7.1344).

252. We agree with the Panel that some form of non-attribution analysis is *inherent* in the establishment of a causal link between rapidly increasing imports from China and material injury to the domestic industry. As noted above[564], Paragraph 16.4 of the Protocol requires that rapidly increasing imports from China make an important contribution to bringing about material injury to the domestic industry. This determination can only be made if an investigating authority properly ensures that effects of other known causes are not such as to suggest that subject imports are in fact only a "remote" or "minimal" cause, rather than a "significant" cause of material injury to the domestic industry. For this reason, the significance of the effects of rapidly increasing imports from China must be assessed in the context of other known causal factors. The extent of the analysis of other causal factors that is required will depend on the impact of the other factors that are alleged to be relevant and the facts and circumstances of the particular case. As noted above, the participants do not contest that "some form of non-attribution analysis" may be required in order to establish properly that subject imports are a "significant cause" of material injury within the meaning of Paragraph 16.4 of the Protocol.[565] In some cases, the investigating authority may need to perform a detailed analysis of other causes of injury to support adequately a conclusion that subject imports are nonetheless "a significant cause" of injury.[566] In other cases, a less extensive analysis of other causal factors may suffice to support adequately a conclusion that subject imports are "a significant cause" of injury.[567]

253. China takes issue with the Panel's statement that:

> … a finding of causation for 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.[568]

254. China asserts that the Panel's focus in this case was on identifying some "residual effect" from subject imports, rather than on assessing how different factors may be affecting the condition of the domestic industry and whether any remaining effects attributable to imports from China could properly be deemed to be "a significant cause" of material injury.[569] China argues that, under the Panel's standard, any injurious effects—including "residual effects"—could constitute "a significant

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[564]*Supra*, paras. 176 and 177 of this Report.

[565]Panel Report, para. 7.174. We further note that the United States agrees with the Panel that "the USITC was required to perform some analysis of the effects of other factors that have caused injury to the industry" in the present case. (United States' appellee's submission, para. 132)

[566]Such analysis may be necessary, for example, where the volume of subject imports and the margins of underselling are small and the record evidence suggests that the effects of the other possible causes of injury are particularly important.

[567]This may be the case, for example, where the volume of subject imports and margin of underselling are very important.

[568]Panel Report, para. 7.177.

[569]China's appellant's submission, para. 285.

cause".[570] In other words, if the other causal factors "do not explain everything", and instead leave some residual injurious effects attributable to imports from China, "then those residual effects somehow constitute a 'significant cause' of material injury".[571] China rejects this as an "all or nothing" approach to the assessment of other causes.[572]

255. The United States disagrees with China's assertion that the Panel applied an "all or nothing" approach to the consideration of other causes, or that the Panel permitted "residual effects" to constitute a "significant cause". Instead, according to the United States, the Panel properly assessed whether subject imports were a "significant" or "important" cause of material injury independent of other possible causes.[573]

256. Read in isolation, the Panel's reference to "injurious effects that cannot be explained by the existence of other causal factors" could give the impression that the Panel viewed Paragraph 16.4 as requiring only that subject imports have "any" injurious effects, rather than examining whether such imports make an important contribution and therefore constitute "a significant cause" of material injury. Certain other statements made by the Panel might also suggest that the Panel was in fact examining whether subject imports had "any" injurious effects, rather than "significant" effects. For example, in relation to the impact of the 2008 recession, the Panel found that the USITC properly established that the injury to the domestic industry could not be attributed "in whole" to the fall in demand resulting from the 2008 recession.[574]

257. This finding and other similar statements by the Panel may be unfortunately worded. We note, however, that the Panel clearly indicated that it viewed the applicable standard under Paragraph 16.4 to consist of two elements: the "causal" element *and* the "significant" element.[575] Moreover, the Panel rejected the proposition that even "a minimal cause" of injury might be "a significant cause" of injury.[576] The Panel also stated that the fact that subject imports continued to increase significantly during that recession indicated that subject imports were having an adverse impact *independent* of the effect of the fall in demand during the 2008 recession.[577] Importantly, in dismissing China's claims regarding the USITC's assessment of the individual injurious effects of other factors, the Panel also stated that it had "reviewed record evidence indicating that subject imports from China had *significant* injurious effects, *independent* of any injurious effects of other

[570]China's appellant's submission, para. 286.
[571]China's appellant's submission, para. 284.
[572]See China's appellant's submission, paras. 284, 289, 433, and 436.
[573]United States' response to questioning at the oral hearing.
[574]Panel Report, para. 7.354.
[575]See, for example, Panel Report, para. 6.28.
[576]Panel Report, para. 7.159.
[577]Panel Report, para. 7.354.

causal factors".[578] In the light of these statements, we consider that the Panel correctly articulated the standard of review appropriate for assessing the USITC's analysis of other possible causes of injury.

258. For all these reasons, we disagree with China's assertion that the Panel set out an approach that focused only on identifying any "residual effects" of imports, rather than on assessing whether the effects of subject imports could properly be deemed a significant cause of material injury. As explained above[579], we consider that an investigating authority can make a determination as to whether subject imports are a significant cause of material injury only if it properly ensures that effects of other known causes are not improperly attributed to subject imports and do not suggest that subject imports are in fact only a "remote" or "minimal" cause, rather than a "significant" cause of material injury to the domestic industry. In our view, the Panel properly understood that it was required in this case to assess whether the USITC had adequately explained that subject imports were a "significant" or "important" cause of material injury "independent" of the injurious effects of other possible causes.

2. The Panel's Findings relating to the USITC's Consideration of Other Causes of Injury

259. China attributes the injury suffered by the US domestic industry, at least in part, to three causal factors other than subject imports from China, namely: (i) the US domestic industry's business strategy of shifting focus to higher-value products for its US production; (ii) demand declines in the US market; and (iii) non-subject imports. China contends that the Panel erred in finding that the USITC properly considered and addressed the effects of these other factors that were allegedly causing injury to the domestic industry.

260. First, China argues that the Panel failed to examine properly the USITC's analysis of the domestic industry's business strategy, including the factual basis for the USITC's conclusion that the US producers' capacity reductions in 2006 were largely a reaction to increases in subject imports from China and not part of a strategy by domestic producers to abandon voluntarily the low-price segment of the US tyres market. Next, China contends that the Panel failed to review properly the USITC's analysis of the impact of declines in demand and the effect of non-subject imports, even though the latter had a larger presence in the US market than the Chinese imports. As we understand it, China does not claim that these other causal factors explain all of the material injury found to exist in this

[578]Panel Report, footnote 511 to para. 7.377. (emphasis added) The Panel introduced its analysis of changes in demand by articulating the proper inquiry, that is, whether subject imports had injurious effects independent of the injury caused by changes in demand. The Panel also concluded that the USITC did not "improperly attribute injury caused by non-subject imports to subject imports". (See Panel Report, paras. 7.333 and 7.367)

[579]See *supra*, para. 201 of this Report.

case. However, China asserts that "individually and collectively they call into serious doubt the causal link between imports from China and the condition of the U.S. industry".[580]

261. In response, the United States does not contest that the USITC was "required to perform an assessment of other injury factors under the Protocol".[581] Instead, it agrees with the Panel that the USITC was under an obligation "to perform some analysis of the effects of other factors that have caused injury to the industry".[582] The United States considers, however, that the USITC properly addressed all of the factors that could reasonably be considered significant enough to break the causal link between subject imports and material injury in the present case. Moreover, in the United States' view, the Panel properly examined China's arguments concerning the effects of other causal factors to determine whether they seriously undermined the USITC's conclusion that rapidly increasing imports from China were a significant cause of material injury to the industry.

(a) The US Domestic Industry's Business Strategy

262. Before the Panel, China claimed that the domestic industry's business strategy was an "other cause" of material injury to the domestic industry, in the sense that declines in certain injury indicators (including production, shipments, and net sales quantities) should be attributed to what China asserted was the domestic industry's *voluntary* withdrawal from the low-value segments of the replacement market rather than to subject imports.[583] According to China, this business strategy involved closing those plants in the United States that made lower-value tyres and shifting that production to lower-cost foreign production facilities, while concentrating US production on higher-value tyres. In China's view, this strategy resulted in a "supply gap" in the US market that was filled by imports from both China and other sources.

263. As the Panel noted, the USITC rejected the argument that domestic producers *voluntarily* abandoned the lower-priced part of the US tyres market and that imports from China simply filled the supply gap left by the retreating domestic industry.[584] Instead, the USITC found that the reduction in domestic capacity and the closures of US plants were largely "a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future".[585] In reaching this conclusion, the USITC relied upon: (i) data indicating that imports from China were already increasing before Bridgestone, Continental, and Goodyear announced the plant closures in 2006 and 2008; (ii) evidence indicating that competition

[580]China's appellant's submission, para. 386.
[581]United States' appellee's submission, para. 132.
[582]United States' appellee's submission, para. 132.
[583]See Panel Report, para. 7.285.
[584]See Panel Report, para. 7.287 (quoting USITC Report, pp. 26-27).
[585]Panel Report, para. 7.287 (quoting USITC Report, pp. 24-27).

from low-priced imports from Asia, including China, was an "important part" of the companies' decisions to close these plants; (iii) articles in trade publications referring to a surge in purchases of tyre-manufacturing equipment by Chinese producers that occurred over the past 10 years; and (iv) a 2006 news article noting that imports from China were expected to increase.[586]

264. China's arguments on appeal focus on the Panel's analysis of the USITC's conclusion that the plant closures by US producers were largely a reaction to increases in subject imports from China. In particular, China takes issue with the Panel's analysis of the evidence relied upon by the USITC to support its conclusions in this regard.

