ANNEX B

EXECUTIVE SUMMARIES OF THIRD PARTIES' WRITTEN SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. The European Union intervenes in this dispute because of its interest in the correct interpretation of the *Transitional Product-Specific Safeguard Mechanism* (the "TPSSM") laid down in Article 16 of the *Protocol on Accession of the People's Republic of China* (the "Protocol").

2. The present dispute raises complex factual issues on which the European Union is not in a position to comment. The European Union will not, therefore, express any views on the compatibility of the measure in dispute with the requirements of Article 16 of the Protocol.

3. China's First Written Submission stresses certain textual differences between the TPSSM, on the one hand, and GATT Article XIX and the AS, on the other. China's analysis, however, fails to consider the most important differences.

4. First, China glosses over the crucial fact that, unlike GATT Article XIX, the TPSSM does not provide that the increase of imports must be the result of "unforeseen developments". Furthermore, China also disregards that, consistent with the omission of that circumstance, Article 16 of the Protocol does not, unlike GATT Article XIX and the AS, characterise the measures taken pursuant to the TPSSM as "emergency actions".

5. Second, the TPSSM lays down a different standard of injury. GATT Article XIX and the AS require that the increase in imports must be such as to cause "*serious* injury" or threat thereof. In contrast, under the TPSSM, it is enough if the increase in imports causes "*material* injury" or threat thereof. The Appellate Body has observed "the word 'serious' connotes a much higher standard of injury than the word 'material'".

6. Third, while the TPSSM uses similar words as the AS and GATT Article XIX in order to describe the requirement of increased imports ("being imported […] in such increased quantities"), the Appellate Body has underlined that those terms must be interpreted in the specific context in which they appear. In the case of the AS and GATT Article XIX, that context includes the circumstance that the increased imports must be the result of "unforeseen developments", as well as the condition that they must cause "serious injury". Relying on those two contextual elements, the Appellate Body has concluded that the increase in imports must be "recent" and "sudden". In the TPSSM the terms "being imported […] in such increased quantities" appear in a very different context. In view of these contextual differences, the increase in imports required under the TPSSM can be, to paraphrase the Appellate Body, less recent, less sudden, less sharp and less significant than that required under GATT Article XIX and the AS.

7. Last, it is worth noting that Article 16.6 of the Protocol allows China to suspend the application of substantially equivalent concessions or obligations under the GATT to the trade of a Member applying a safeguard measure on the basis of a relative increase in the level of imports only if such a measure remains in effect more than two years. In contrast, GATT Article XIX and the AS allow for the immediate adoption of suspension of concessions in the same situation.

8. When the minor textual differences invoked by China are considered in the light of the fundamental differences discussed above, it becomes clear that the former do not have the implications alleged by China.

9. If the TPSSM uses the term "rapidly" it is precisely because, due to the contextual differences discussed above, there is no requirement that the increase be "sudden", or at least as "sudden" as under GATT Article XIX and the AS.

10. Despite the minor grammatical differences highlighted by China, the phrase "imports […] are increasing" has the same meaning as the phrase "being imported […] in such increased quantities", as already interpreted by the Appellate Body.

11. Although GATT Article XIX and the AS do not expressly require that increased imports be a "significant" cause of injury, the Appellate Body has clarified that there must be a "genuine and *substantial* relationship of cause and effect". On the basis of any of the ordinary meanings of those terms, China would be wrong in arguing that increased imports must be a less "important" cause of injury under GATT Article XIX and the AS than under the TPSSM. Indeed, some of the ordinary meanings strongly suggest that, if anything, under GATT Article XIX and the AS increased imports must be an even more "important" cause of injury.

12. Finally, China's restrictive interpretation of the TPSSM finds no support in the "object and purpose" of the Protocol. The Protocol may "impose obligations on China that are not imposed on other Members under the WTO Agreement, or are stricter than those applicable to other Members". The TPSSM is one such obligation. Furthermore, the Protocol constitutes a single 'package' of rights and obligations. The obligations imposed upon China by the TPSSM have their counterpart in other provisions of the Protocol conferring rights on China, including provisions that accord a transitional period to China for implementing certain obligations.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) reasoned and adequate explanation of importing Members' decision to impose a transitional safeguard measure; (b) implication of the *Agreement on Safeguards* and the Article XIX of the *General Agreement on Tariffs and Trade 1994* (the "*GATT*"); (c) the substantive obligation to determine the existence of market disruption; (d) to the extent necessary to prevent or remedy market disruption; and (e) period of time as may be necessary to prevent or remedy market disruption.

