ANNEX F

ORAL STATEMENTS OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

ANNEX F-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

I. INTRODUCTION AND INTERPRETATIVE ISSUES

1. This dispute is not an abstract exercise. It has real-world implications, as the imposition of tariffs continues to block market access and impose costs. This is not due to any unfair trade, but rather to the application of a country-specific safeguard measure that has no grounding in the Protocol of Accession or the facts. The facts at issue – what the USITC majority actually stated in its report, as opposed to arguments raised by the United States – are important, and a proper resolution cannot be undertaken without examining them thoroughly. A Panel must "review whether the competent authorities' explanation fully addresses the nature, and especially, the complexities of the data and responds to other plausible interpretations of the data."

2. The United States tries to hide the shortcomings of the USITC determination behind arguments for broad deference. It argues that investigating authorities are free to make any determination – and apply any standards – that they wish so long as the determination passes only minimal scrutiny. In attempting to isolate the Protocol and limit the Panel's review, it is unclear what standards, if any, the United States believes should be applied. The United States is adamant that Article 16 "contains different, and in some cases fewer, prescriptions" than the *Agreement on Safeguards*, yet it fails to articulate what these alleged lower standards are.

3. The United States accuses China of confusing the standard of review with substantive obligations. China is arguing for the same standard of review that applies in all WTO cases – the careful and searching "objective assessment." A review must take shape based on the underlying obligations at hand. If the underlying obligations make it explicit that the panel must consider whether an increase is "rapid" or a causal relationship is "significant," then the standard of review – and the review itself – must allow for an "objective assessment" of these key concepts.

4. The United States seems finally to acknowledge that Article 16 must be read in the context of the *Agreement on Safeguards*. The United States has downplayed this context because the relevant WTO jurisprudence on analogous issues reveals the inadequacies of the USITC determination. This context provides important guidance. Both textual additions and deletions have interpretative relevance, but on balance these differences support the interpretation that Article 16 imposes more demanding standards – with respect to increasing imports and causal link – than those under the *Agreement on Safeguards*. The United States argues that it did not have to undertake any of the analyses that it has stated it in fact did undertake. But the United States has repeatedly affirmed that the USITC engaged in analyses of conditions of competition, coincidence, and alternative causes – thus it must apply that methodology adequately.

II. INCREASING IMPORTS

A. THE SPECIFIC STANDARD FOR "INCREASING RAPIDLY"

5. Under Article 16, investigating authorities must find both that imports from China "are being imported … in such increased quantities" and that they are "increasing rapidly." A finding of a simple increase in imports over the period of investigation, therefore, is not enough. The United States, however, has relied heavily on such a finding. The US confusion on this issue can be seen in its

statement that: "The issue for this Panel is whether the ITC reasonably found that the data showed that the subject imports *increased* rapidly *over the period*, especially at the end."

6. This formulation – stressing a past-tense increase that has taken place over the entire period – is at odds with the standard in Article 16 for finding that imports have been "increasing rapidly." The use of "increasing" instead of "increased" creates the need to find recent and ongoing increases, not past increases. Both Article 16.1 and 16.4 use the present continuous tense formulation. This specific language requires investigating authorities to focus on the most recent period and determine properly that imports from China are still "increasing rapidly" at the end of it. The Panel must give meaning to the term "rapidly." Because "rapidly" has been used in the text of Article 16, but not in other trade remedies addressing the issue of increasing imports, it must be given meaning. The use of this distinctive term modifies the basic idea of increasing imports under other trade remedies. It demands something more.

7. Quantitatively, the ordinary meaning of "rapidly" suggests a surge in imports, intrinsically linked to the rate at which imports are increasing. "Rapidly" requires for imports to be "increasing rapidly," they must be distinguished from imports that are merely "increasing." US attempts to limit "rapidly" to a temporal sense ignore the ordinary meaning of the term and are internally inconsistent. The US attempt to equate the lack of an express quantitative standard for "rapidly" in Article 16 to the lack of any standard whatsoever is impermissible and reads "rapidly" out of the text.

8. Qualitatively, China suggests that three elements should be considered. At a minimum, investigating authorities should: focus on the most recent full year of data and any available interim data; consider and give the most weight to the most recent import trends; and analyze the most recent year in more detail when initial analyses show that imports are slowing. In the absence of an explicit quantitative standard, these three qualitative factors allow the Panel to evaluate the USITC determination and give meaning to the term "rapidly."

9. The fact that Article 16 requires a showing of "material injury" and not "serious injury" does not lower the standard for finding that imports are "increasingly rapidly." The "increasing rapidly" standard is a distinct requirement. As the first requirement in Article 16, "increasing rapidly" is the threshold consideration. Only after a proper finding of "increasing rapidly" may an authority then begin properly to determine whether such imports were a "significant cause" of "material injury." Contrary to the US assertion, the words "so as to be" do not change this analytic process. The US attempt to conflate the two discrete issues is improper.

B. THE USITC'S ANALYSIS OF "INCREASING RAPIDLY"

10. Investigating authorities should consider at least three qualitative factors when assessing whether imports are increasing rapidly. The USITC, however, did not. The failure to use these certain analytic approaches does not necessarily create WTO-inconsistency. There may be other approaches, but the USITC neither developed nor applied a methodology that would explain how imports from China were "increasing" (not just having "increased") and how those "increasing" imports were still doing so "rapidly." These analytic approaches, when applied, demonstrate that imports were not still "increasingly rapidly," thus they call into question the approach of the USITC. The USITC should have explained why, even though the trends in 2008 showed substantial declines from the earlier trends, the USITC still found imports from China to be "increasingly rapidly." The USITC did not do so. Essentially, the USITC simply applied its traditional approach without any effort to consider the requirements of this different standard or to interpret the meaning of "rapidly."

11. The USITC relied too heavily on a finding of a simple increase in imports over the entire investigation via its typical "end-point-to-end-point" analysis. Such an approach, however, has been rejected by the Appellate Body and is inconsistent with the need under Article 16 to focus on the most recent period of time when determining whether imports are in fact still "increasing rapidly." The fact

that the USITC may not have relied exclusively on such an approach is irrelevant. The considerable weight the USITC attached to the overall increase skewed its analysis.

12. US efforts to limit the Appellate Body's guidance on this issue are unpersuasive. The United States cites *US – Lamb*, which deals with future threat of injury and states that in such cases there is a need to consider injury factors, not increasing imports, over a longer period of time. This is inapplicable to an analysis of whether imports are "increasingly rapidly." Cases involving threat of injury require predictions of future injury, thus the most recent period must be put in context with the rest of the period to show why, although there is no present injury, there is still likely to be future injury. In contrast, cases of current injury can be evaluated based on existing facts. Here, the key is the most recent period and whether or not imports are still "increasing rapidly" at the end of it. The earlier period can be context for evaluating whether imports are in fact still "increasing rapidly," but past increases cannot lead to a conclusion that imports are still "increasing rapidly."