265. As an initial matter, we note that several of China's arguments appear to be directed at the objectivity of the Panel's assessment of the facts, while other arguments are directed mainly at the way in which the Panel assessed the evidence that was before the USITC. Regarding several aspects of its challenge, China has made parallel claims under Section 16 of the Protocol, alleging an error of application, and under Article 11 of the DSU, alleging that the Panel failed to make an objective assessment of the facts. While the Appellate Body has noted that "an appellant is free to determine how to characterize its claims on appeal"[587] and that "it is often difficult to distinguish clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact", the Appellate Body has also emphasized that "a failure to make a claim under Article 11 of the DSU on an issue that the Appellate Body determines to concern a factual assessment may have serious consequences for the appellant."[588]

266. With these principles in mind, we proceed to review China's arguments on appeal both below and in section VI.E of this Report, where we deal with claims that China brings referring explicitly to Article 11 of the DSU.

(i) *Continental's plant in Charlotte*

267. With respect to the reasons for the closure of Continental's plant in Charlotte, North Carolina, the Panel noted that a contemporaneous press release by Continental attributed the closure to "global competition putting pressure on us as our manufacturing costs are cheaper overseas".[589] The USITC interpreted this statement as including a reference to import competition from China. The Panel disagreed, and found instead that Continental's reference to "global competition" should "be

[586]Panel Report, para. 7.287 (quoting USITC Report, pp. 26-27).
[587]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177 (referring to Appellate Body Report, *Japan – Apples*, para. 136).
[588]Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 274.
[589]Panel Report, para. 7.299.

understood as competition from other Continental plants in the world".[590] The Panel reasoned that this "is because the press release clearly refers to 'our' manufacturing costs being 'cheaper overseas'".[591] As to whether import competition from other Continental plants in the world might include subject imports from China, the Panel found that since Continental did not have any production facilities in China, there was therefore "no proper basis for the USITC to conclude that imports from Continental plants around the world might include subject imports from China".[592] The Panel concluded that the USITC therefore "could not properly have attributed the closure of Continental's plant to subject imports from China".[593]

268. China submits that the Panel erred in rejecting the USITC's conclusion that Chinese imports played a role in the closure of Continental's plant in Charlotte, *without* assessing whether that conclusion undermined the USITC's finding that imports from China played an important part in the decisions to close Bridgestone's plant in Oklahoma City and Goodyear's plant in Tyler.[594] In addition, according to China, both the Panel and the USITC failed to ensure that the injurious effects resulting from the closure of Continental's plant in Charlotte were not attributed to imports from China.

269. We are not persuaded that Continental's reference to "global competition" must necessarily be understood as referring exclusively to competition from "other Continental" factories located overseas. However, we note that evidence regarding the Charlotte facility was *not* the only evidence that the USITC relied upon to support its conclusion that "low-priced competition from Asia, including China" was an "important part" of the decision by certain US producers to close factories in the United States, including both Bridgestone's plant in Oklahoma City and Goodyear's plant in Tyler. We consider it was appropriate for the Panel to proceed to assess the evidence relied upon by the USITC regarding those two plant closures given that the USITC also relied on this evidence.[595]

270. China argues that the Panel's finding regarding the Charlotte plant calls into question the USITC's conclusions with respect to the closures of Bridgestone's plant in Oklahoma City and Goodyear's plant in Tyler. China suggests that all three companies were "reacting to the same market

[590]Panel Report, para. 7.299.
[591]Panel Report, para. 7.299.
[592]Panel Report, para. 7.299.
[593]Panel Report, para. 7.299.
[594]See China's appellant's submission, paras. 406 and 407.
[595]In any event, even if we were to accept that the kind of non-attribution analysis that is suggested by China was required, we note that the closure of Continental's plant in Charlotte represented a reduction in industry capacity of 9.3 million units, whereas the closure of Bridgestone's plant in Oklahoma City and Goodyear's plant in Tyler represented a total reduction in US producers' capacity of 30.1 million units. In the light of these figures, we do not see why the Panel could not have proceeded to examine in this case whether the closures of the Bridgestone and Goodyear plants could reasonably support the USITC's overall finding regarding US producers' capacity reductions in 2006. (USITC Report, pp. 26-27).

situation".[596] We do not view the Panel to have found that the closure of the Charlotte plant was not caused by subject imports from China. Rather, the Panel's finding was that the evidence before the USITC did not support the USITC's conclusion that imports from Asia, including China, played an important part in the closure of Continental's plant in Charlotte. In any event, we see no basis to assume that the reasons for the plant closings were necessarily the same for all three companies. Even assuming that Continental may *not* have closed its plant as a result of low-priced competition from subject imports, this does not mean, without more, that "low-priced competition" from subject imports may not have played a role in the closing of other plants by other companies.

(ii) *Bridgestone's plant in Oklahoma City*

271. Bridgestone announced the closure of its plant in Oklahoma City, Oklahoma, in 2006.[597] With respect to the reasons for the plant's closure, the Panel noted that the USITC relied on a contemporaneous press release that stated that "this plant produces tires in the low-end segment of the market where demand is shrinking and fierce competition from low-cost producing countries is increasing."[598] The Panel reasoned that, "to some extent", "shifts in demand played a part in the closure of the Bridgestone, Oklahoma, plant".[599] However, the reference to "fierce competition from low-cost producing countries" in the same press release suggested to the Panel that such "shifts in demand were not entirely responsible for the closure of that plant".[600] The Panel further found that the reference to "fierce" competition also suggested that import competition was not as benign as China suggested, and that imports were not merely filling a "supply gap" caused by the industry's retreat from the low-end of the market.[601] For these reasons, the Panel found that "the USITC could properly have attributed the closure of the Bridgestone, Oklahoma City, plant to subject imports."[602]

272. China argues, on several grounds, that the Panel erred in finding that the USITC could properly have understood Bridgestone's reference to "fierce competition from low-cost producing countries" to include competition from subject imports from China. First, China observes that the official press release by Bridgestone refers only to "low-cost producing countries", and does not refer explicitly to imports from China as a reason for shutting down Bridgestone's plant in Oklahoma City.[603] Second, China asserts that the "low-cost imports" causing these closures were more likely non-subject imports, since they occupied a larger share of the US market than Chinese

[596]China's appellant's submission, para. 407.
[597]Panel Report, para. 7.302 (referring to USITC Report, footnote 62 at p. III-16). (emphasis added)
[598]Panel Report, para. 7.300.
[599]Panel Report, para. 7.300.
[600]Panel Report, para. 7.300.
[601]Panel Report, para. 7.300.
[602]Panel Report, para. 7.304.
[603]China's appellant's submission, para. 409.

imports in 2006.[604] China contends that the Panel "downplayed the significant and increasing presence" of such non-subject imports.[605]

273. The issues raised by China on appeal appear to be directed mainly at the Panel's assessment of the factual basis for the USITC's conclusions. We consider these issues to be more in the nature of claims made under Article 11 of the DSU. However, China has not brought a claim of error under Article 11 of the DSU to challenge this aspect of the Panel's findings. Consequently, we do not consider it necessary to further address China's arguments in this regard.

274. China further claims that the Panel "mischaracterized the evidentiary basis" of the USITC's finding, when relying on a statement made in the USITC staff report (which the USITC did not explicitly refer to in its determination) in assessing whether the USITC could properly attribute the closing of the Bridgestone plant to imports from China.[606] We note that China also raises a claim under Article 11 of the DSU regarding this aspect of the Panel's analysis. Consequently, we address that claim in section VI.E of this Report.

(iii) *Goodyear's plant in Tyler*

275. China makes similar claims regarding the Panel's analysis of the reasons for closure of Goodyear's plant in Tyler, Texas. First, China alleges that there was no factual basis for the Panel's assertion that "competition from subject imports was clearly greater than the competition from non-subject imports".[607] For China, with non-subject imports representing more than 80% of the total import volume, priced on average 17% below US price levels, and largely imported by US domestic producers themselves, it made "no sense" for the USITC and the Panel to read a generic reference to "low-cost imports" as a reference to imports from China.[608] China also criticizes the Panel for its "selective" approach in dealing with certain evidence, not only by equating "low-cost imports" to "subject imports" from China, but also by ignoring the non-import factors behind the Goodyear plant closure identified by the USITC.[609]

276. In our view, China's allegations on appeal are more properly characterized as claims made under Article 11 of the DSU, because they are directed at the objectivity of the Panel's assessment of the factual components of the USITC determination. We will examine them under Article 11 of the

[604]China's appellant's submission, para. 414.
[605]China's appellant's submission, para. 415.
[606]China's appellant's submission, para. 411.
[607]China's appellant's submission, para. 419 (quoting Panel Report, para. 7.305).
[608]China's appellant's submission, para. 426.
[609]China's appellant's submission, paras. 420 and 421 (referring to USITC Report, footnote 62 at p. III-16).

DSU in section VI.E of this Report to the extent that these allegations have been brought as claims under Article 11 of the DSU.

