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

(WT/DS399)

EXECUTIVE SUMMARY OF SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

June 30, 2010

I. Introduction

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

II. Interpretive Issues

A. Transitional Mechanism and Safeguards Agreement

2. The question of what, if any, relationship there is between the transitional mechanism contained in paragraph 16 of China's Protocol of Accession and the Safeguards Agreement has been a focus of attention in this dispute. As the United States has noted before, this is not a useful framework for analysis.

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

4. With respect to whether the Protocol is *lex specialis*, in its answers to the Panel's questions, China states that paragraph 16 "provide[s] a more specific set of rules to address the application of safeguard measures to import from China under certain particular circumstances" and that the Safeguards Agreement provides "the more general principles." This is simply wrong. The Safeguards Agreement and the transitional mechanism apply in different circumstances. They are separate remedies available to a WTO Member under different circumstances. Indeed, China's own answer acknowledges that the Protocol and the Safeguards Agreement apply in different circumstances. Therefore, China seems to concede – as it must – that the transitional mechanism is distinct from the Safeguards Agreement - that is, it exists separate and apart from the Safeguards Agreement, as the United States has explained.

5. The United States simply disagrees with China's assertion that there is "substantial overlap in structure and language" between the transitional mechanism and the Safeguards Agreement. Even a quick reading of both reveals that there are substantial portions and concepts from the Safeguards Agreement that are simply not present in the transitional mechanism. Any analysis that starts from the premise that terms have been "added" to the Safeguards Agreement text is flawed.

6. Under the interpretive approach required by Article 3.2 of the DSU, the Panel must

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

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

7. The United States has not argued that "there is no standard and that the authorities are always correct." A Member invoking the transitional mechanism must meet the standards contained in the text of paragraph 16 of the Protocol, read in conjunction with the context provided by the Working Party Report. It is evident that the text of the transitional mechanism contains different, and in some cases fewer, prescriptions than the text of the Safeguards Agreement. This is not an "extreme interpretation," but an interpretation consistent with the customary rules of interpretation of public international law, as required by DSU Article 3.2.

C. Language Differences in Paragraph 16.1 Have No Impact on Analysis

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

D. Standard of Review

9. China's answers regarding this issue (to questions 9 and 18), do not address the issue of what is the proper standard of review which the Panel must use to evaluate whether the United States met its obligations. China instead confuses the standard of review with what is required by the particular obligation. In discussing what it views as the differences in "application" of the

standard of review, China merely restates particular terms from the provisions of the Safeguards Agreement and the Protocol, but the terms of these provisions are not a "standard of review."

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

III. Imports of Tires from China Increased Rapidly Over the Period

11. As the ITC found, the record showed clearly that imports of tires from China increased rapidly. Imports increased by significant amounts in each year of the period of investigation, growing by 42.7 percent in 2004, 29.9 percent in 2005, 53.7 percent in 2007, and 10.8 percent in 2008, the final year of the period of investigation. On a relative basis, Chinese imports gained approximately 12 percentage points of market share during the period of investigation, which correlated with similar declines in the U.S. industry's market share. The largest portion of these increases occurred during the final two years of the period. As the ITC concluded, the record showed that import "increases were large, rapid, and continuing at the end of the period – and from an increasingly large base."

12. China's challenges to this finding are flawed. First, China's assertion that imports "abated" is misleading. It is only through use of a chart that is limited to changes in the rate of growth of import increases that China can provide any support for its claim that there was a "declining" or "lessening" trend in import volumes during 2008. The Protocol provides that competent authorities should establish that imports were "increasing rapidly", on an absolute or relative basis – it does not require that subject imports be growing at an increasingly rapid rate at the end of the period, or that imports be increasing at a rate that is higher than the rate of growth of imports in any earlier point of the period. Even if the rate of growth in absolute terms lessened somewhat in 2008 when compared to the extremely rapid rate of growth seen in 2007, the quantities of Chinese imports continued to grow rapidly in 2008.

13. Moreover, China's use of quarterly data also is misleading. China's comparison of changes in the quarterly volumes of Chinese imports in 2008 involves a comparison of quarterly data for successive quarters. This type of comparison can be inherently distortive, however, because changes in import shipment data between quarters can be affected by variations in production schedules, seasonal demand, and weather developments.

14. Further, China's increasing imports arguments ignore the textual link in the Protocol between increased imports and material injury. The United States did not "conflate two distinct issues," as China claims. The concept of increased imports does not stand alone. The language of the Protocol links the issue of rapidly increasing imports to material injury. Accordingly, when considering the meaning and scope of the term "rapidly," the Panel must take into account the "context" in which that term is used. The Protocol's language, which links "rapid increases" of imports to material injury or threat of material injury, establishes that the import increases required by the Protocol are less significant than those required in the context of the Safeguards Agreement.

15. Finally, China's assertion that the Appellate Body requires a competent authority to obtain data only for the "most recent past" is unsupported by the relevant Appellate Body reports. In *Argentina – Footwear* and *US – Lamb Meat* the Appellate Body found that the examination of data for at least two years was appropriate. Moreover, the Appellate Body has stated that "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period."