13. The more recent period in the context of the overall period highlights the fact that any continuing increase dropped dramatically. At most, the USITC has shown that imports from China were still "increasing" in 2008. That is not enough. The USITC has not shown, and cannot show, that imports from China were "increasingly rapidly" in 2008 and beyond. The USITC's finding that increases had not abated in 2008 ignores recent trends and misinterprets the data. The USITC sidestepped the data concerning 2008 in favour of analyzing 2007 and 2008 as a single unit. This was improper. That the United States continues do so reveals its efforts to mask the most recent period and its recognition that 2008 considered alone cannot support a finding that imports from China were still "increasingly rapidly" as required by Article 16.

14. Likewise, the United States wrongly suggests that the increase in 2008 was "rapid" because China "conceded the Chinese imports were growing rapidly" in 2007, from which 2008 saw an 11 per cent increase. The United States distorts China's argument. China acknowledged that the increase in 2007 might possibly be interpreted as "increasing rapidly" in the past because it was a 50 per cent increase over the prior year. In contrast, the increase in 2007 highlights the very different situation in 2008, which saw just an 11 per cent increase. This stark difference underscores that the modest increase in 2008 was simply not sufficient.

15. The US claim that a comparison of changes in "successive quarters" is inappropriate is incorrect. If an authority is to determine properly that imports are "increasing rapidly," it must do so looking at the data over the entire period, with emphasis on the most recent period. If imports are declining from quarter-to-quarter in the most recent year, as they were here, such declines counsel against a finding of "increasing rapidly." Even when one compares quarterly imports as posited by the United States, imports from China are still not "increasing rapidly." The United States claims successive comparison increases of 23 per cent to 14 per cent to 9 per cent to zero show that imports are "increasing rapidly." The pattern is not one of rapidly increasing imports, but rather one of slowing and abating imports. Because the increases abated, the USITC could not find that imports were "increasing rapidly."

16. The USITC should have obtained and analyzed data for the first quarter of 2009. The US claims that such a collection would have been too burdensome and that the USITC makes its decisions on a case-by-case basis are unpersuasive.

III. CAUSATION – AS SUCH

17. The US statute wrongly redefines "significant cause," stating that a "significant cause" can be a cause that merely "contributes significantly" and "need not be greater than or equal to any other cause." Contrary to the US assertion, China's claim on this issue is not "premised on the mistaken notion" that imports must be the "sole" cause of injury. China has never made such an argument.

18. When WTO members redefine legal standards, they bear the responsibility of ensuring the standards remain WTO-consistent. The United States argues that it defined "significant cause" so as to somehow provide "guidance" but the redefinition does not provide guidance. Rather, the definition impermissibly redefines and lowers the standard for "significant cause." "Cause" does not mean "contributes," and "significant" does not mean "need not be greater than or equal to any other cause." WTO members do not have discretion to adopt whatever "standard" they wish. The standard in this case is "significant cause," and that standard has been set by the text of Article 16. The United States has no discretion to change it. Nor can the legislative history of Section 406 justify the redefinition of "significant cause." The legislative history of the US statute is not the negotiating history of Article 16, and no negotiating history can justify changing the standard set forth in the treaty text.

19. Article 16 adds the term "significant" to the causation standard. The unilateral US decision to set forth a lower causation standard when defining this term and its added modifier is wholly impermissible. Whatever the need under US law to distinguish global safeguards from China-specific remedies with respect to whether imports need to be the most important cause, the US explanation of this need does not apply to the redefinition of "significant cause" as a cause that only "contributes significantly," and is irrelevant to determining the nature of the US obligations under Article 16 and the WTO Agreement. The causal connotations of "contribute" are less than those of "cause." This is reinforced by the instruction that the necessary causal contribution "need not be equal to or greater than any other cause." The Panel should reject the US claim that the statute really means "a direct and significant causal link." That is not the language used in the statute itself. The noncommittal way in which the USITC references this quote from Section 406's legislative history does not justify overriding the "contributes significantly" language used in Section 421.

20. In an "as such" claim, the inquiry must focus on the text of the statute itself. US assertions that the USITC interpreted the statute in a way that is consistent with the Protocol, and that this interpretation somehow trumps the statute, are misleading. The US argument that in an "as such" claim "it is necessary to refer both to the language of the statute and to evidence of how that language has been applied" is incorrect. Appellate Body jurisprudence makes clear that a proper "as such" assessment may focus solely on the text of the statute. It is not necessary to look to domestic application of the statute, but when the WTO-consistency of text of the statute by itself is unclear, the evidence of the text "may be supported, as appropriate" by the "consistent application" of the statute. In this case, such a step is unnecessary as the words of the statute reveal the WTO-inconsistency.

21. *US - Wheat Gluten* cannot support the claim that Section 421's definition of "significant cause" is in accordance with the Protocol's causation standard. The fact that the Appellate Body used the word "contribute" in part of its definition of "causal link" does not make "contributes significantly" the equivalent of "significant cause." Additionally, the Appellate Body went on to state that "causal link" requires "a genuine and substantial relationship" whereas the US statute states that "contributes significantly" merely "need not be equal to or greater than any other cause."

IV. CAUSATION – AS APPLIED

A. AN IN-DEPTH ANALYSIS IS REQUIRED FOR "SIGNIFICANT CAUSE"

22. The USITC's causation finding was WTO-inconsistent and failed to link the condition of the industry to imports from China. The overall thrust of Article 16 is to establish a clear nexus between imports from China and the condition of the industry. A remedy cannot be imposed against fairly traded imports from China when the conditions of the industry are not caused by those imports. Despite this, the USITC failed to conduct a reasoned and adequate conditions of competition analysis; failed to establish a temporal "coincidence" between rapidly increasing imports from China and various alleged injury factors; and failed to address adequately alternative causes that undermine any suggestion that imports from China are causing "material injury." The United States has not explained what analysis it believes was necessary and has tried to avoid all responsibility for the

analysis the USITC did conduct, arguing that the USITC was not required to engage in any of the above analyses. Regardless of the methodology the USITC chose, it must apply that methodology reasonably and adequately. Because the USITC did engage in analyses of conditions of competition, coincidence, and alternative causes, it was required to do so adequately.

B. THE USITC'S ANALYSIS

23. The US claim that there is "overall coincidence" is misplaced. This claim rests on two broad generalizations: imports from China increased over the period and domestic industry injury factors generally declined. The United States views these two overarching trends as proof that the increases in imports caused injury to the domestic industry. This is incorrect as a factual matter – there is no "overall coincidence." This claim is simply part of the US attempt to focus on the overall period to obscure any assessment of the more specific year-to-year changes and the magnitude of those changes that would answer the question whether a causal link actually exists between rapidly increasing imports and alleged injury. The purpose of the causal analyses developed over time by WTO jurisprudence is to assess whether increases in imports actually caused injury. Although these analytic tools were developed under other trade remedies, they apply with equal force here.

1. The USITC failed to assess adequately conditions of competition

24. An analysis of the conditions of competition is required under Article 16. Going against the jurisprudence of the Appellate Body, the US argument hinges on the use of the word "or" in "or under such conditions of competition" in the English version of Article 16.1. The French and Spanish texts of Article 16.1, however, use the terms "et" and "y." This conjunctive use is also consistent with Article 2.1 of the *Agreement on Safeguards*, which uses "and" in all three languages. The best way to reconcile the texts is to apply the conjunctive interpretation of the term "or" in the English text of Article 16. The United States has completely reinvented its argument on this issue. In the US First Written Submission, the United States wholly relied on the language of Article 16.1 when arguing that a conditions of competition analysis was not required. Faced with the linguistic differences in the different texts, however, the United States has abandoned this argument entirely, and now tries to relegate Article 16.1 to an irrelevant status, dealing only with "consultations."