(iv) *Plant closures, change in business strategy, and other causes of injury*

277. In addressing China's claim that the US industry's change in business strategy was voluntary and created a supply gap in the US market, the Panel observed that "the majority of the USITC and the dissenting commissioners drew precisely the opposite conclusions on the issue of business strategy."[610] As the Panel noted, the "majority took the view that the strategy to reduce U.S. production and locate production in China was itself a response to increased imports and thus it was not an alternative cause that prevented the increasing imports from China to be a significant cause."[611] By contrast, the "dissenting commissioners took the view that the business strategy of relocating production to China was an independent business strategy that began before imports were increasing."[612] The Panel considered that it would be inappropriate in these circumstances "for the Panel simply to make a choice between the views of the majority and the dissenting commissioners".[613] The Panel expressed the view that "the decision to [re]locate production in China might have been the result of an independent business strategy, but the decision to close plants might well have been a response to imports."[614] In the light of these considerations, the Panel found "no basis for determining that the USITC's analysis of the alternative business strategy was in error".[615] Rather, the Panel considered that it was for China to establish a *prima facie* case of such error "and it failed to do so".[616]

278. China faults the Panel for failing to assess fully whether the majority or the dissent was correct, arguing that the Panel failed to "consider critically whether the USITC majority sufficiently explained its conclusion to ignore the effect of the change in business strategy".[617]

279. China's arguments are based on its own reading of the underlying facts. In particular, according to China:

> [T]he domestic industry's business strategy significantly affected the U.S. industry and many of the injury factors assessed by the USITC. Given their high costs and comparative advantages in the non-commodity tire segments, U.S. producers chose to withdraw their

[610]Panel Report, para. 7.320.
[611]Panel Report, para. 7.320.
[612]Panel Report, para. 7.320.
[613]Panel Report, para. 7.321.
[614]Panel Report, para. 7.321.
[615]Panel Report, para. 7.322.
[616]Panel Report, para. 7.322.
[617]China's appellant's submission, para. 430.

> domestic production from the low-value segments of the replacement market and focus instead on the high-value segments. This decision to refocus and close certain plants created an increased need for imports—both subject and non-subject, both imported by U.S. producers and not. Given this strategic decision, which bore fruit in 2007 prior to the recession, increasing subject imports were not a "significant cause" of injury to the domestic industry.[618]

280. We see no error in the Panel's analysis in this regard. In particular, we note that it is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Instead, it must test whether the explanations for the conclusions reached by the investigating authority are reasoned and adequate in the light of other plausible alternative explanations. In doing so, a panel should examine whether the investigating authority provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings supported the overall determinations.[619] Contrary to what China asserts, it was not for the Panel to decide whether the majority or the dissent was "correct"[620], and in this way "substitute its judgement for that of the competent authorities" by deciding the issue for itself.[621] Instead, it was for the Panel to assess whether the USITC's explanation of its conclusion was reasoned and adequate in the light of plausible alternative explanations proffered by China.

281. China considers that US producers closed certain plants for a "broader set of economic and business reasons", and that subject imports were just one of many factors being considered by these firms.[622] China argues that, "even if one assumes the USITC could properly find that imports from China played some role in the decision to close the plants, that does not justify attributing the entire consequences of the plant closures to the imports from China."[623]

282. China appears to suggest that the USITC attributed the "entire consequences" of the plant closures to imports from China. This is not correct. In fact, the USITC simply found that low-cost imports from Asia, including China, played an "important part" in the decisions to close the Goodyear, Continental, and Bridgestone plants and acknowledged that there may well be other

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[618]China's appellant's submission, para. 383.

[619]See Appellate Body Report, *Argentina – Footwear (EC)*, paras. 119-121; Appellate Body Report, *US – Cotton Yarn*, paras. 74-78; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 183 and 186-188; Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *US – Lamb*, paras. 101 and 105-108; Appellate Body Report, *US – Steel Safeguards*, para. 299; Appellate Body Report, *US – Wheat Gluten*, paras. 160 and 161; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[620]China's appellant's submission, para. 430.

[621]Appellate Body Report, *US – Steel Safeguards*, para. 299 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 121).

[622]China's appellant's submission, para. 485.

[623]China's appellant's submission, para. 433. (original underlining)

reasons for the plant closures. Moreover, the USITC's analysis focused on the rationale for the closures rather than the consequences thereof.

283. As a separate matter, we note that China also takes issue with certain general observations made by the Panel regarding China's argument that imports from other countries, including China, were merely filling a "supply gap" left by US producers in certain market segments.[624] On this point, the Panel noted, *inter alia*, that China presented subject imports as non-injurious because they were drawn into the US market by the business strategy of US tyres producers.[625] According to China, nothing in the Panel's observations "calls into doubt … the extent to which imports from China could properly be considered a 'significant cause'" of material injury.[626] We do not view the Panel's preliminary remarks to have been a necessary component of the Panel's analysis of China's arguments concerning the specific factors relied upon by the USITC to support its findings regarding the impact of changes in business strategy during the period of investigation. For this reason, we do not consider it necessary to address further these remarks by the Panel in our analysis.

284. For all these reasons, we do not agree with China that the Panel erred in its review of the USITC's analysis of the US domestic industry's business strategy and the reasons for the three US plant closures.[627]

(b) Changes in Demand

285. China takes issue with the Panel's analysis of declines in demand arguing that the Panel and the USITC both failed to "evaluate seriously" demand declines as a possible alternative cause of injury to the domestic industry.[628] China claims that a contraction in demand over the full period of investigation, combined with a sharp decline in demand in 2008 due to the recession, accounted for "a sizeable portion"—albeit not all—of the injury suffered by the industry over the relevant period.[629]

286. China recalls that the consumption data collected by the USITC showed a decline in three out of four years of the period of investigation, and an overall decline of more than 10% over the entire period of investigation.[630] China faults the USITC for not addressing this "longer term trend in demand" and claims that the Panel failed to distinguish between "average trends" over time and "the fluctuations that inevitably occur year-by-year".[631] In China's view, the overall decline in demand

[624]See Panel Report, para. 7.291 (quoting China's response to Panel Question 41, para. 58).
[625]Panel Report, para. 7.291.
[626]China's appellant's submission, para. 402.
[627]Panel Report, para. 7.322.
[628]China's appellant's submission, para. 437.
[629]China's appellant's submission, para. 436.
[630]China's appellant's submission, para. 437.
[631]China's appellant's submission, paras. 438 and 443.

represents a significant competitive factor that the Panel and the USITC should have considered "more carefully".[632]

287. The United States disagrees with what it describes as China's notion of a "consistent demand decline" in the US tyres market over the period of investigation, arguing instead that the record indicated "fluctuations" in demand, with the "bulk" of the overall decline in consumption occurring during the recession in 2008.[633] The United States further contends that the demand changes during the period did not explain "to any significant degree" the declines in the industry's condition, as the industry's production, shipments, sales, and market share levels fell consistently while the volume and market share of Chinese imports increased, irrespective of whether demand declined, increased, or remained relatively stable.[634]

288. In its analysis of this issue, the Panel observed that "apparent consumption of all passenger vehicle and light truck tyres declined (by volume) by 10.3 per cent from 2004 to 2008".[635] The Panel added, however, that "the bulk of this fall in apparent consumption occurred at the end of the period of investigation, from 2007 to 2008"[636] and "[p]rior to 2007, apparent U.S. consumption declined slightly by 0.8 per cent from 2004 to 2005, by 4.4 per cent from 2005 to 2006, but actually increased by 1.6 per cent from 2006 to 2007."[637] The Panel concluded, therefore, that, "while there was a pronounced decline in apparent consumption from 2007 to 2008", the record evidence did not indicate a "prolonged contraction" in demand over the period of investigation as a whole, as China had argued before the Panel.[638] On this basis, the Panel found no error in the USITC's finding that demand "fluctuated"[639] during the period of investigation.

289. On appeal, China appears to accept that demand may have "fluctuated" on a yearly basis as the USITC concluded. China argues, however, that the drop in consumption over the period of investigation represented a significant competitive factor that must have had some effect on the domestic industry and should have been analyzed "more carefully" by the Panel and the USITC.[640]

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[632]China's appellant's submission, para. 443.
[633]United States' appellee's submission, para. 203.
[634]United States' appellee's submission, para. 204.
[635]Panel Report, para. 7.339.
[636]Panel Report, para. 7.339. According to Table V-1 of the USITC Report, apparent consumption fell from 307,484,000 units to 296,091,000 units, that is, 3.7%, over four years from 2004 to 2007. Apparent consumption fell by 6.9% in the single year from 2007 to 2008 (from 296,091,000 units to 275,702,000 units). (Panel Report, footnote 470 to para. 7.339)
[637]Panel Report, para. 7.329.
[638]Panel Report, para. 7.339.
[639]USITC Report, p. 15.
[640]China's appellant's submission, para. 443.