IV. The U.S. Statute Is Consistent, As Such, with the Protocol

16. China has failed to carry its burden of establishing that the U.S. statute is inconsistent, as such, with the Protocol. Despite China's claims, section 421's definition of a "significant cause" of material injury as a cause that "contributes significantly to the material injury of the domestic industry" is consistent with the language of the Protocol itself, the ordinary meaning of the words "cause" and "contribute," and the Appellate Body's own definitions of the words "cause" and "causal link" under the Safeguards Agreement. Simply put, section 421 does not "impermissibly lower" the causation standard of the Protocol, as China claims.

17. China's claims on this score appears to be premised on the mistaken notion that the Protocol requires that imports from China be the sole cause of material injury to an industry. This concept is not consistent with the Protocol. The Protocol provides that "market disruption shall exist" if Chinese imports constitute "**a** significant cause of material injury" to the industry. By providing that Chinese imports may constitute "a significant cause" of injury, the Protocol explicitly contemplates that there may be multiple significant causes of material injury or threat to an industry, a point which China ignores.

18. China's argument is also not consistent with the ordinary meaning of the word "cause." While the Shorter Oxford English Dictionary defines the word "cause" as meaning a factor that "produces an effect or consequence" or "that brings about an effect or result," there is no question that the word "cause" can be used to describe a situation where more than one factor brings about or produces a particular effect or result. Given this, it is clear that "cause" can be used with respect to situations where multiple factors contribute to "bringing about" or "producing" an effect or result.

19. Finally, China's argument is inconsistent with the Appellate Body's explanation of the terms "cause" and "causal link" in the Safeguards Agreement context. In *US – Wheat Gluten*, the Appellate Body explained that "the term 'causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about, "producing," or "inducing" the serious injury." Given this reasoning, the ITC can reasonably conclude that imports that significantly "contribute" to the industry's injury are a significant cause of that injury.

20. China is also mistaken in claiming that the U.S. statute "allows the U.S. investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be considered as 'a significant cause.'" Under the U.S. statute, rapidly increasing imports from China must "contribute significantly" to material injury to be considered a significant cause of injury to the industry. Moreover, the ITC has consistently stated that the statute requires a finding that Chinese imports have a "direct and significant causal link" to the industry's material injury. Indeed, the ITC has rejected the idea that imports from China can be a "significant cause" of material injury if they constitute a "minimal" or "unimportant" cause of such injury. The statute does not allow the ITC to find imports to be a significant cause of injury if they contribute minimally to that injury.

21. Furthermore, China has now raised, for the first time, the claim that the legislative history of section 406, the U.S. statute on which the Protocol was modeled, indicates that the "significant cause" standard of section 406 "was intended to be an easier standard to satisfy than" the "substantial cause" standard of section 201, the U.S. global safeguards statute. China's statements seriously misconstrue the legislative history of section 406 and the relationship of the causation standards set forth in sections 406 and 201.

22. In making this claim, China fails to point out to the Panel that the "substantial cause" standard of section 201 contains an additional element that makes the statutory "substantial cause" standard a higher one than section 406's "significant cause" standard. In section 201, the Congress defines "substantial cause" to mean "a cause which is important and not less than any other cause" of serious injury to an industry. As the ITC has consistently explained in its global safeguards determinations, section 201 therefore requires that "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." In contrast, 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. Thus, the standard of section 201 is higher because it requires a finding that global imports be as important as any other cause of serious injury to the domestic industry during the period of investigation. In its argument, China has entirely failed to point out this important distinction between the two statutes to the Panel.

23. Accordingly, it should be clear, then, why China is mistaken when it asserts that section 421 permits the ITC to find that imports are a significant cause of material injury even if they are a minimal cause of such injury, simply because section 421 provides that those imports "need not

be equal to or greater than any other cause" of injury to the industry. This phrase does not mean that imports can be considered a "significant cause" if they are "less than any other cause," including a minimal cause of injury, as China asserts. Instead, this language establishes imports from China need not be the most important cause, or equal in effect to the most important cause, of material injury to the industry, a concept that is consistent with the requirements of the Protocol.

V. The ITC's Causation Analysis, As Applied, Was Consistent with the Protocol

A. The ITC Reasonably Found There Was A Causal Link Between Chinese Imports and Injury

24. As the United States has established, the ITC's analysis of the causal link between rapidly increasing imports from China and the industry's declining condition is fully consistent with paragraph 16.4 of the Protocol. The ITC objectively and thoroughly analyzed the record evidence on these issues and established, clearly and unambiguously, that rapidly increasing imports from China were a significant cause of material injury to the domestic industry.