25. The United States attacks the attenuated nature of competition between imports from China and domestic tyres. Its arguments are misplaced. The bulk of the US efforts are spent on criticizing China's claim that subject imports are absent in approximately 74 per cent of the US tyre market. China stands by this figure, especially in light of the weak evidence offered by the United States to rebut it. The United States claims that the data is "belied by the very article China cites" – yet China cited no article for this data, but rather relied on the reporting on US producers discussed in the USITC Determination. The point of the estimate was to convey the order of magnitude to which competition was attenuated. Even based on the numbers offered by the United States and the article it now relies upon, there is still no competition in roughly half of the US market. Attenuated competition for about half of the market dramatically reduces the likelihood of imports from China being a "significant cause" of material injury to the domestic industry. If it is important to understand precisely how much overlap actually occurred based on the data before the USITC, the Panel should ask the United States for this information.

26. The USITC made unsupported inferential leaps in finding competition and equating this with a significant causal relationship. The USITC stated there was competition in the OEM market despite the fact that in 2008 imports from China made up just 5 per cent of the market, US tyres made up over 50 per cent, and imports other than China made up the remaining 45 per cent of the market. The United States continues to maintain that such a finding is "consistent with the record." Even if these facts are consistent with the record, the Protocol requires investigating authorities to provide a reasoned and adequate explanation of why subject imports are a "significant cause" of injury. When imports occupy such a negligible portion of a market – such as the 5 per cent here – the authority must

then explain adequately how the imports could nonetheless be a "significant cause" of injury, or how they could be having a significant competitive effect. This USITC did not do so.

27. The US argument on the significance of the "interchangeability" of imports from China and domestic tyres is incorrect. There was highly attenuated competition in this case, driven by market segmentation. The bulk of US tyres were in tier 1 of the replacement market, while the bulk of imports from China were in tier 3. The fact that, in response to a generic question, some market participants reported that imports from China and domestic tyres were "interchangeable," presumably within a segment, does not mean that they were "interchangeable" across segments. Indeed, as US Exhibit-29 itself states, "Most of the flagship brands held their own because they *don't compete* against low-cost radials." Market divisions remain an important condition of competition and competition remains attenuated.

2. The USITC failed to assess adequately whether there was temporal coincidence between imports and injury

28. When examined properly, the ten factors assessed by the USITC demonstrate the lack of coincidence between rapidly increasing imports and injury. The US assertion that the "evidence established a clear overall coincidence" is incorrect. The Appellate Body has explained that "coincidence" analysis plays a "central" role in determining whether or not a causal link exists between imports and injury. The United States claims that such a requirement is linked solely to the specific text of the *Agreement on Safeguards*. This attempt to ignore the logic that motivated the Appellate Body's findings ultimately fails. The Appellate Body stated such an analysis was necessary because movements in imports should correspond with movements in injury factors when assessing whether imports caused injury. This logic applies whether imports are required to be "increased" or "increasing." Whether or not such an analysis is ultimately required under the Protocol, it is the analysis that the USITC conducted. The United States claims the USITC made a "finding" of "clear overall 'coincidence.'" This finding must be reasoned and adequate. It is not.

29. An adequate coincidence analysis would compare year-over-year changes in injury factors to year-over-year changes in subject import levels to assess whether coincidence in fact exists. In contrast, the US argument focuses on two simple facts. The fact that imports from China increased in "every year of the period" and the fact that several of the injury factors had "overall declines" for the five-year period. The United States treats this combination as somehow establishing coincidence. This is not a coincidence analysis but rather a simplistic juxtaposition of two sets of data. A proper coincidence analysis requires an assessment of the "relationship between the movements" of imports and the movements of injury factors. The fact that, in general, imports increased over the period and that, in general, injury factors declined over the five-year period is not a coincidence analysis, much less an adequate one.

30. The United States stresses that imports increased "in every year of the period" and certain injury factors "declined in every year of the period." The only way for these statements to be significant in a proper coincidence analysis, however, is for the degree of the respective annual increases to correspond generally with the degree of the respective declines in injury factors. The orders of magnitude are key. If correlation exists between imports and injury, the varying degrees in annual import increases should be reflected in varying degrees of annual declining injury indicators. Yet the US coincidence analysis never addresses the relationship between the magnitude of import increases and the magnitude of injury indicator decreases. This failure renders its coincidence analysis inadequate.

31. Because of this failure, China offered an overall assessment of factors for the critical 2006 to 2007 and 2007 to 2008 periods. The analysis presented allows the Panel to test the US theory over the most recent period. These results demonstrate a complete lack of coincidence over the critical

2006 to 2008 period. An assessment of the ten injury factors over that period clearly reveals this lack of coincidence:

- *Prices*: Prices rose significantly across the period, and indeed rose at their highest rate during the 2006-2007 period when imports from China grew at their fastest rate of the period.

- *Production*: Production fell by its lowest rate of the period when imports grew at their fastest rate in 2006-2007, and subsequently fell by its highest rate of the period when imports grew at their lowest rate in 2007-2008.

- *Net Sales*: Net sales in volume decreased during the large increase in imports in 2006-2007 but this decrease more than doubled, at its fastest rate of the period, when imports only slightly increased in 2007-2008.

- *Market Share*: Market share in value decreased by less than 2 per cent during the large increase in imports in 2006-2007 but then decreased by over 2 per cent when imports only slightly increased in 2007-2008.

- *Operating Profits*: Operating profits increased by the highest rate of the period during the large increase in imports in 2006-2007 whereas they decreased by the highest rate of the period when imports only slightly increased in 2007-2008.

- *Productivity*: Productivity saw an increase during the large increase in imports in 2006-2007, but experienced a decrease when imports only slightly increased in 2007-2008.

- *Capacity Utilization*: Capacity utilization significantly increased during the large increase in imports in 2006-2007, yet significantly decreased when imports only slightly increased in 2007-2008.

- *Employment*: Employment experienced a modest decrease during the large increase in imports in 2006-2007, yet decreased much more so when imports only slightly increased in 2007-2008.

- *Capital Expenditures*: Capital expenditures rose across the period, experiencing an increase both during the large increase in imports in 2006-2007 and when imports only slightly increased in 2007-2008.

- *Research and Development*: Research and development trended upward over the entire period, and increased strongly during the large increase in imports in 2006-2007 but decreased when imports only slightly increased in 2007-2008.

32. These ten factors reveal a complete lack of coincidence. The largest increases in imports from China occurred from 2006 to 2007. Therefore, under the US theory – and a proper coincidence analysis – one would expect the largest adverse impact on injury factors. Yet the record shows that many factors, such as prices, net sales values, and operating profits, went up. Subsequently, because there was only a small increase in imports from China from 2007 to 2008, one would expect there to be the smallest adverse impact on injury factors. Again, the opposite of the US theory is true. Production fell by more than four times the rate from the prior year, and net sales dropped by over double. Thus, over both of these periods, the record strongly contradicts the USITC finding and US argument of "overall coincidence." There is no meaningful correlation in this case.