290. Our review of the Panel's reasoning does not indicate that the Panel failed to assess adequately China's arguments regarding the decline in demand over the full period of investigation as distinct from yearly fluctuations in demand. Rather, as we see it, the Panel carefully examined the correlation between trends in subject imports and changes in demand over the full period of investigation. The Panel noted the USITC's finding that:

> [t]he large increase in the volume of subject imports is also reflected in those imports' large and growing share of the U.S. market. Subject imports increased their share of the U.S. market by 12 percentage points (more than threefold) between 2004 and 2008, from 4.7 percent in 2004 to 16.7 percent in 2008. More than half of this increase, 7.4 percentage points, has occurred since 2006.[641]

291. The Panel further noted the USITC's finding that "the ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008."[642] The Panel added that, in a related footnote, the USITC stated that the "ratio of subject imports to U.S. apparent consumption increased from 4.7 percent in 2004 to 6.8 percent in 2005, 9.3 percent in 2006, 14.0 percent in 2007, and 16.7 percent in 2008."[643]

292. The Panel went on to note that:

> … the ratio of subject imports to U.S. apparent consumption increased throughout the period of investigation. Even when demand increased by 1.6 per cent in 2007, the volume of subject imports increased by the significantly greater figure of 53.7 per cent. As a result, subject import market share increased by 4.8 percentage points, while the domestic industry's market share declined by 3.4 points (and the market share of non-subject imports declined by 1.1 per cent). In 2005, demand fell by a very modest 0.8 per cent. Subject imports in that year increased by 42.7 per cent, resulting in a 2.1 percentage point increase in market share, while the domestic industry's market share fell by 3.7 percentage points. In 2006, as demand fell by 4.4 per cent, the volume of subject imports increased by a further 29.9 per cent, resulting in a 2.4 percentage point increase in subject import market share. This contrasted with a 3.4 percentage point decline in the domestic industry's market share.[644] (footnote omitted)

293. Regarding the decline of demand in 2008 due to the recession, the Panel added that, "as demand fell by 6.9 per cent in 2008, the volume of subject imports continued to increase by an

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[641]Panel Report, para. 7.333 (quoting USITC Report, p. 22). The Panel used the terms "demand" and "US apparent consumption" interchangeably. (See Panel Report, footnote 469 to para. 7.339)

[642]Panel Report, para. 7.334 (quoting USITC Report, p. 12).

[643]Panel Report, para. 7.335 (quoting USITC Report, footnote 52).

[644]Panel Report, para. 7.336.

additional 10.8 per cent, resulting in a 2.7 percentage point increase in market share, compared with a fall in the domestic industry's market share of 2.9 percentage points."[645]

294. The Panel and the USITC therefore discussed changes in the level of demand over the full period of investigation. We also attach importance to the fact that the "bulk" of the decline in demand, as the Panel noted, "occurred at the end of the period of investigation, from 2007 to 2008"[646]; that this recession-driven decline in demand was separately addressed by the Panel and the USITC; and that "[p]rior to 2007, apparent U.S. consumption declined slightly by 0.8 per cent from 2004 to 2005, by 4.4 per cent from 2005 to 2006, but actually increased by 1.6 per cent from 2006 to 2007".[647] In these circumstances, since the Panel did not find error in the USITC's conclusion that demand "fluctuated" over the period of investigation, we do not consider that the Panel was required to address as a separate matter the overall decline in demand over the full period of investigation.

295. China further argues that the Panel erred in finding no fault in the USITC's assessment of the impact of the 2008 recession. We disagree with China. The Panel noted the USITC's finding that subject imports "continued to increase rapidly even in 2008 when U.S. apparent consumption was falling".[648] As the Panel found, this would suggest 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."[649] We therefore do not agree with China that the USITC failed to distinguish the "contribution of imports from China from those of the current recession on the overall condition of the industry".[650]

296. Finally, we note China's argument that, in its analysis of the 2008 recession, the Panel "suggested that if the sharp decline in demand could not explain all of the injury to the domestic industry, then it could explain none of the injury".[651] In particular, China takes issue with the Panel's finding that:

> … the USITC properly established that the injury to the domestic industry could not be attributed in whole to the fall in demand resulting from the 2008 recession. The fact that subject imports continued to increase significantly during that recession, forcing the domestic industry to absorb virtually all of the resultant fall in demand, indicates that subject imports were having an adverse

[645]Panel Report, para. 7.338.
[646]Panel Report, para. 7.339.
[647]Panel Report, para. 7.329.
[648]USITC Report, p. 26.
[649]Panel Report, para. 7.354.
[650]China's appellant's submission, para. 449.
[651]China's appellant's submission, para. 451. (original underlining)

> impact on the domestic industry independent of the effects of the fall in demand during the 2008 recession.[652]

297. As discussed above[653], we agree with China that, read in isolation, the passage quoted above may suggest that the Panel was merely assessing whether "all of the injury" could be attributed to the fall in demand resulting from the 2008 recession, rather than examining whether subject imports had "significant effects". However, the Panel went on to explain that the fact that subject imports continued to increase significantly during that recession indicated that subject imports were having an adverse impact *independent* of the effect of the fall in demand during the 2008 recession.[654] The Panel also clarified elsewhere in its Report that, in rejecting China's claims regarding the USITC's assessment of the individual injurious effects of other causal factors, it had "reviewed record evidence indicating that subject imports from China had *significant* injurious effects, independent of any injurious effects of other causal factors".[655] Therefore, while the passage quoted above may give rise to some concern and is unfortunately worded, we do not agree with China that the Panel suggested that, if the sharp decline in demand in 2008 "could not explain all of the injury to the domestic industry, then it could explain none of the injury".[656]

298. China further submits that the Panel "substituted its own analysis" instead of assessing the USITC's determination.[657] For example, in China's view, the Panel compared the changing levels of apparent consumption with the changing levels of subject import penetration, although the USITC did not conduct such an analysis in its determination.[658] We note that China also raises a claim under Article 11 of the DSU regarding this aspect of the Panel's analysis and we address that claim in section VI.E of this Report. Based on the foregoing, we find no error in the Panel's conclusion that the USITC properly addressed the issue of demand and properly found "that subject imports had injurious effects independent of any injury caused by changes in demand".[659]

(c) Non-Subject Imports

299. China faults the Panel for upholding the USITC's finding, contending that the USITC "never seriously addressed the competitive significance of non-subject imports".[660] According to China, despite the fact that non-subject imports held a larger share of the US market than Chinese imports

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[652]Panel Report, para. 7.354.
[653]*Supra*, paras. 256 and 257 of this Report.
[654]Panel Report, para. 7.354.
[655]Panel Report, footnote 511 to para. 7.377. (emphasis added)
[656]China's appellant's submission, para. 451. (original underlining)
[657]China's appellant's submission, para. 440.
[658]China's appellant's submission, para. 440.
[659]Panel Report, para. 7.333.
[660]China's appellant's submission, para. 470.

and were lower priced than the tyres produced in the United States, the USITC failed to address their competitive effects in the market.[661]

300. We note, as an initial matter, that the United States contends that China did not identify before the Panel non-subject imports as a possible "other" factor causing injury that the USITC should have addressed in its analysis. The United States submits that it is therefore "inappropriate for China to raise this issue on appeal".[662] Contrary to what the United States suggests, however, it appears, that China did raise this issue before the Panel.[663]

301. Turning to China's arguments on appeal, we are not persuaded that the USITC failed to address adequately the competitive effect of non-subject imports in the market. As the Panel noted, the USITC found that, "since 2006, imports from China gained a greater share of the U.S. market than was lost by domestic producers, indicating that they also took market share away from third-country sources."[664] Moreover, with respect to changes occurring in 2008, the USITC explained:

> 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.[665] (footnote omitted)

302. Having said that, China is correct in noting that non-subject imports consistently held a larger share of the US market than subject imports from China, and that prices for non-subject imports remained lower than prices for domestically produced tyres throughout the period of investigation.[666] Nonetheless, as the Panel noted, the record also indicates that the average unit value of non-subject

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[661]China's appellant's submission, para. 470.

[662]United States' appellee's submission, para. 216.

[663]Panel Report, para. 7.360. The Panel noted China's contention that "the USITC also failed to properly analyse the injury caused to the domestic industry by imports from countries other than China." The Panel added that "China suggests that injury caused by non-subject imports was improperly attributed to subject imports." The United States is correct, however, when it points out that 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." (United States' appellee's submission, para. 216) Yet, although China's arguments focused on changes in demand and the US industry's alleged business strategy, we note that China also referred in its arguments to "other contributing factors", including "massive numbers of non-subject imports", arguing that the USITC "failed to explain why imports from China were nonetheless a 'significant' cause amid these multiple factors." (China's first written submission to the Panel, para. 332) We note that the United States suggests that the Panel itself "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." (United States' appellee's submission, para. 216)

[664]Panel Report, para. 7.364 (quoting USITC Report, p. 26).

[665]Panel Report, para. 7.353 (quoting USITC Report, p. 26).

[666]China's appellant's submission, para. 470.

imports remained 22-25% *higher* than the average unit value of subject imports, with the average unit value of subject imports increasing from US$31.10 to US$38.90 over the period, while the average unit value of non-subject imports increased from US$40.42 to US$55.29, and the average unit value of US producers' shipments increased from US$48.40 to US$69.69.[667] In assessing China's allegations as to the effects of non-subject imports, the Panel further noted that "by 2006 only imports from Indonesia were cheaper than subject imports from China, and Indonesian imports represented only 3.4 per cent of total imports in 2006, compared to subject imports' 21.2 per cent share."[668] In addition, the Panel observed that "the share of non-subject imports in total U.S. imports declined from 87.1 to 66.9 per cent over the period, as the share of subject imports to total U.S. imports increased from 12.9 to 33.1 per cent."[669] This suggests, as the Panel found, that "non-subject imports would have had considerably less price effect on the domestic industry than subject imports."[670]

303. China also contends that the Panel impermissibly substituted its own analysis for that of the USITC when it stated that "the dominant feature of the U.S. market was the rise of subject imports from China at the expense of both non-subject imports and the U.S. industry."[671] China also raises a claim under Article 11 of the DSU regarding this aspect of the Panel's analysis. We address that claim in section VI.E.3 of this Report.