II. DISCUSSION

A. REASONED AND ADEQUATE EXPLANATION OF IMPORTING MEMBERS' DECISION TO IMPOSE A TRANSITIONAL SAFEGUARD MEASURE

2. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Dispute* (the "*DSU*") sets forth the standard of review of the Panel that it "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."

3. As the Appellate Body stated "an 'objective assessment' under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."[1] The covered agreement in this case is the *Protocol*.

4. In the context of *Agreement on Safeguards*, the Appellate Body clarified that the standard of review of the panel in connection with the specific obligation dictates the actions that an investigating authority must have taken in its safeguard investigation. The Appellate Body found that the Panel was obliged to assess whether the competent authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.[2]

5. The rationale under the *Agreement on Safeguards*, together taking account of case laws developed under the *Agreement on Subsidies and Countervailing Measures* and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, would provide a good framework for this Panel to consider the Member's obligations derived from the Article 11 of the *DSU* and specific obligation under Section 16 of the *Protocol*. The "determination" requirement is significant in clarifying the importing Member's obligation. Paragraph 16.4 of the *Protocol* obliges the importing Member to "determin[e]" if market disruption exists by reference to the definition of market disruption that imports of an article are increasing rapidly so as to be a significant cause of material injury and to "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".[3]

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[1] *See* Appellate Body Report, *United States – Countervailing Duty Investigation on DRAMS*, para. 184.
[2] *See* Appellate Body Report, *Argentina – Footwear (EC)*, para. 121 (emphasis added).
[3] The second sentence of paragraph 16.4 of the *Protocol*.

6. Paragraphs 16.1, 16.3 and 16.6 do not explicitly provide that the importing Member must "determine" particular issues. Even if a provision does not set forth a specific obligation to "determine", the Appellate Body has explained that a general obligation under such provision nevertheless obliges the Member to provide a reasoned and adequate explanation in its notice to impose a measure through the context of other provisions and stated, "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction."[4] Since, these provisions are an "inseparable package of rights and disciplines" to which the importing Member is entitled and to which it is obliged to obey before imposition of a transitional safeguard measure, as explained by the Appellate Body, these provisions "have to be considered in conjunction."

7. Paragraph 16.5 of the *Protocol* requires the importing Member to "provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration."[5] This procedural requirement clarifies that satisfaction of the underlying substantive requirements must be explicitly explained in the written notice of the decision to impose a particular transitional safeguard measure.

B. IMPLICATION OF THE *AGREEMENT ON SAFEGUARDS* AND THE ARTICLE XIX OF THE *GATT* TO THE *PROTOCOL*

8. In light of the language of Section 1 of the *Protocol* and the lack of any express cross-reference to Article XIX of the *GATT* or the *Agreement on Safeguards*, substantive rules to impose a transitional safeguard measure under Section 16 are separate and independent from the provisions of these WTO Agreements. The text of Section 16, therefore, as required by Article 31.1 of the *Vienna Convention*[6], should be interpreted in accordance with the ordinary meaning of the language in the context of Section 16 of the *Protocol* and the light of its object and purpose.

9. The Panel also should note that "these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[7] While Japan agrees that prior panel and Appellate Body reports clarifying the language of Article XIX of the *GATT* and the *Agreement on Safeguards* provide a good basis to consider the language of Section 16 of the *Protocol*, the Panel should carefully apply their rationale so as not to incorporate obligations under these WTO Agreements in accordance with language that does not exist in Section 16 of the *Protocol*.

C. THE SUBSTANTIVE OBLIGATION TO DETERMINE THE EXISTENCE OF MARKET DISRUPTION

1. Paragraph 16.4 of the *Protocol*: The Requirement of "Imports of an Article Shall be Found to Be Increasing Rapidly" to Find the Market Disruption

10. China argues that the use of the present tense in paragraph 16.4 emphasizes the need to look at the most recent period of time for actions under Article 16 of the *Protocol*.[8] As set forth in paragraph 16.4, the importing Member must determine that imports "are increasing". The ordinary meaning of the term "increase" is "make or become greater in size, amount or degree".[9] The *Protocol*,

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[4] Appellate Body Report, *Argentina – Footwear (EC)* , para. 81.
[5] Emphasis added.
[6] *See* Article 31.1 of the Vienna Convention on the Law of Treaties.
[7] Appellate Body Report, *India – Patent (US)*, para. 45.
[8] China First Written Submission, para. 101.
[9] Concise Oxford English Dictionary, tenth edition, revised, p. 718.

however, does not set forth any particular methodology to determine whether imports are becoming greater.

11. In the context of the *Agreement on Safeguards*, the Appellate Body found that "the competent authorities are required to consider the *trends* in imports over the period of investigation."[10] The panel in *US – Line Pipe* drew conclusion based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the authority allows it to focus on the recent imports; and third, the period selected by the authority is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.[11] This finding may give guidance to this Panel in reviewing the appropriateness of such period of investigation.