3. The USITC failed to consider adequately alternative causes or engage in a weighing of causes to determine whether increasing imports were a "significant cause"

33. Due to the conditions of competition in the US tyre market and the lack of correlation, it was particularly important for the USITC to assess the alternative causes in this case. It did not do so adequately. The US argument that the Protocol does not require a "non-attribution" analysis is inconsistent with the repeated US attempts to isolate Article 16 from the *Agreement on Safeguards*. Declines in demand and a shift in business strategy had a considerable effect on the US tyre industry over the period investigated. Yet the USITC chose to dismiss these factors, invoking the low US statutory standard that it need not engage in any "weighing of causes." The USITC cannot determine whether or not imports from China were a "significant" cause of injury without seriously assessing other causes.

34. The United States asserts that the "ITC did investigate, consider, and analyze all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury." There are two problems with this statement. First, the USITC never made a finding that other causes did not "break the causal link between imports and material injury." Second, whether or not alternative causes "break the causal link" is not the only issue. Even if other factors do not completely sever the causal link, the issue remains whether – in light of the degree of impact of other causes – subject imports can still be considered a "significant cause" of material injury. The US argument reads "significant" out of Article 16.

35. The analysis employed by the USITC regarding alternative causes is inadequate. In assessing changing demand, the United States claims the USITC "found that demand trends did not break the causal link." Such a finding was never made expressly. The USITC gave only passing attention to changes in demand and failed to account for the essentially 1:1 correlation between declining demand in 2008 and the fall in US shipments. There was a broader trend of declining consumption over the entire period. US production was logically hurt more by declines in demand than imports from China due to contractions in the OEM market.

36. In assessing US producers' new business strategy, the US failure to note that imports from China were increasing before plant closures, or that US producers imported nearly one out of every four of the tyres from China, renders this assessment incomplete. This strategy was a positive factor for domestic manufacturers. In the face of testimony and evidence concerning industry restructuring which predated the arrival of imports from China, cursory treatment of this issue is insufficient. The defects of the USITC analyses of conditions of competition, coincidence, and alternative causes reinforce each other. The defects in one of these analyses might be less problematic if the USITC had provided a very compelling analysis of the other two analytic tools but the USITC provided insufficient analyses under all three.

V. THE WTO-INCONSISTENT US TARIFF REMEDIES

37. The requirements for applying a transitional product-specific safeguard under Article 16 have not been met in this case and thus no remedy was appropriate. Even if the United States had complied with the other requirements of Article 16, the tariffs imposed were still overbroad and inconsistent with the Protocol. Articles 16.3 and 16.6 require that any remedies imposed must be "only to the extent necessary" and only for "such period of time" as may be necessary to prevent or remedy market disruption. Imports cannot be held responsible for the entire downturn experienced by the domestic industry, and the remedy cannot seek to address that entire downturn.

38. The United States never took into account what "extent" was necessary to remedy the alleged market disruption. Without determining the amount of injury that imports from China allegedly caused, the remedy could not be tailored to address only that harm being caused by those imports. After China's *prima facie* showing of this, the US defence has been insufficient. The Panel has asked

the United States how it determined the calculated reduction in imports from China "would address the market disruption found to exist." The US response avoids the question and simply provides quotations from the USITC remedy recommendation. This does not explain how reductions address the extent of the market disruption. The only elaboration provided in the Presidential Determination, now cited by the United States, is that: "The President's determination is a response to a *surge* of tire imports from China that has disrupted the domestic market." It is odd that now the United States opposes references to "surges" and insists that the use of "rapidly" does not imply one. Stating that there is a reduction is not an explanation of why the reduction is taking place, much less why the tariff rates were imposed. Quotes from the USITC determination and copies of staff economic models are not adequate. Overbroad and unexplained remedies are not permissible under Article 16 of the Protocol.

VI. CONCLUSION

39. The circumstances of this dispute are unique as it does not involve allegations of unfair trade. Article 16 provides a limited fair trade remedy to safeguard the interests of the "domestic producers" in the face of import surges. Yet here, the USITC Determination applied a remedy where the domestic producers did not support the petition, stated that they were not injured by Chinese imports, and said that they had no plans to change their operations if a remedy was imposed. The United States gave the domestic producers a remedy not justified in Article 16, which they never asked for and did not need.

ANNEX F-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

I. PANEL MUST REJECT CHINA'S INTERPRETIVE APPROACHES

1. China accuses the United States of "hiding" behind an "extreme interpretation" of paragraph 16 so as to "forestall" any evaluation of the ITC's determination. However, our interpretation is simply one that asks the Panel to interpret the plain meaning of the Protocol in a manner consistent with the customary rules of treaty interpretation, as required by DSU Article 3.2. There is nothing extreme or extraordinary about this approach.

2. Rather than focusing on the text, China seeks to convince the Panel that the transitional mechanism can only be understood in relation to the Safeguards Agreement and that the Panel must exercise a higher level of scrutiny. China's basic theory seems to be that anything called a "safeguard" measure must by necessity have the Safeguards Agreement as the "default mode." China argues that anything that is not expressly set out in the Protocol must by necessity be "filled in" by reference to the disciplines of the Safeguards Agreement. Nothing in the text of the Protocol, the DSU, or the customary rules of treaty interpretation support this approach.

3. China argues that the Safeguards Agreement is the "parent" of a transitional measure under the Protocol, because the Safeguards Agreement is the only other place in the WTO agreements where the term "safeguard" is used. However, other WTO agreements contain safeguard provisions. There may well be a general concept of "safeguards" in the framework of international trade rules, but this does not mean that there is a necessary link between the Safeguards Agreement and the transitional mechanism of the Protocol. Such a link would have had to be established in the text of the Protocol itself. It was not. References in the Protocol to the Committee on Safeguards and the fact that paragraph 16.1 of the Protocol sets out that China and the affected WTO Member may discuss whether the affected Member should pursue application of a measure under the Safeguards Agreement do not support China's theory either.

4. China argues that our position regarding the Safeguards Agreement is internally inconsistent because we reference panel and Appellate Body reports regarding that Agreement. It should be clear that China's own argumentation has led us down this path. While it is axiomatic that panel and Appellate Body reports create legitimate expectations among WTO Members, those reports are not binding, *except with respect to resolving the particular dispute between the parties to that dispute*. While the reasoning contained in reports may create legitimate expectations, it does not create binding interpretations even with respect to the agreement at issue in the particular dispute. There is nothing that requires the Panel to consider panel and Appellate Body reports regarding the Safeguards Agreement.