304. China argues that the Panel's analysis of price effects disregarded the "relative volumes" of non-subject imports vis-à-vis subject imports.[672] In relation to the replacement market, China submits that "imports from China in 2008 were less than 1 percent of the tier 1 market while imports from other countries made up 39 percent of the market."[673] In China's view, "the Panel's analysis essentially assumed that <u>one</u> tire from China at $40 had more of an adverse impact than <u>thirty nine</u> tires from other countries at $55."[674] China adds that "there were approximately <u>nine times</u> as many non-subject imports in the OEM market in 2008" as there were imports from China, and "non-subject imports grew from 30.2 percent to 43.5 percent of the U.S. OEM market between 2004 and 2008".[675] Noting that "[t]ogether the OEM and tier 1 segments represent about 60 percent of U.S. shipments",

[667]USITC Report, Table C-4.
[668]Panel Report, para. 7.364 (referring to USITC Report, Table II-1).
[669]Panel Report, para. 7.364 (referring to USITC Report, Table II-1).
[670]Panel Report, para. 7.364.
[671]China's appellant's submission, para. 473 (quoting Panel Report, para. 7.367). See also China's appellant's submission, para. 577.
[672]China's appellant's submission, paras. 476 and 477.
[673]China's appellant's submission, para. 477.
[674]China's appellant's submission, para. 477. (original underlining)
[675]China's appellant's submission, para. 478 (referring to USITC Report, Table V-3 at p. V-4). (original underlining)

China asserts that the Panel ignored the fact that "non-subject imports remained the overwhelming competitive factor facing U.S. producers".[676]

305. This argument by China focuses exclusively on distinct segments of the overall US tyres market. While it may be, as China suggests, that subject imports might not have had a significant effect in tier 1, the issue before the Panel, however, was whether the USITC reasonably established that subject imports were "a significant cause" of injury in the *overall US market*, consisting of the OEM market and the three tiers of the replacement market. In section VI.B of our Report, we have examined this matter in more detail when addressing China's arguments concerning the conditions of competition.

(d) Comparative Analysis of Alternative Causal Factors

306. China acknowledges that Section 16 of the Protocol does not require that an investigating authority compare or "weigh" the effects of various causal factors against one another.[677] However, China maintains that such analysis would provide an "alternative way" for an investigating authority to determine appropriately that imports from China are "a significant cause" of material injury in the light of the existence of other causal factors.[678] Moreover, even if this approach is not required, China contends that, in this case, a consideration of the relative importance of other causes "reinforces" the conclusion that imports from China were not in fact "a significant cause" of injury.[679] In China's view, this is because other causes reduced any residual contribution by imports from China to a level that no longer meets the standard of "significant cause".[680]

307. According to China, the Panel erred by affirming the USITC's analysis of other causes. China contends that the USITC relied exclusively on its holistic explanation—based on conditions of competition, overall correlation, and other causes—without any assessment of the relative importance of each of the various causes at work.[681] China makes reference to the industry's alleged business strategy, declines in demand, and the role of non-subject imports, maintaining that the evidence before the USITC "strongly suggested" that these other possible causes of injury were more important than imports from China.[682]

[676]China's appellant's submission, para. 478.
[677]China's appellant's submission, para. 480.
[678]China's appellant's submission, para. 480.
[679]China's appellant's submission, para. 481.
[680]China's appellant's submission, para. 481.
[681]China's appellant's submission, para. 482.
[682]China's appellant's submission, para. 492.

308. As we understand it, China does not claim that an investigating authority is required to compare or "weigh" the effects of various causal factors against one another in order to determine whether imports from China are a significant cause of injury to the domestic industry. China argues, however, that a consideration of subject imports in the context of other causes can *inform* the issue of whether rapidly increasing imports from China rise to the level of being a significant cause of injury. As we see it, China's arguments on this issue are closely linked to its argument concerning the need to consider the relationship between rapidly increasing imports and other causal factors. We consider it appropriate therefore to address these arguments together in the following section of this Report.

(e) Cumulative Assessment, Interplay, and Integrated Analysis

309. Referring to the Appellate Body's findings in *EC – Tube or Pipe Fittings*, the Panel reasoned that, notwithstanding the lack of any requirement for cumulative assessment under the Protocol, "there may be cases where the collective injurious effect of other causal factors might be so dominant that the injury caused by increasing imports could not properly be found to be 'significant'."[683] The Panel stated, however, that China has not demonstrated that this was the case in the underlying USITC investigation. The Panel further noted that, in rejecting China's claims regarding the USITC's assessment of the individual injurious effects of these other causal factors, it had "reviewed record evidence indicating that subject imports from China had significant injurious effects, independent of any injurious effects of other causal factors."[684] The Panel found that China had "failed to establish that in the context of the present case the USITC should have provided a cumulative assessment of the effects of the other causes of injury".[685]

310. China takes issue with this finding, claiming that the Panel improperly dismissed China's arguments on this point. According to China, it provided the Panel with "the unique factual 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.[686] In

[683]Panel Report, para. 7.377 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192).
[684]Panel Report, footnote 511 to para. 7.377.
[685]Panel Report, para. 7.377.
[686]China's appellant's submission, para. 494. (original underlining)

support of its argument, China refers to certain passages in its first and second written submission to the Panel.[687]

311. On appeal, China refers to the "interplay" between factors other than subject imports and points to the "subsequent reduction in the possibility for subject imports to be a 'significant cause'".[688] In doing so, China largely repeats the arguments it makes concerning distinct other causes of injury that it claims the Panel and the USITC failed to address meaningfully. China argues, for instance, that import levels in 2007 and 2008 reflected, "at least in part", the consequences of earlier decisions by US producers to globalize and create more demand for imports.[689] According to China, the "void" left by US producers "became particularly important during the recession in 2008 as demand shifted to lower-priced value tires and thus shipments of those imported tires at a lower price-point held up significantly better than domestic shipments of the more expensive U.S.-manufactured tires."[690] China asserts that it was therefore "improper to assume imports from China displaced U.S. production at the end of the period when many of the U.S. production lines of the most directly competitive products had already been shut down for broader reasons that only partially related to imports from China."[691]

312. With regard to non-subject imports, China reiterates its argument that, during the 2004-2006 period, non-subject imports had a much larger share of the market than imports from China and were lower priced than US-made tyres. China asserts that it was therefore "improper to attribute significant effects to the smaller volume of imports from China while ignoring the effects of the larger volume of imports from other countries that also undersold U.S. tire prices by a wide margin."[692] China adds that "the domestic industry itself was responsible for imports of both subject and non-subject imports, and therefore U.S. producers themselves had some control over the relative magnitude of those imports."[693] Moreover, for China, "[g]iven the importance of non-subject imports in the overall U.S. market (comprising more than four times as large a presence in the market as imports from

[687]China's appellant's submission, para. 494 (referring to China's first written submission to the Panel, paras. 235-238, 357, and 358; and China's second written submission to the Panel, paras. 345-347). China argued, *inter alia*, that declining demand, the US domestic industry's business strategy to globalize production, attenuated competition, and other factors, individually sever the requisite causal link that must be shown in order to justify the imposition of a product-specific safeguard under Section 16 of the Protocol. China further argued that these factors "work together to create the overall conditions of competition in the market place" and that they "interact and reinforce each other". For China, in order to justify the imposition of a product-specific safeguard in this case, the USITC was required to show that, "even in the face of these interrelated conditions of competition, imports from China were still themselves a 'significant cause' of material injury".

[688]China's appellant's submission, para. 494.

[689]China's appellant's submission, para. 495.

[690]China's appellant's submission, para. 495.

[691]China's appellant's submission, para. 495.

[692]China's appellant's submission, para. 496.

[693]China's appellant's submission, para. 496.

China) and their ability to undersell the higher-cost U.S.-based production of lower-end tires (with average unit values about 20 percent lower than U.S.-produced tires), U.S. producers themselves had to find lower cost places to produce."[694] In China's view, "it makes little sense to blame this need on the smaller volume of imports from China", when "[a]ll imports—not just those from China—offered more price-competitive options and drove the new business strategy."[695]

313. With regard to declines in demand, China further argues that the longer-term decline in overall US demand created the need for US producers to shift production to where the markets were strongest and "reinforced the need for a new business strategy to globalize production".[696] China adds that the "decline in U.S.-based automobile production drove down production for the OEM market" and further "reinforced the need to produce in other markets".[697]

314. China's arguments on appeal regarding the "interplay" of causes other than rapidly increasing subject imports are clearly more elaborate and detailed than the arguments that China developed on this point before the Panel. Having said this, we recall that the Panel found that China failed to establish that the USITC's analysis of the domestic industry's business strategy was in error.[698] We further recall that the Panel found "no error in the USITC's consideration of changes in demand for tyres in the United States, or the conclusion that any injury suffered by the domestic industry was caused by subject imports, rather than demand changes".[699] Moreover, the Panel found that "although the volume of non-subject imports was greater than the volume of subject imports from China, and although non-subject imports remained cheaper than domestically-produced tyres, the dominant feature of the U.S. market was the rise of subject imports from China at the expense of both non-subject imports and the U.S. industry."[700] On our part, in reviewing China's arguments on appeal, we have not found the Panel to have erred in reaching these conclusions. In these circumstances, we are not persuaded that the Panel erred in concluding that China failed to demonstrate in this case that "the collective injurious effect of other causal factors might be so dominant that the injury caused by increasing imports could not properly be found to be 'significant'".[701]

315. Even accepting that non-subject imports, declines in demand, and the domestic industry's business strategy of shifting focus to higher-value products for its US production may also have played a role, even an important role, in bringing about material injury to the domestic industry, we

[694]China's appellant's submission, para. 499.
[695]China's appellant's submission, para. 499.
[696]China's appellant's submission, para. 497.
[697]China's appellant's submission, para. 497.
[698]Panel Report, para. 7.322.
[699]Panel Report, para. 7.359.
[700]Panel Report, para. 7.367.
[701]Panel Report, para. 7.377 (referring Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192).

are not persuaded that the Panel erred in concluding that the record evidence before the USITC indicated "that subject imports from China had significant injurious effects, independent of any injurious effects of other causal factors."[702] To the contrary, we consider that the Panel properly concluded that the effects of rapidly increasing imports from China remained significant in the context of the effects of these other causes.