12. China also argues that "The increase cannot be in the past."[12] It might be ideal if the importing Member could base its determination as of the time of imposition, but the nature of the determination inherently prevents the importing Member from doing so. The Member necessarily relies on import data for a recent past period, as recognised by the Appellate Body and panels in the context of anti-dumping and countervailing duty investigations.[13]

13. With respect to the term "rapidly," the ordinary meaning is "happening in a short time or at great speed".[14] The phrase "increasing rapidly" would mean that the increase should have happened either over a short period of time or at a speed greater than the ordinary speed of increase. *No fu*rther guidance was provided in the terms or context of the *Protocol*. Accordingly, the importing Member has certain discretion to choose a methodology to assess whether the imports are increasing rapidly.

2. Paragraph 16.4 of the *Protocol:* A Significant Cause of Material Injury

14. As clarified in the panel, "significant" means something more than just a nominal or marginal cause of the material injury.[15] The use of the article "a" in "a significant cause" in paragraph 16.4 suggests that material injury does not have to be caused solely by the imports of Chinese product. It would be sufficient to find the market disruption by imports if they are one of various other factors, which as a whole, cause the material injury.

15. In the context of the *Agreement on Safeguards*, the Appellate Body stated that "the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury... Article 4.2(b), as a whole, suggests that "the causal link" between increased imports and serious injury may exist, *even though other factors are also contributing…*".[16] Considering the similarity of the term "cause" in paragraph 16.4 of the *Protocol* to the term "causal link" in the first sentence of Article 4.2(b) of the *Agreement on Safeguards*, the above-mentioned findings by the Appellate Body may provide a good basis in considering paragraph 16.4 of the *Protocol*.

[10] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[11] *See* Panel Report, *US – Line Pipe*, para. 7.201.
[12] China First Written Submission, para. 74.
[13] *See* Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.239; Panel Report, *Japan – DRAMs (Korea)*, para. 7.357.
[14] Concise Oxford English Dictionary, tenth edition, revised, p. 1187.
[15] *See* Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307.
[16] Appellate Body Report, *US – Wheat Gluten*, para. 67 (emphasis in original).

D. PARAGRAPH 16.3 OF THE *PROTOCOL:* TO THE EXTENT NECESSARY TO PREVENT OR REMEDY MARKET DISRUPTION

16. Paragraph 16.3 of the *Protocol* provides that the measure must be "necessary" and may not exceed the "extent" to prevent or remedy such market disruption and such necessity and such extent are determined by "such market disruption". To justify a transitional safeguard measure, the importing Member must analyze the factors creating market disruption ((i) imports of Chinese products, which are increasing rapidly; (ii) the material injury to the domestic industry; and (iii) causal link between these imports and the injury) and the measure may not extend beyond the extent to make such factors cease to exist or be prevented from recurrence.

17. Prior findings in the context of *Agreement on Safeguards* would suggest that the importing Member would have been required to provide a reasoned and adequate explanation that the transitional safeguard measure addressed the above-mentioned factors, and it would not exceed the extent to make such factor cease t*o exist or being prevent*ed from recurrence.

18. It should be noted that the rationale of Appellate Body reports on the lack of a general procedural obligation to demonstrate compliance with Article 5.1 of the *Agreement on Safeguards* would not apply to paragraph 16.3 of the *Protocol*. Unlike Article 5.1 of the *Agreement on Safeguards*, the *Protocol* does not have any exceptions or specific provisions and thus , the procedural obligation to provide "the reasons for such measure and its scope" applies to all transitional safeguard measures.

E. PARAGRAPH 16.6 OF *PROTOCOL*: ONLY FOR SUCH PERIOD OF TIME AS MAY BE NECESSARY TO PREVENT OR REMEDY THE MARKET DISRUPTION

19. Paragraph 16.6 differs from paragraph 16.3 by providing "as may be necessary" instead of "(as) necessary". The term "may" is the word "expressing possibility."[17] The words "may be" therefore provide that the required certainty of the necessity analysis of a transitional safeguard measure with respect to its period of time to impose would be less than the extent of the measure in paragraph 16.3. It would be sufficient to show that such period would possibly be needed.

20. As the *Protocol* does not set forth any particular methodologies on how the importing Member should examine the appropriate period of the time to impose the transitional safeguard measure, the importing Member has the discretion. It is required, however, to provide the reasons for the "duration" in its written notice of the decision, according to paragraph 16.5.

III. CONCLUSION

21. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the provisions of the *Protocol*.

[17] Concise Oxford English Dictionary, tenth edition, revised, p. 881.