5. According to China, the negotiating history of the Protocol provides no meaningful interpretive guidance, but confirms the relationship between the Safeguards Agreement and the transitional mechanism. On the contrary, a quick review of the documents in the WT/ACC/SPEC/CHN series confirms our reading of the Protocol. China alleges that these documents only demonstrate that the result was a "hybrid" or compromise. Those documents show

China sought, but failed, to have the Safeguards Agreement apply to the Protocol, except as otherwise provided in the Draft Protocol. To achieve what China hoped for, the negotiators would have had to include language to that effect in the Protocol, as they did with respect to other WTO disciplines, for example, in paragraph 15 of the Protocol. The lack of any similar language in paragraph 16 demonstrates China did not prevail.

II. THE PANEL SHOULD APPLY THE STANDARDS CONTAINED IN THE PROTOCOL

6. Unlike China's attempt to unilaterally create standards unsupported by the plain text of the Protocol, the standards are clear from the plain meaning of the text at issue. Paragraph 16.1 sets forth the general conditions under which a Member is authorized to seek consultations with China. The obligations regarding the ITC's market disruption determination are found in paragraph 16.4. While paragraph 16.1 provides context for interpreting paragraph 16.4, it does not set out a general obligation with respect to the market disruption determination. Since China is not arguing that the United States acted inconsistently with respect to consultations, there is no basis to find any inconsistency with paragraph 16.1.

7. Paragraph 16.5 of the Protocol provides important context for interpreting the substantive obligations. Paragraph 16.5 provides that the Member imposing a measure must provide written notice of the decision, "including the reasons for such measure." This can be properly interpreted to mean that a Member must provide a reasoned explanation for its market disruption findings. China did not raise a claim under paragraph 16.5, so any specific findings under paragraph 16.5 would be beyond the Panel's terms of reference. However, it would be equally improper to impose a higher procedural standard than is provided in paragraph 16.5. This is precisely what China has tried to persuade the Panel to do by arguing that the same "standard of review" used in the Safeguards Agreement must be used here.

8. Paragraph 16.4 sets out the standards that must be satisfied to make a finding that market disruption exists. The first sentence of paragraph 16.4 explains that the Member must find: (1) that imports are increasing rapidly, either absolutely or relatively; (2) so as to be a significant cause; (3) of material injury or threat thereof. The Panel is expected to assess whether the ITC reasonably found that imports from China were "increasing rapidly, either absolutely or relatively" over the period of investigation. "Rapid" is defined as "progressing quickly; developed or completed within a short time." Thus, the Panel should assess whether the ITC reasonably concluded that the growth in Chinese imports had "progressed quickly" over the period of investigation." The ITC's finding was fully consistent with this standard.

9. The Protocol also requires the ITC to determine that Chinese imports are "a significant cause" of material injury to the industry. Since the word "significant" is defined as meaning something that is "important," "notable" or "consequential," the Panel should assess whether the ITC reasonably concluded that imports from China were a "notable" or "important" cause of material injury. Since the ITC has consistently stated that it must assess whether there is a "direct and significant causal link" between the Chinese imports and material injury, the ITC's analysis is again consistent with the requirements of the Protocol.

10. The second sentence of paragraph 16.4 directs a Member to evaluate "objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products." The Protocol does not otherwise provide specific guidance on how the Member should conduct this analysis. Accordingly, a Member has the discretion to adopt and utilize reasonable analytical approaches to perform its analysis. Thus, the Panel should assess whether the ITC's analytical approach in its investigation is consistent with the Protocol and whether the ITC reasonably

addressed the three factors specified in paragraph 16.4. The ITC's analytical approach in this investigation satisfies this standard.

11. The charts in our submissions make it abundantly clear that imports of tyres from China increased rapidly on both an absolute and a relative basis. The increases were rapid and sustained, and occurred in every year of the ITC's five-year period of investigation. Moreover, the largest increases, in relative terms, occurred in the last two years of the period.

12. China contends that imports showed the "smallest rate [of increase] of the period" in 2008. This is incorrect. Measured relative to consumption or to production, the increase in imports in 2008 was the second highest annual increase of the period. China attempts to obscure this fact by comparing the increase in 2008 to the average annual increase for the preceding four years, which includes the large increase in 2007. Of course, the average increases cited by China are skewed significantly upwards by the enormous increase in imports that occurred in 2007.

13. China's argument that the Protocol contains a stricter "increased imports" standard than the Safeguards Agreement is untenable. Among other things, the language of the Protocol links the issue of rapidly increasing imports to material injury, which is a lower standard of injury than the serious injury standard under the Safeguards Agreement. Paragraph 16.4 provides the increase in imports must be rapid enough "so as to be a significant cause of material injury, or threat of material injury" to the industry. The Appellate Body's report in *US – Steel Safeguards* provides support for recognizing this linkage. A lesser injury standard means that a smaller increase in imports may be sufficient to cause material injury than to cause serious injury.

14. China attempts to deny this linkage. It claims that, in *US – Steel Safeguards*, the Appellate Body was linking increased imports only to causation and not to serious injury. However, the Appellate Body explained that "whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten to cause serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., the consideration of serious injury/threat and causation)." China, citing only to paragraph 16.1, also claims that "the Protocol does not link "increasingly rapidly" to "material injury," but rather to "market disruption." China overlooks the fact that the linkage between increasing imports and injury is clear in paragraph 16.4, which states that imports must be rapid enough "so as to be a significant cause of material injury."

15. China argues that the "increasing rapidly" standard in paragraph 16.4 is distinct from the "in such increased quantities" standard in paragraph 16.1 and that paragraph 16.4 imposes an additional and different requirement. The "increased imports" language of paragraph 16.1 and the "rapidly increasing" imports language of paragraph 16.4 relate to the very same issue, that is, the issue of whether increased imports from China have caused market disruption. The only reasonable way to interpret the two phrases is to do so in a manner that reconciles their meaning.

16. The need to seek interim period data depends on the nature and complexities of an investigation, including the length of time between the filing of the petition and the end of the interim quarter, and the number of parties from whom data must be sought. In this case, only 20 days had elapsed since the end of that quarter when the petition was filed, and information would have had to have been collected from approximately 80 US producers, importers and foreign producers. The ITC reasonably concluded that "a relatively complete data series for that period would not have been available in time for use in this investigation."

17. China continues to portray the ITC's decision not to collect interim data as inconsistent with its practice. Aside from the fact that the issue here is consistency with a Member's obligations under paragraph 16 rather than consistency with a Member's domestic practice, we have shown that there was no merit to China's argument. In *almost all* of the cases cited by China in which interim data was

collected, the period of time that elapsed since the end of the quarter was longer than 20 days. China also claims that seeking interim data cannot be burdensome on responding firms because businesses commonly collect quarterly data. While this may be true, the question is how soon after the close of a quarter all of this data has been compiled by all of the firms involved. Nothing in paragraph 16 imposes the standard that China seeks, and we wonder if the obligation China would like to read into the Protocol is one that could be met by all Members.

III. CHINA HAS NOT CARRIED ITS BURDEN ON ITS "AS SUCH" CLAIM

18. China remains unable to explain exactly why the ordinary meaning of the words "cause" and "contribute" show that the US statute's causation standard supposedly "weakens" the "significant cause" standard of the Protocol. China has failed to address the language in the Protocol providing that Chinese imports may be "**a** significant cause" of material injury, which is language establishing that Chinese imports can be one of several factors "contributing significantly" to material injury. Finally, China has not seriously explained why the Appellate Body's statement in *US – Wheat Gluten* that a factor can be a "cause" of injury if it "contribute[s] to "bringing about, "producing," or "inducing" that degree of injury does not provide helpful guidance here. China has failed to carry its burden on this issue.