316. China further argues that the Panel "erred by considering each causation argument raised by China in isolation", and never addressing them together in what China describes as an "integrated analysis".[703] According to China, the lack of correlation and the existence of attenuated competition in this case "reinforced each other" and "undermined" any conclusion that subject imports might be a significant cause of material injury.[704] China maintains that the domestic industry's business strategy "helped explain why attenuated competition was an accelerating phenomenon in the market over the period of investigation".[705] China also refers to the "continuing large presence" of non-subject imports and improvements in the performance of the domestic industry in 2007.[706]

317. We are not persuaded that the Panel failed to consider sufficiently how different causal factors interacted in its analysis. For example, the Panel juxtaposed trends in subject imports with declines in demand, noting that, "[e]ven when demand increased by 1.6 per cent in 2007, the volume of subject imports increased by the significantly greater figure of 53.7 per cent".[707] Based on its analysis, the Panel concluded that the USITC properly found "that subject imports had injurious effects independent of any injury caused by changes in demand."[708] The Panel also noted that the fact that the "domestic industry was required to absorb virtually 100 per cent of the decline in demand in 2008, while subject imports continued to increase by 10.8 per cent, demonstrates that subject imports were having effects on the domestic industry that could not be explained by that decline in demand."[709] In addition, the Panel examined the relationship between rapidly increasing imports from China and imports from third countries, noting, for example, that "the prices of non-subject imports were lower than those of U.S. producers throughout the period of investigation, and this may have impacted negatively on the domestic industry."[710] The Panel also noted that "the average unit value of non-subject imports remained 22-25 per cent higher than the average unit value of subject imports, suggesting that non-subject imports would have had considerably less price effect on the domestic

[702]Panel Report, footnote 511 to para. 7.377.
[703]China's appellant's submission, para. 502.
[704]China's appellant's submission, para. 506.
[705]China's appellant's submission, para. 507.
[706]China's appellant's submission, paras. 508 and 509.
[707]Panel Report, para. 7.336.
[708]Panel Report, para. 7.333.
[709]Panel Report, para. 7.343.
[710]Panel Report, para. 7.364.

industry than subject imports."[711] The Panel added that "the share of non-subject imports in total U.S. imports declined from 87.1 to 66.9 per cent over the period, as the share of subject imports to total U.S. imports increased from 12.9 to 33.1 per cent."[712] The Panel's analysis reveals that the USITC also considered the interaction between several of the factors referred to by China. For example, with respect to changes occurring in 2008, the USITC referred to subject imports, non-subject imports, and declines in demand, finding that:

> [s]ubject 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.[713] (footnotes omitted)

318. China suggests that the Panel erred by "isolating elements of the causation analysis instead of considering their interrelated and mutually reinforcing nature".[714] We do not agree. Instead, as we see it, the Panel's analysis of the USITC's findings largely mirrored arguments that China made before the Panel. The fact that the Panel assessed China's arguments concerning the USITC's causation analysis separately does not mean that the Panel failed to consider whether the reasoning provided by the USITC for its overall conclusion regarding causation was adequate in the light of China's arguments and the record evidence taken as a whole. Thus, for example, in addressing China's arguments regarding the US plant closures in 2006 and 2008, the Panel referred to various factors relied upon by the USITC, including the proportion of total subject imports made by US producers. The Panel emphasized that, while it would consider "the USITC's handling of these factors, and the relevant evidence, individually", it would "also assess the USITC's conclusion on the basis of the totality of the factors and evidence relied on by the USITC".[715] We consider the Panel's analysis to have been sufficient particularly given that, under Paragraph 16.4 of the Protocol, rapidly increasing imports from China may be one of several causes that contribute to producing or bringing about material injury to the domestic industry. China's argument that this is not the case is predicated on China's interpretation of Paragraph 16.4, which we have rejected above.

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[711]Panel Report, para. 7.364.
[712]Panel Report, para. 7.364.
[713]Panel Report, paras. 7.337 and 7.353 (quoting USITC Report, p. 26). In addition, we note that, in reaching its ultimate conclusion on the existence of market disruption, the USITC relied in large part on the significant increase in the volume of subject imports, the significant underselling of domestic products, and the correlation of the increase in subject imports with the domestic industry's performance indicators. (See USITC Report, p. 29)
[714]China's appellant's submission, para. 510.
[715]Panel Report, para. 7.289.

3. Conclusion

319. Based on the foregoing, we *uphold* the Panel's finding, in paragraph 7.378 of the Panel Report, that China has failed to establish that the USITC improperly attributed injury caused by other factors to subject imports.

E. *Article 11 of the DSU*

320. China claims that the Panel failed to conduct an objective assessment of the matter as required under Article 11 of the DSU in its review of the USITC's determination that subject imports were "a significant cause" of material injury to the domestic industry. China relies on several arguments to support its claim. First, China alleges that the Panel failed to consider the totality of the evidence on the question of causation. Second, China contends that the Panel failed to conduct a balanced assessment of the evidence on the question of causation and disregarded evidence that was not consistent with the conclusion reached by the USITC. Third, China submits that the Panel went beyond the rationale contained in the USITC determination on the question of causation and relied on *post hoc* clarifications provided by the United States or analysis developed by the Panel itself. Finally, China asserts that the Panel failed to consider all of China's arguments on the cumulative effects of other causal factors.[716]

321. The Appellate Body has consistently recognized that panels enjoy a margin of discretion in their assessment of the facts.[717] This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings[718], and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case.[719] A panel does not commit a reversible error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.[720] In addition, as the Appellate Body has previously emphasized, a claim under Article 11 of the DSU must "stand by itself and be substantiated with specific arguments,

[716]China's appellant's submission, paras. 566-583.

[717]Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Japan – Apples*, para. 222; Appellate Body Report, *Korea – Dairy*, para. 137; and Appellate Body Report, *US – Wheat Gluten*, para. 151.

[718]Appellate Body Report, *EC – Hormones*, para. 135.

[719]Appellate Body Report, *Korea – Dairy*, para. 137.

[720]Appellate Body Report, *Australia – Salmon*, para. 267; Appellate Body Report, *Japan – Apples*, para. 221; and Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[721]

322. With these considerations in mind, we turn to China's four specific allegations that the Panel failed to comply with Article 11 of the DSU.

1. Totality of the Evidence

323. China claims that the Panel failed to consider the "totality of the evidence" on the question of causation.[722] China also faults the Panel for failing to see how the various causes are interrelated, and for failing to consider the way in which other causes interacted with each other.[723] Noting that the USITC itself "embraced a holistic approach to the causation issue", China submits that it was therefore error for the Panel to address "each causation issue in isolation".[724] In support of its position, China refers to the dispute in *US – Countervailing Duty Investigation on DRAMS*, where the Appellate Body "explained that when the authorities considered evidence as a whole, a panel must use the same approach when evaluating the WTO consistency of the decision reached by the authority".[725]

324. As noted above, the Panel's discussion of possible other causes of injury largely mirrored arguments that China made before the Panel.[726] The fact that the Panel structured its analysis by addressing China's arguments individually does not mean that the Panel failed to consider whether the USITC's overall conclusion regarding causation was reasoned and adequate in the light of China's arguments and the record evidence taken as a whole. We see no error in the Panel's analytical approach. We therefore disagree with China's assertions in this respect.

2. Balanced Assessment of the Evidence

325. China claims that the Panel failed to conduct a balanced assessment of the evidence on the question of causation, and disregarded evidence that was not consistent with the conclusions reached

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[721]Appellate Body Report, *Australia – Apples*, para. 406. See also Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 498); and Appellate Body Report, *China – Publications and Audiovisual Products*, footnote 368 to para. 189. More recently, the Appellate Body found that "[i]t is also unacceptable for a participant effectively to recast its argument before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment." (Appellate Body Report, *EC – Fasteners (China)*, para. 442)

[722]China's appellant's submission, para. 566.

[723]China's appellant's submission, para. 567.

[724]China's appellant's submission, para. 568.

[725]China's appellant's submission, para. 568 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 188-190).

[726]See *supra*, para. 318 of this Report.

by the USITC. In particular, China takes issue with the Panel's reliance on footnote 62 of the USITC staff report, which refers to, *inter alia*, reasons for the closure of Bridgestone's plant in Oklahoma City and Goodyear's plant in Tyler.[727] According to China, the Panel "went out of its way to find and cite evidence the USITC majority did not cite or rely upon" and "extracted only those pieces of evidence that supported the USITC conclusion and ignored those other pieces of evidence that were not consistent with the USITC conclusion".[728] Referring to the Appellate Body Report in *US – Upland Cotton (Article 21.5 – Brazil)*, China submits that panels must be "even-handed" in their review and consider all of the arguments and evidence in a balanced and consistent way.[729]

326. We do not agree with China's assertion that the Panel erred by relying on information contained in footnote 62 of the USITC staff report that indicates that competition from low-cost imports from China and Korea was one of the reasons for the closure of Bridgestone's plant in Oklahoma City. Instead, the Panel simply engaged in a review of record evidence (including information found in the USITC staff report) to assess whether the USITC's statement regarding plant closings was supported by the evidence before the USITC. We see no reason why, in this context, the Panel would have been precluded from examining information set out in the USITC staff report. Furthermore, the fact that the information is provided in a passage of the USITC staff report that addresses a different issue (COGS/sales ratio) does not mean that it cannot be relevant for purposes of determining whether the USITC could reasonably understand the reference to "low cost producing countries" as including China. Rather, as we see it, the information on which the Panel relied provides relevant context for the purpose of assessing whether one of Bridgestone's reasons for the closing of its plant was low-cost imports from China.