25. In its oral statement, China continues to claim that the ITC misinterpreted and distorted the conditions of competition in the U.S. market. The ITC did nothing of the sort. Rather, the ITC provided a detailed and reasoned explanation of the pertinent conditions of competition in the U.S. tire market. The ITC reasonably analyzed issues argued by the parties, such as declining demand, the industry's business strategy and allegedly attenuated competition, and found that the record evidence did not establish that these issues broke the requisite causal link under the Protocol.

26. In its oral statement, China also mistakenly claims there was "no correlation between imports and injury." As detailed in the U.S. first written submission and its oral statement, this statement shows China's fundamental misunderstanding of the extensive record that was before the ITC in the *Tires* investigation. That evidence established a clear overall coincidence between rapidly increasing subject imports volumes and the deterioration in the condition of the domestic industry. China's bold claim of no correlation in light of this record, calls into doubt the validity of China's other arguments in this proceeding.

27. At the outset, China continues to claim that a coincidence analysis is required under the Protocol by referring to the requirements under the Safeguards Agreement. As a legal matter, China is seeking to impose obligations on the United States not found in the language of the Protocol. China asserts that Article 16 of the Protocol involves the same causal analysis as in the Safeguards Agreement, which means that a "'coincidence' analysis is logically required under the Protocol." As the United States has explained, China's argument ignores the fact that there is different language in the Safeguards Agreement and the Protocol. Moreover, China's argument also ignores the fact that the Appellate Body and WTO panels had made clear that investigating authorities are not required to perform a correlation analysis even under the Agreement on

Safeguards.

28. China's arguments on the lack of coincidence are also misplaced as a factual matter. As the ITC stated there was a clear overall "coincidence" in trends between the rapidly increasing imports and their effects on the domestic industry. This finding was reasoned, fully supported by the record, and met the requirements under the Protocol. As the United States noted in both its first written submission and in its oral statement, as Chinese import volumes increased rapidly in every year of the period, the record showed that the large majority of the domestic industry's performance indicators declined in every year of the period as well. As the ITC explained in its determination, the underselling by large and rapidly increasing subject Chinese tires eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment.

29. The evidence showed that all of these indicators were at their lowest levels in 2008 when subject imports were at their highest. Even though some factors, such as profitability and productivity, improved somewhat in a single year - 2007 - when imports continued to increase, numerous other injury factors including capacity, shipments, net sales quantities, market share, and employment-related factors all continued to decline in that year. Moreover, even the improvement in profitability and productivity was temporary. The record showed that both factors declined in 2008 to levels below the start of the period, at the same time subject imports rose to their highest levels both in terms of absolute volume and market share.

30. In sum, the ITC found that the significant increase in the volume of subject imports throughout the period coincided with significant and pervasive underselling of the domestic like product by the subject imports. The rising volume of subject imports also coincided with the decline in the domestic industry's performance indicators as subject imports from China displaced domestic sales, and this displacement led to declining domestic production, shipments, capacity utilization, employment, and profitability. As a result, the record clearly supported the ITC's finding that the subject imports were a significant cause of material injury to the domestic industry.

B. Other Factors Did Not Sever the Causal Link

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

32. China continues to argue that a Member cannot determine whether subject imports are "a significant cause" of injury as required by the Protocol without examining whether other factors were responsible. China ignores the fact that the Protocol, unlike the Safeguards Agreement, does not specifically require a Member to consider the possible effects of other factors causing material injury or threat of material injury as part of its causation analysis. Instead, the Protocol requires a Member, when assessing whether rapidly increasing imports are a significant cause of material injury or threat of material injury to the industry, to consider the "volume of imports," their "effect . . . on prices for like or directly competitive articles, and the effect of such imports on the domestic industry" producing such articles.

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

34. For example, China continues to claim the ITC "largely ignored the U.S. tire market's prolonged contraction in demand," and failed to acknowledge that changes in demand might have been a cause of injury to the industry. As discussed in the U.S. First Written Submission, however, the ITC fully addressed demand trends in the market, including those in the OEM market, and found that demand trends did not break the causal link between the subject imports and injury. The ITC found that, even though apparent U.S. consumption fell in 2008, shipments of low-priced subject imports not only remained strong but continued to grow during the market contraction in that year. The fact that low-priced subject imports were able to increase both absolutely and relatively in the face of a contracting market in 2008, even as the quantities of domestically produced tires and non-subject imports both declined, contradicts China's argument that the domestic industry was injured solely by demand declines in 2008.

35. China also claims the ITC "chose to attribute plant closings to imports from China, when the record does not support such a conclusion." Again, this is mistaken. As the United States previously explained, the ITC cited ample record evidence to support its finding. The ITC explained that imports of tires from China were rapidly increasing before Bridgestone, Continental, and Goodyear announced the closing of plants in 2006 and 2008. As the producers stated, the decision to close those facilities was not a voluntary decision that was made independently of imports. It was, instead, a direct response to the growing presence in the market of low-cost Chinese imports, that had already had a "profound" effect on the U.S. market at the very beginning of the period according to contemporaneous press reports. The ITC's analysis had a strong evidentiary foundation.

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

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

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

VII. Conclusion

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