19. China claims the US arguments "rest fundamentally on the assertion that, because Article 16 of the Protocol does not define [the phrase 'significant cause,'] the United States may adopt its own 'methodologies or standards' to determine whether imports from China are a significant cause of material injury." However, the US "fundamental" point is that the terms "a significant cause" and "contribute significantly," as used in the Protocol and the US statute, have the same meaning and scope.

20. China asserts that the United States has argued that the "significant cause" standard is clearly lower than the "genuine and substantial" standard under the Safeguards Agreement and the causation standard of the Antidumping and Subsidies Agreements. However, the United States has taken no position with respect to the relationship of the "significant cause" standard of the Protocol to the "causal link" standard of the Antidumping and Subsidies Agreements. The United States has consistently explained that it would not be useful for the Panel to try to determine whether the "significant cause" standard of the Protocol is the same as, or lower than, the "genuine and substantial" standard under the Safeguards Agreement.

21. Finally, China continues to argue that the United States believes a Member may find Chinese imports to be a cause of material injury if they make a "mere" or "minimal" contribution to injury. The United States has never indicated this. Instead, the US statute specifically requires the ITC to determine that Chinese imports "contribute significantly" to the material injury being suffered by the industry. The ITC itself has consistently stated the US statute requires a "direct and significant causal link" between Chinese imports and material injury, and that a "minimal" or "unimportant" contribution to injury does not satisfy the "significant cause" standard of the statute. China's arguments are unfounded.

22. China also continues to argue that the language of the US statute which provides that Chinese imports "need not be equal to or greater than any other cause" "allows an investigating authority to determine that even a minimal cause .. could still be considered as a 'significant cause.'" This is not the meaning of this statutory phrase. This language makes clear that imports from China need not be the most important cause, or equal in effect to the most important cause, of material injury to the industry. This is consistent with the Protocol, which does not require that imports be the sole, primary, or most important cause of injury.

23. China also asserts that the legislative history of section 406 – which was the model for the causation standards included in the Protocol and section 421 – indicates that the US statute weakens the causation standard of the Protocol, because it states that the "term 'significant cause' is intended to be an easier standard to satisfy than that of the 'substantial cause,'" standard of section 201, the US global safeguards statute. China has neglected to mention that the "substantial cause" standard of section 201 contains an additional element that necessarily makes it higher than section 406's "significant cause" standard. In section 201, the Congress defines "substantial cause" to mean "a cause which is important and not less than any other cause" of serious injury to an industry. As the ITC has consistently explained in its global safeguards determinations, this standard means that, under section 201, "increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause." Under section 201, the ITC must determine that imports are both an important cause of injury to the industry and are a cause of serious injury greater than, or equal to, any other single factor injuring the industry in an important way.

24. Section 406's "significant cause" standard is not considered lower than the section 201 standard because the term "significant cause" somehow has an inherent meaning that connotes a lower causal link standard than "substantial cause." Section 406's standard is lower than section 201's standard because section 406 does not require the ITC to conclude that the injury caused by the subject imports is greater than or equal to the injury caused by any other factor injuring the industry. Instead, section 406 requires the ITC to find only that the subject imports are a significant cause of material injury or threat to the industry. It should be very clear now why China would now like to disavow its statement at the first Panel meeting that the causation standard of section 421 was "derived from" the standard contained in section 406.

25. Finally, China now asserts that it "strongly doubts" that, in *US – Wheat Gluten*, "the Appellate Body was focused [in that statement] on the particular meaning of the word "contribute" and how this might relate to other formulations in relation to causation." In that report, of course, the Appellate Body stated that the words "cause" and "causal link" indicate that a factor can be a "cause" of the requisite level of injury if it "contribute[s] to "bringing about, "producing," or "inducing" that degree of injury. China's reading of this language is mistaken. The Appellate Body's analysis focused precisely on whether the word "cause" meant that a factor could "contribute" to the requisite level of injury under the Safeguards Agreement.

IV. THE ITC'S CAUSATION ANALYSIS, AS APPLIED, WAS CONSISTENT WITH THE PROTOCOL

26. China continues to challenge the ITC's finding that Chinese and US tyres were competing significantly in the market. China contends the replacement market consisted of three separate tyre categories where there was little competition between the US and Chinese tyres, claiming that imports from China were allegedly absent from 74 per cent of the market.

27. The record showed that, while most market participants agree the replacement market could be divided into three general categories, there was no consensus among producers, importers, and purchasers on how to define the three categories or on the tyre brands that were included in the three categories. The record showed there was competition between the Chinese and US tyres within the three tiers of the US tyres market. In 2008, at least 18.6 per cent of the US industry's shipments of tyres were made in category 3 of the replacement market, the category where the largest percentage of the Chinese tyres were sold. Moreover, in category 2, the quantity of Chinese shipments was 64.3 per cent of the quantity of China's shipments in category 3. The record also showed Chinese imports held five per cent of the OEM segment by the end of the period and were sold in category 1 of the market as well. There clearly was competition between US and Chinese tyres in all segments of the market. The dissenting Commissioners agreed with the majority that there was significant competition within

the tier 2 and 3 categories of the market. The record showed that the large majority of market participants reported that Chinese imports and US tyres were always or frequently interchangeable.

28. China continues to make the claim that there was no coincidence whatsoever between increasing Chinese import volumes and declines in the industry's condition. However, the record shows a direct correlation between the consistent growth in Chinese imports over the period and significant declines in the industry's market share, capacity, production, shipment quantities, net sales quantities, profitability, capacity utilization, productivity, and employment levels.

29. It is possible that China continues to believe there was no coincidence in trends because of its mistaken understanding of the record. China continues to make the incorrect claim that "the various injury factors typically showed a substantial improvement in 2006-2007, when imports from China were at their highest level of the period ....". China's argument is incorrect. First, and perhaps most important, Chinese imports were not at their highest level in 2007. They were at their highest level in 2008, which is when the US industry experienced very significant declines in its condition. Second, it is not true that the industry's overall condition improved substantially in 2007. The industry may have experienced improvements in its profitability and capacity utilization levels in that year, but it also experienced significant declines in its market share, capacity, production, sales, shipments, and employment levels in that year as well.

30. China also claims incorrectly that there was no coincidence in trends between increasing import volumes and industry declines in 2008, because "industry conditions were at their worst while the rate of increase in imports was the lowest of the period." Again, this claim is mistaken. First, the increase in Chinese imports in 2008 was not the lowest of the period. The increase in Chinese imports in 2008 was actually the second highest of the period in relative terms, and was only lower than the increase in 2007, which is when Chinese imports grew at a very rapid rate. Moreover, Chinese imports were at their absolute highest levels of the entire period in 2008, and were 10 per cent higher than 2007. The increase in 2008 was, indeed, significant in that year. Second, in 2008, as subject imports increased by more than 10 per cent over the already high levels of 2007, virtually every injury indicator for the industry fell.