327. Moreover, although China is correct in saying that footnote 62 of the USITC staff report cites three non-import related factors as reasons for the closure of the Goodyear plant, the footnote also states that the plant was experiencing "considerable pressure from low cost imports".[730] We do not agree with China that the Panel "ignored" these other reasons for the closure of Goodyear's plant in Tyler. Contrary to what China seems to suggest, the question before the Panel was not whether subject imports were the only reason for the closure of the plant. Rather, the Panel was called upon to assess the USITC's conclusion that competition from low-priced imports from Asia, including China, played an "important part" in the plant closures that occurred in 2006 and 2008.[731] We therefore do

[727]China's appellant's submission, para. 569 (referring to USITC Report, footnote 62 at p. III-16).
[728]China's appellant's submission, para. 569.
[729]China's appellant's submission, paras. 49 and 562 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293).
[730]USITC Report, footnote 62 at p. III-16. Non-import-related factors justifying Goodyear's plant closure were identified as rising costs, Goodyear's decision announced in June 2006 to exit the wholesale private label market, and reduced demand for the types of tyres produced at Goodyear's plant in Tyler.
[731]See Panel Report, para. 7.287 (quoting USITC Report, p. 26).

not agree with China that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to conduct a balanced assessment of the evidence before the USITC.

3. Rationale and Reasoning in the USITC Determination

328. China claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU by going beyond the rationale contained in the USITC determination on the question of causation, and relying on *post hoc* clarifications provided by the United States or analysis developed by the Panel itself to "bolster the USITC determination".[732] China does not set out "specific" arguments and reasoning to support its claim. Instead, China refers to certain arguments it made earlier in other sections of its appellant's submission dealing with conditions of competition, declining demand over the period of investigation, the recession in 2008, and the role of non-subject imports.[733]

329. The Appellate Body has previously clarified that a panel's examination of the conclusions of an investigating authority "must be critical and searching, and be based on the information contained in the record and the *explanations given by the authority in its published report*."[734] The Appellate Body has also clarified that during panel proceedings a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination.[735]

330. Based on our examination of the Panel's analysis, we find that the Panel merely engaged in a review of whether the evidence on record supported the conclusion reached by the USITC, rather than constructing a rationale for the USITC. The fact that the Panel may have examined evidence or data on the record that the USITC did not refer to specifically in its determination does not establish that the Panel conducted an improper review of the USITC determination. To the contrary, as noted above, a panel should examine whether the explanation provided by the investigating authority to support its conclusion is reasoned and adequate, in the light of the evidence on the record and other plausible alternative explanations. Moreover, although the Panel may have attributed different weight to certain evidence on record than did China, this is insufficient to demonstrate that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

331. In any event, the Appellate Body has held that a challenge under Article 11 of the DSU must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a

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[732]China's appellant's submission, para. 572.
[733]China's appellant's submission, paras. 574-577.
[734]Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (emphasis added)
[735]Appellate Body Report, *Japan – DRAMs (Korea)*, para. 159.

particular provision of a covered agreement."[736] This, in our view, is not the case here. Accordingly, we reject this aspect of China's claim that the Panel acted inconsistently with Article 11 of the DSU.

4. Consideration of Certain Arguments Made by China

332. China claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to consider China's arguments regarding: (i) how "other causes interacted with each other" and had a broader "cumulative effect"[737]; (ii) the existence of "attenuated competition" between subject imports and domestic tyres in the US replacement market, including evidence provided by the United States to the Panel indicating a limited presence of Chinese imports in tier 1 of that market[738]; and (iii) how it was necessary to distinguish the standard in China's Accession Protocol of a "significant cause" from the mere "cause" standard of other WTO agreements.[739]

333. Contrary to China's assertion, it appears that the Panel did in fact consider China's arguments on these three issues. First, in relation to China's argument concerning the cumulative effect of causes other than subject imports, the Panel reasoned that, notwithstanding the lack of any requirement for cumulative assessment under the Protocol, "there may be cases where the collective injurious effect of other causal factors might be so dominant that the injury caused by increasing imports could not properly be found to be 'significant'."[740] The Panel explained, however, that, in rejecting China's claims regarding the USITC's assessment of the individual injurious effects of these other factors, it had "reviewed record evidence indicating that subject imports from China had significant injurious effects, independent of any injurious effects of other causal factors."[741] On this basis, the Panel concluded that China "failed to establish that in the context of the present case the USITC should have provided a cumulative assessment of the effects of the other causes of injury".[742]

334. Second, with respect to the issue of attenuated competition, the Panel noted that there was no consensus among market participants as to how to define what types of tyres should be classified in each tier, or what brands should be classified in each tier, of the US replacement market. On this basis, and following further analysis, the Panel found no fault with the USITC's conclusion that there were no distinct dividing lines between tiers 1, 2, and 3. Also, while the Panel recognized that "there was some variation in levels of competition between subject imports and domestic products as

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[736]Appellate Body Report, *US – Steel Safeguards*, para. 498; and, most recently, Appellate Body Report, *Australia – Apples*, para. 406.
[737]China's appellant's submission, para. 579.
[738]China's appellant's submission, para. 580.
[739]China's appellant's submission, para. 583.
[740]Panel Report, para. 7.377 (referring Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192).
[741]Panel Report, footnote 511 to para. 7.377.
[742]Panel Report, para. 7.377.

between tier 1 and tiers 2 and 3", based on its analysis, the Panel found "no fault with the USITC's conclusion that subject imports and domestic products were not focused in different tiers" and did not accept that "the USITC should have found that there was only 'vestigial' competition between them in tiers 2 and 3."[743]

335. Third, with respect to the need to distinguish "a cause" from "a significant cause", we note that the Panel agreed with China (and the United States) that "a significant cause" is one that is "important" or "notable". The Panel added, however, that it disagreed with China's argument that the meaning of "significant" must include the notion of significance relative to other causal factors. The Panel further explained that China had "provided no evidence or explanation in support of this argument", and expressed the view 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."[744]

336. Based on our review of the Panel's reasoning, we believe that the Panel reasonably considered China's arguments regarding the USITC's causation analysis.[745] The fact that the Panel ultimately disagreed with China's position does not establish that it committed an error of law under Article 11 of the DSU. While we agree with China that the Panel could have provided more reasoning to support its findings, we do not think that any shortcomings in the Panel's analysis of the USITC's determination on causation are so serious as to amount to a failure to make an objective assessment of the matter before it.

337. Based on the foregoing, we do not consider that the Panel acted inconsistently with its duties under Article 11 of the DSU.

F. *Conclusion*

338. For all these reasons, and having considered all of China's arguments concerning the Panel's assessment of the USITC's causation analysis, we uphold the Panel's finding, in paragraph 7.379 of the Panel Report, that the USITC did not fail properly to establish that rapidly increasing imports from China were a significant cause of material injury to the domestic industry within the meaning of Paragraph 16.4 of China's Accession Protocol.

[743]Panel Report, para. 7.197.
[744]Panel Report, para. 7.158. The Panel also explained that it agreed with China that the term "a significant cause" requires more than a mere contribution. (*Ibid.*, footnote 271 to para. 7.159)
[745]See also Appellate Body Report, *EC – Poultry*, para. 135.

VII. Findings and Conclusion

339. For the reasons set out in this Report, the Appellate Body:

(a) with respect to the USITC's analysis of whether imports from China are increasing rapidly within the meaning of Paragraph 16.4 of the Protocol, upholds the Panel's finding, in paragraph 7.110 of the Panel Report, that the USITC did not fail to properly evaluate whether imports from China met the specific threshold under Paragraph 16.4 of China's Accession Protocol of "increasing rapidly";

(b) with respect to whether rapidly increasing imports from China are "a significant cause" of material injury to the US domestic industry within the meaning of Paragraph 16.4 of China's Accession Protocol:

(i) upholds the Panel's finding, in paragraph 7.216 of the Panel Report, that the USITC did not err in its assessment of the conditions of competition in the US market;

(ii) upholds the Panel's finding, in paragraph 7.261 of the Panel Report, that the USITC's reliance on overall coincidence between an upward movement in subject imports and a downward movement in injury factors supports the USITC's finding that rapidly increasing imports from China are a significant cause of material injury to the domestic industry within the meaning of Paragraph 16.4 of China's Accession Protocol;

(iii) upholds the Panel's finding, in paragraph 7.378 of the Panel Report, that China has failed to establish that the USITC improperly attributed injury caused by other factors to subject imports;

(iv) finds that the Panel did not act inconsistently with its duties under Article 11 of the DSU in its analysis of the USITC's determination that rapidly increasing imports from China were a significant cause of material injury to the domestic industry; and accordingly

(v) upholds the Panel's finding, in paragraph 7.379 of the Panel Report, that the USITC did not fail properly to establish that rapidly increasing imports from China were a significant cause of material injury to the domestic industry within the meaning of Paragraph 16.4 of China's Accession Protocol.