31. China argues that the United States is required to use a "coincidence of trends" analysis to establish the necessary causal link between imports and material injury. A "coincidence of trends" analysis is not required by the specific text of the Protocol. It is also not the only causation approach permitted under the Safeguards Agreement, the source of China's reasoning. Under the Safeguards Agreement, even if there is no "coincidence of trends" between imports and declines in the industry's condition, a Member can establish that there is a causal link between imports and injury by providing a compelling explanation of why a causal link exists.

32. China has failed to carry its burden of establishing that several of the other factors allegedly causing injury actually caused such injury during the period of investigation. China has offered no evidence to establish its claim that factors like "automation for increased productivity," "higher gasoline prices resulting in less driving," "strikes and labor actions," "U.S. tire producers' high legacy costs," or "equipment restraints" actually injured the industry .

33. China's assertions that the ITC failed to adequately address the impact of demand on the industry's condition in 2008, or the impact of demand changes during the rest of the period do not withstand scrutiny. Specifically, the ITC considered whether declines in the industry's condition in 2008 were caused by the demand declines that occurred in the second half of 2008 due to the economic recession in that period. The ITC acknowledged that apparent US consumption fell in 2008 but also pointed out that the shipments of Chinese continued to grow during that market contraction. In contrast, non-subject imports declined in 2008 by 6.1 per cent, roughly equivalent to the decline in apparent consumption, and that the industry's production levels fell by 11 per cent in that year. This

meant that the industry "absorbed virtually all the decline in US apparent consumption in that year." It was not reasonable for the industry to absorb all of the demand decline in that year while China's imports continued to grow.

34. China also claims demand declines caused the declines in the industry's production, shipment and sales volumes in other years of the period. Again, China misstates the record. Between 2006 and 2007, for example, the industry's production, shipment and sales quantities all declined significantly, even though apparent consumption increased by 1.6 per cent in that year. Similarly, when demand declined in 2005 and 2006, the declines in apparent consumption were considerably smaller than the overall declines in the industry's production, shipments and sales quantities in each of those years. Thus, the record shows that, throughout the period, Chinese imports entered the market in increasingly significant volumes and took market share from the industry, causing significant declines in the industry's production, shipment and sales levels, whether or not demand was increasing or declining.

35. China asserts that the declines in the industry's market share, production, shipment, and sales quantities over the period had nothing to do with the growing influence of Chinese imports but were the result of the industry's decision to voluntarily abandon the lower-end tyre market. The ITC addressed this issue in detail in its determination and concluded this theory was not particularly persuasive. The record showed that Chinese imports were increasing considerably before Bridgestone, Continental, and Goodyear announced the significant plant closings in 2006 and 2008. By 2006, Chinese imports had increased their market share by 4.6 percentage points over the market share levels seen in 2004, and occupied 9.3 per cent of the market by the end of 2006. Indeed, in March 2006, an industry publication reported that "the overall effect [of Chinese imports] on domestic supply [had been] 'profound'" and predicted that the impact of China on the market was "likely to remain so as imports increase."

36. China points to the Appellate Body's statements in *US – Cotton* to claim that the ITC is required to address in detail the injurious effects of other factors. We would like to make several points. First, in *US – Cotton*, both the Appellate Body and the Panel acknowledged that the "serious prejudice" provisions of the Subsidies Agreement, do not "'contain the more elaborate and precise 'causation' and non-attribution language' found in the trade remedy provisions of the [Subsidies] Agreement," the Antidumping Agreement and the Safeguards Agreement. As the Panel indicated, the "absence of such detailed language, which exists elsewhere in the covered agreements, ... may be taken as a demonstration that the drafters knew how to craft a precise causation standard when they deemed it appropriate." Moreover, the Appellate Body stated, the absence of non-attribution language "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 under Article 6.3(c)" of the Subsidies Agreement. This is exactly what the United States has argued here. The Protocol does not contain the same non-attribution language as that set forth in the Subsidies Agreement, the Antidumping Agreement, or the Safeguards Agreement. As a result, a Member is not required to perform the specific and detailed "non-attribution" analysis the Appellate Body has found under those Agreements. Instead, a Member has discretion to adopt an appropriate and reasonable analysis to assess the effects of other factors, which will depend on the facts and circumstances of the particular case. The *US – Cotton* findings are not inconsistent with the US position on this issue.

37. Second, we would note the Appellate Body affirmed the Panel's consideration of four significant other injury factors in *US – Cotton*. In its analysis, the Panel addressed each of four factors and concluded that none of the factors "attenuate the genuine and substantial link that we have found between" the US subsidies and significant price suppression. On review, the Appellate Body confirmed that the Panel adequately addressed the possible effects of these factors and reasonably concluded that they did not sever the causal link between the subsidies and price suppression. The ITC's analysis of demand and alleged business strategy was at least as detailed as the Panel's

consideration of other factors in *US – Cotton*. China has little basis for claiming that the ITC's analysis of these issues was inadequate under the Protocol.

V. CHINA'S REMEDY CLAIMS ARE UNFOUNDED

38. Aside from China's argument that the remedy imposed is inconsistent with paragraphs 16.3 and 16.6 because the United States did not have the right to impose a measure in the first place, China's main argument seems to be that the United States did not explain or justify how it met the requirements of paragraphs 16.3 and 16.6 at the time the measure was imposed. China's first arguments fails once the United States demonstrates that its market disruption determination meets the requirements of the Protocol. China has not made a *prima facie case* of why the US measure is inconsistent with paragraphs 16.3 and 16.6. China's alternative argument is nothing more than an improper attempt to shift the burden of proof and must be rejected.

39. Neither paragraph 16.3 nor paragraph 16.6 require that the Member provide a justification at the time the measure is imposed. Paragraph 16.5 provides context confirming that no such obligation to explain exists. According to paragraph 16.5, a Member has to provide written notice, including the reasons for the measure and the measure's scope and duration. Paragraph 16.5 does not require that the Member explain how the scope and duration meet the requirements of paragraphs 16.3 and 16.6 at the time the measure is imposed. Even, if it did, China did not raise a claim under paragraph 16.5. Therefore, to the extent that China's claims under paragraphs 16.3 and 16.6 are that the ITC did not sufficiently explain, China's claims must fail. For the same reason, China's arguments that the United States is limited in its explanations to what is in the ITC report, is without basis.

40. China has conceded that paragraph 16.3 does not require the investigating authority to "separate and distinguish causes" and that there "is no specific obligation to quantify" injury. The United States agrees. Given China's acknowledgment that paragraph 16.3 does not require a quantification of injury, it is puzzling that it argues that the obligation "limits the extent of any such safeguard measures to 'such' market disruption, which is limited to that disruption properly attributed as having been significantly caused by rapidly increasing imports from China." It appears that China is arguing that the word "such" implies some form of quantification. However, the plain meaning is that "such market disruption" merely refers to the fact that an investigating authority must have found there to be market disruption. Nor can a quantification requirement be found in the phrase "to the extent necessary." We note that the word "necessary" is linked to "prevent or remedy". The need for relief is what makes the measure necessary. A measure under the transitional mechanism is permissible if it remedies the material injury caused by rapidly increasing imports from China.