340. Given that we have not found in this Report that the United States acted inconsistently with any of its WTO obligations, we make no recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 12th day of August 2011 by:

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Jennifer Hillman
Presiding Member

_____ _____

Shotaro Oshima
Member

Peter Van den Bossche
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS399/6
27 May 2011

(11-2662)

Original: English

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

Notification of an Appeal by China
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 24 May 2011, from the Delegation of China, is being circulated to Members.

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1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the People's Republic of China hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report in *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* (WT/DS399) ("Panel Report"). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, China is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.

2. The measure at issue is a transitional product-specific safeguard measure under Paragraph 16 of the *Protocol of Accession* that has been applied by the United States on imports of certain passenger vehicle and light truck tyres from China pursuant to Section 421 of the Trade Act of 1974. The U.S. International Trade Commission ("USITC") determined that there was market disruption as a result of rapidly increasing imports of subject tyres from China that were a significant cause of material injury to the domestic industry. The USITC made this determination in its investigation of *Certain Passenger Vehicle and Light Truck Tires from China* (Inv. No. TA-421-7).

3. The issues that China raises in this appeal relate to the Panel's findings and conclusions in respect of the consistency of the challenged measures with the *Protocol on the Accession of the People's Republic of China* ("the Protocol") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

4. For the reasons stated below, and as will be developed in its submissions to the Appellate Body, China appeals the following errors of law and legal interpretation contained in the Panel Report and requests the Appellate Body to reverse or modify the related findings and conclusions of the

Panel. In doing so, China makes five specific claims, delineated below and to be detailed in its submissions to the Appellate Body.[1]

5. First, China seeks review by the Appellate Body of the Panel's interpretation of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were "increasing rapidly" within the meaning of that provision. The Panel's legal interpretation erred by not giving appropriate meaning to the phrase "increasing rapidly."[2] The Panel's errors of law and legal interpretation include:

(a) The Panel erred in interpreting the term "increasing" from Paragraph 16.4 as meaning nothing more than the term "increased" from Paragraph 16.1 and failing to otherwise address the analytically appropriate period of time in a meaningful way.[3]

(b) The Panel erred in interpreting the term "rapidly" from Paragraph 16.4 as meaning "with great speed" but not requiring an assessment of the rate of increase in imports or any other alternative metric to give meaning to the idea of great speed.[4]

(c) The Panel erred in interpreting the phrase "increasing rapidly" from Paragraph 16.4 as not requiring the most recent rate of increase in imports to be put in context relative to prior rates of increase earlier in the period, or in any other context, that would distinguish imports that are "increasing rapidly" from those that merely "increased" or are merely "increasing."[5]

6. Second, China seeks review by the Appellate Body of the Panel's application of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were "increasing rapidly" within the meaning of that provision. The Panel's application of the legal standard erred by upholding the USITC finding that imports from China were "increasing rapidly."[6] The Panel's errors of law and legal application include:

(a) The Panel erred in upholding the USITC determination even though the USITC assessed the period as a whole, instead of the most recent period.[7] Rather than requiring a focus on the most recent period, as is necessary to determine properly whether subject imports are "increasing rapidly," the Panel approved a temporal assessment that stressed the entire five-year period as a whole.

(b) The Panel erred in upholding the USITC determination even though the USITC failed to assess properly the rate of increase in imports, particularly that of the most recent year.[8] Instead of determining whether this rate constituted a "rapid" increase, the Panel dismissed the notion that the USITC was required to assess the rate of increase in subject imports when determining whether they were "increasing rapidly."

(c) The Panel erred in upholding the USITC determination even though the USITC failed to put the most recent rate of increase in proper context with prior rates of increases.[9] To the

[1] Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes citations to the paragraphs of the Panel Report containing the alleged errors. These citations, however, do not prejudice to the ability of China to refer to other paragraphs of the Panel Report in its appeal.
[2] Panel Report, para. 7.110.
[3] Panel Report, paras. 7.90-7.91.
[4] Panel Report, para. 7.92.
[5] Panel Report, paras. 7.90-7.93.
[6] Panel Report, para. 7.110.
[7] Panel Report, paras. 7.83-7.85, 7.96-7.100, 7.104.
[8] Panel Report, paras. 7.92-7.93.
[9] Panel Report, paras. 7.92-7.93.

extent the Panel did assess the most recent rate of increase in context, the Panel erred in going beyond the USITC determination as written and in finding that a lower rate of increase constituted "increasing rapidly" because it came "in addition" to prior increases.[10]

7. Third, China seeks review by the Appellate Body of the Panel's interpretation of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were a "significant cause" within the meaning of that provision. The Panel's legal interpretation erred by not giving proper meaning to the term "significant" from the phrase "significant cause" and failing to distinguish a "significant cause" from a "cause."[11] The Panel's errors of law and legal interpretation include:

(a) The Panel erred in offering a definition of the term "significant" but not otherwise providing an interpretation of what "significant" meant in application, or explaining how a "significant cause" differed from a "cause."[12]

(b) The Panel erred in interpreting the phrase "significant cause" as not requiring a conditions of competition analysis that meaningfully assesses whether subject imports are capable of being a "significant cause" of injury and not simply whether they are capable of being a "cause."[13]

(c) The Panel erred in interpreting the phrase "significant cause" as not requiring a coincidence analysis that assesses whether correlation goes beyond mere overall correlation, and instead corresponds in the degrees of relative magnitude as well as in a year-by-year assessment.[14]

(d) The Panel erred in interpreting the phrase "significant cause" as not requiring analysis that ensures injury caused by other factors is not being attributed to the significance, or degree, of the injury allegedly caused by subject imports.[15]

8. Fourth, China seeks review by the Appellate Body of the Panel's application of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were a "significant cause" within the meaning of that provision. The Panel's application of the legal standard erred by upholding the USITC finding that imports from China were a "significant cause" of injury even though the USITC's and Panel never distinguished a "cause" from a "significant cause" nor modified their causal analyses to conform to this distinct standard.[16] The Panel's errors of law and legal application include:

(a) The Panel erred in upholding the USITC determination even though the USITC failed to conduct the conditions of competition analysis with care sufficient to assess whether subject imports were in fact capable of being a "significant cause" of injury and not merely a "cause."[17]

(b) The Panel erred in upholding the USITC determination even though the USITC failed to conduct a coincidence analysis that assessed whether correlation went beyond mere

[10] Panel Report, para. 7.93.
[11] Panel Report, para. 7.379.
[12] Panel Report, paras. 7.158, 7.139-7.146, 7.170-7.178.
[13] Panel Report, paras. 7.169-170.
[14] Panel Report, paras. 7.228-7.234.
[15] Panel Report, paras. 7.175-7.177.
[16] Panel Report, para. 7.379.
[17] Panel Report, paras. 7.209-7.216.

general overall correlation and instead corresponded in the degrees of relative magnitude and in a year-by-year assessment that would be necessary to establish a "significant cause."[18]

(c) The Panel erred in upholding the USITC determination even though the USITC failed to analyze other causes properly to ensure that injury caused by these other factors was not being improperly attributed to the significance, or degree, of the injury allegedly caused by subject imports.[19]

(d) The Panel erred in upholding the USITC determination even though the USITC failed to undertake an integrated analysis of all the causation factors to consider their collective implication for the existence of a sufficient link of "significant cause" between those imports that are "increasing rapidly" at the end of the period and the condition of the domestic industry.[20]

9. Fifth, China seeks review by the Appellate Body under Article 11 of the DSU of how the Panel applied the "significant cause" standard of Paragraph 16.4 of the Protocol. 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. The Panel's errors of law and legal application under Article 11 include:

(a) The Panel erred in failing to consider the totality of the evidence. Regarding causation, the Panel approached individual arguments and pieces of evidence in isolation instead of addressing the ways in which the arguments and supporting evidence interrelated.

(b) The Panel erred in failing to conduct a balanced assessment of the evidence. Regarding causation, the Panel went out of its way to cite evidence the USITC majority did not rely on from page III-16, footnote 62 of the USITC determination, yet ignored the evidence in the very same footnote that was not consistent with the USITC conclusion.[21]

(c) The Panel erred in failing to focus on the USITC's decision as written. In upholding the USITC determination on causation, the Panel repeatedly went beyond the rationale contained in the determination itself and relied upon *post hoc* clarifications by the United States and the Panel's own new analysis of the issues.[22]

(d) The Panel erred in failing to consider all the arguments of the parties. The Panel failed to consider China's arguments about how other causes interacted with each other and had a broader cumulative effect,[23] how the more detailed data on the different suppliers to the aftermarket affected attenuated competition,[24] and how it was necessary to distinguish the Protocol's "significant cause" requirement from the mere "cause" requirement of other WTO agreements.[25]

[18] Panel Report, paras. 7.234-7.238; 7.244-7.245; 7.254-7.260.
[19] Panel Report, paras. 7.285-7.322; 7.333-7.345; 7.348-7.350; 7.353-7.354; and 7.364-7.367.
[20] Panel Report, paras. 7.376-7.378.
[21] Panel Report, paras. 7.301, 7.305, 7.307.
[22] Panel Report, paras. 7.195, 7.301, 7.305, 7.336, 7.354, and 7.366-7.367.
[23] Panel Report, paras. 7.376-7.377.
[24] Panel Report, para. 7.197.
[25] Panel Report, paras. 6.26-6.30.

10. China respectfully requests that the Appellate Body reverse the findings and conclusions of the Panel that are based on the errors of law and legal interpretation identified above. With respect to the claims of error identified in paragraphs 6 and 8 above, China respectfully requests that the Appellate Body complete the analysis to conclude that the challenged measures were inconsistent with the obligations of the United States under the covered agreements.