41. A Member that has determined there is market disruption will seek to determine the range of effects from various remedy options. The Member will want to know at which level relief would be ineffective because it would not limit imports enough to remedy the market disruption found to exist. On the other hand, to the extent that there may have been other causes at play, the remedy should not aim to prohibit all imports from China. A Member is likely to end up with a range of remedy options.

42. China has not argued - because it can not - that the additional tariffs are prohibitive. The ITC, in its remedy analysis and recommendation, rejected petitioner's proposed remedy because its effect would be higher than necessary to remedy the market disruption. In addition, the measure actually imposed by the United States was 20 percentage points lower than the ITC's recommended measure for the first year, to be reduced by five percentage points on the second and third years. Therefore, the expected effect should be less and lessen over the duration of the remedy. China has not provided any evidence of how the measure is inconsistent with paragraph 16.3. To the extent China's argument is that the United States did not explain how its measure met the requirements of paragraph 16.3, there is no such requirement. Therefore, China's claim under paragraph 16.3 must fail.

43. China argues that because the ITC did not quantify the effect Chinese imports were having it is "virtually impossible for a remedy to comply with Article 16.6's requirement." China has conceded that there is no requirement to quantify with respect to paragraph 16.3, and we understand this to apply with respect to paragraph 16.6 as well. Therefore, it is not clear why a failure to quantify could mean there has been a violation of paragraph 16.6.

44. The first sentence of paragraph 16.6 is drafted in terms of how long a Member "shall apply a measure." This confirms an interpretation that this first sentence is not intended to require precision at the time the measure is imposed, but that there has to be a limit and that at such time as the measure may no longer be necessary, it will be removed. This is further reinforced by the next two sentences of paragraph 16.6. These sentences allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. These indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tyres. Indeed, they could remain in place even longer, except that the Member imposing the measure would be subject to retaliation by China. China has tried to dismiss these provisions as "rights that China has under certain circumstances," but that does not diminish their utility as context for the first sentence of paragraph 16.6 or as an indication of the expectations of the negotiators of the Protocol.

45. China has not made any arguments or provided any evidence that the measure has been in place for longer than necessary. Therefore, China's claim under paragraph 16.6 must be rejected.

ANNEX F-3

CLOSING STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

1. Good afternoon. The People's Republic of China would like to express its continued appreciation to the Panelists and the Secretariat for their insightful questions and comments at the hearing, and for their careful attention to the facts and issues throughout this dispute.

2. Amid the numerous submissions and argument adduced in this case, one thing is clear: there is no basis in the Protocol or the factual record for the United States' decision to impose punitive tariffs on imports from China. The USITC Determination was a results-oriented exercise, taken within a distinctive political and economic context. The USITC process yielded a determination and remedy that none of the "domestic producers" sought or supported.

3. Much has been said in this case about the interpretation of Article 16. However, in conducting its interpretation, the Panel will not be writing on a blank slate. At the end of the day, both sides agree that the language of Article 16 is dispositive, but that the Panel can and should draw where appropriate on guidance from other provisions of the WTO Agreement – in particular, the *Agreement on Safeguards* – and jurisprudence interpreting and applying those provisions. If one cuts through all of the bluster and rhetoric from the US side concerning how Article 16 is "outside and apart from" the *Agreement on Safeguards*[1], the United States has conceded this key point[2], rendering this entire discussion moot.

4. A key textual addition in Article 16 is the term "increasing rapidly" – which sets a standard that is indisputably more demanding than the "increased quantities" standard in the global safeguards context. Here, when one looks at the most recent period, it is clear that imports from China were not "increasing rapidly," absolutely or relatively. A drop of 39 percentage points in the rate of increase between 2006 to 2007 and 2007 to 2008 confirms that growth in imports was slowing and abating, as does the significant drop in the rate of increase in market share in the same period. These trends are further confirmed by analysis of quarterly data (including interim comparisons) and data from the first quarter of 2009, which show substantial declines in growth rates turning to absolute declines in volume. Far from demonstrating a "rapid" increase, this data indicates a rapid deceleration in imports. Suffice it to say, the USITC addressed none of this in its report, relying heavily on endpoint-to-endpoint statistics that WTO jurisprudence confirms is inadequate.

5. The USITC's causation finding was equally deficient. Both in terms of what it did and did not say, the USITC Determination was inadequate, and on multiple levels. With respect to conditions of competition, the USITC majority attempted to cobble together a causation finding by glossing over the segmentation of the tyre market, which showed that domestic tyres and Chinese imports were largely operating in different segments. Although the United States now attempts to invoke the USITC dissent in support of its arguments, the dissent observed that "*U.S. production is focused on the higher-value, premium branded products and the OEM market, segments in which the subject*

[1] US Oral Statement at the Second Panel Meeting, para. 9.
[2] *See, e.g.,* US Oral Statement at the Second Panel Meeting, para. 11.

imports are not competing in any meaningful manner."[3] The presence of imports in tiers 2 and 3 in no way creates a meaningful competitive overlap.

6. The USITC's coincidence analysis was even more inadequate. The USITC majority devoted only a few sentences to this issue, and improperly relied on the mere juxtaposition of endpoint-to-endpoint data. Critically, the USITC majority completely failed to address (even implicitly) the absence of coincidence for the second half of the period. For this crucial period, the USITC did not address the fact that changes in the rate of Chinese imports did not coincide with changes in the ten injury factors under examination. This omission is particularly remarkable when one considers that the absence of coincidence in this period was emphasized by both the dissent and respondents, and compels a finding of WTO inconsistency. Simply put, there can be no "overall coincidence" on this record, and the USITC's finding was neither reasoned or adequate.

7. The USITC also dismissed important causal factors, such as declining demand and changing business strategy, that were plainly driving industry conditions and performance. At a minimum, these and other causal factors were "alternative explanations" of the data that warranted reasoned and adequate analysis by the USITC.[4] It is disappointing that the USITC chose to scapegoat Chinese imports amid these conditions and causal factors, which it essentially dismissed with little or no discussion.

8. Taken either separately or together, the preceding errors rendered the USITC's Determination inconsistent with both Article 16 and the WTO Agreement. The fact that imports were not "increasing rapidly" at the end of the period is itself fatal to the USITC majority's determination. Indeed, past increases in imports cannot establish that imports are either "increasing rapidly" or causing injury in the recent period. Moreover, there was no link between rapidly increasing Chinese imports and the condition of the domestic industry. Again, when imports rose at their highest rate in the period (i.e., 2006 to 2007), the domestic industry had its best performance in the period. When imports rose at their slowest rate and saw a significant decline from the preceding year (i.e., 2007 to 2008), the industry had its worst performance of the period. All of this is at odds with the USITC majority's theory, and none of it was addressed in its report.

9. Accordingly, we respectfully request that the Panel find that the US tariff measures are inconsistent with Article 16 of the Protocol, as well as Articles I:1 and II:1(b) of GATT 1994. Thank you for your time and attention.

[3] USITC Determination, p. 52 (dissenting Commissioners) (emphasis supplied).
[4] Appellate Body Report, *US – Lamb*, para. 106.